

ADVISORY OPINION NO. 90-168

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 21, 1990

GOVERNMENTAL BODY SEEKING OPINION

Cabinet Secretary of a State Department

OPINION SOUGHT

1. Whether it is a violation of subsection 6B-2-5(c)(1) of the Ethics Act for the United Way's West Virginia State Employees' Coordinated Campaign (described below) to be implemented?
2. What changes in the plan (described below) would have to be made to receive the approval of the Ethics Commission?
3. Whether it is a violation of the Act for a supervisor to distribute United Way pledge cards to his subordinates and later collect those pledge cards where peer-to-peer solicitation is not possible?
4. Whether any state official or employee, who abides by the Commission's written advisory opinion in this matter, would be immune to sanctions by the Commission or to criminal prosecution for participating in the United Way's West Virginia State Employees' Coordinated Campaign?

OTHER FACTS RELIED UPON BY THE COMMISSION

The West Virginia State Employees' Coordinated Campaign (hereafter referred to as the WVSECC) will allow the employees of the State of West Virginia to utilize a payroll plan for providing charitable gifts to the United Way. The WVSECC will implement its campaign based on the existing management structure of state government. Many state officials and employees, from the Governor on down, will play a direct role in the campaign.

All state employees will be provided a list of the various United Way agencies within the state which may be designated by the employee as recipient of his or her contribution. In addition, the local United Way agency in an employee's area will provide a list of constituent charities which may be specifically designated.

At all times, every official or employee involved in the program will understand and stress that: 1) state employee participation in the campaign is **strictly voluntary**, 2) any employee's refusal to participate in the campaign will **not in any way affect his or her employment status**, 3) as a general rule, actual solicitation of employee contributions will only be made on a **peer-to-peer basis**, and 4) in those limited situations where peer-to-peer solicitation is not possible, a supervisor distributing campaign information to his or her subordinate employees will be allowed to act as a vehicle to provide information, **but not directly solicit**, participation in the campaign.

WVSECC CAMPAIGN STRUCTURE

Governor/Cabinet Secretaries

The Governor will publicly state his support for the United Way in a message to all state employees. The Governor will specifically request the support of the Cabinet Secretaries during the campaign through their personal involvement. The Governor's message will include a statement that state employee participation in the campaign is strictly voluntary and that an employee's refusal to participate in the campaign will not affect his or her employment status. The Governor will not directly solicit contributions from any state official or employee. Although the Governor will request the involvement of the Cabinet Secretaries in the campaign, Cabinet Secretaries **will only be solicited for funds by their subordinates** or by fellow Cabinet Secretaries.

Loaned Executive

The Governor will allow the United Way to have the full-time assistance of a State employee to assist with this year's state campaign. This State employee, known as the "loaned Executive", will be responsible for assisting the United Way's WVSECC Coordinator in establishing the Campaign Department Coordinator Committee and in training both this Committee and the Peer Solicitors. Additional duties of the Loaned Executive will include talking with community representatives throughout the State with regard to past campaign problems, and speaking with regional and area Campaign Volunteers. While working as a "Loaned Executive" the State employee will not neglect his required duties or allow the campaign project to interfere with the performance of his official responsibilities.

Campaign Department Coordinator Committee

The Campaign Department Coordinator Committee will be comprised of volunteers from each governmental department. These individuals' duties will include **the solicitation of funds from their peers and/or superiors**, and the recruitment of additional volunteers in their department who will also work as peer solicitors for the campaign. The Campaign Department Coordinators will have the responsibility of ensuring that the campaign within their department is completed and that the contribution amounts are properly given to the payroll department. In addition, they will forward campaign information to the appropriate local United Way. A Campaign Department Coordinator will not solicit contributions from subordinate employees, nor require or pressure any subordinate employee to serve as a peer solicitor.

Peer Solicitors

Peer Solicitors in each department or agency will: 1) present campaign literature to employees of the State, 2) explain the purpose and need for the campaign, 3) answer questions, 4) ask each individual to participate in the campaign by contributing, 5) set a time for each employee to return his pledge card, and 6) thank each individual for his interest and time. Peer solicitors will be instructed to conduct their solicitation so as to minimize any negative effect on their required state work or on the required work of other employees.

The peer solicitor will complete a short training session where he or she will learn about the campaign and proper methods of solicitation. This training will stress that any form of coercion during solicitation is inappropriate. Each solicitor will be responsible for preparing and returning a Report Form for each Department Coordinator. However, such Report Form will not include a listing of employees who have chosen **not** to contribute to the campaign. Also, no individual department, division, agency or other organizational unit will be given any specific quota to meet during the campaign, in terms of either money or number of employees participating. Nominal prizes may be given to peer solicitors and/or employees with such departments, division, agencies, or other organizational units based upon the success of the campaign or based upon an employee's participation in the campaign.

When peer-to-peer solicitation is not possible

Efforts to provide peer-to-peer solicitation will be made in every situation. In some departments, however, this may not be possible because only the supervisor may have sufficient individual contact with employees. For instance, employees in a unit responsible for groundskeeping may have assignments to complete each day that require them to be isolated from all others in the unit except the head groundskeeper. In this type of situation, the supervisor will be limited to: 1) presenting the State Campaign literature to the employee, 2) explaining the purpose and need for the campaign, and 3) answering employee questions about the campaign.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(c)(1) states in pertinent part that...a public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: **Provided**, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position as such is subordinate to the soliciting official or employee...

ADVISORY OPINION

1. Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act a public official may not solicit any gift except when it meets these three criteria:
 - a. The solicitation is for a charitable purpose,
 - b. there is no direct pecuniary benefit conferred upon the solicitor or a member of his immediate family, and
 - c. there is no solicitation of subordinate employees.

- a. The Commission considers the United Way to be an umbrella organization created for the purpose of aiding those in need, and thus would be considered a charitable organization.
- b. All contributions would be deducted from state employees' and state officials' payroll checks and donated directly to the United Way and not to any individual. Therefore, it is clear that there would not be a resulting direct pecuniary benefit conferred upon the soliciting public official, employee or a member of his or her immediate family.
- c. The type of solicitation which the Commission wants to eliminate is the one-to-one solicitation of subordinates which affords the opportunity for coercion, undue pressure or extortion by a supervisor. Therefore, solicitation through mass mailings or peer-to-peer solicitation without coercion as planned by the WVSECC would not be prohibited.

"Solicitation" is defined as seeking to obtain something by direct persuasion or by petitioning persistently.

Further, employee participation in the program is **voluntary**. Since, the supervisor is not informed as to whether an employee elects to participate and if so, the amount of contribution, the possibility of retaliation for failure to contribute is reduced.

Therefore, the Commission finds that it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for the United Way's West Virginia Employees' Coordination Campaign to be implemented in the manner described above which consists of peer to peer solicitation, for a charitable purpose, with no direct pecuniary benefits being received by the solicitors.

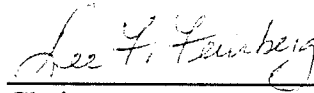
2. It is the Commission's opinion that the following guidelines set forth below should be followed:

- a. Peer solicitors should be instructed to conduct their solicitation in a way as to minimize time taken away from their required state work or the required work of other employees.
- b. Although each solicitor will be responsible for preparing and returning a Report Form for each Department Coordinator, such report Form should not include a listing of employees who have chosen not to contribute to the campaign. If it is possible the supervisor should not view the Report Form of his subordinates since he/she would be able to determine from it which employees did not contribute by a process of elimination.
- c. Also, no individual department, division, agency or other organizational unit should be given any specific quota to meet during the campaign, in terms of either money or number of employees participating.
- d. It is the Commission's opinion that gifts should not be given to the employees based on participation or the success of the campaign in the unit, because of implicit pressure which may result from the offer of promotional prizes for participation.

3. In addressing the question of whether it is a violation of the Act for a supervisor to distribute United Way pledge cards to his subordinates and later collect those pledge cards where peer-to-peer solicitation is not possible the Commission has determined that this would not be the type of solicitation that it finds offensive and is trying to prohibit. In situations where a supervisor must participate in the campaign he or she will not solicit for contributions from subordinate employees but will merely provide State Campaign literature to the employees, explain the purpose and need for the campaign, and answer any questions about the campaign which an employee may have.

4. The Commission would note that pursuant to subsection 6B-2-3 of the Ethics Act, any person subject to the provisions the Ethics Act may rely upon an advisory opinion of the Commission, and any person acting in **good faith reliance** on any such opinion shall be **immune from the sanctions** of the Commission and shall have an **absolute defense to any criminal prosecution** for actions taken in good faith reliance upon any such opinion in regard to the sanctions of this chapter and the sanctions in **§61-10-15**.

5. The Commission's advisory opinion is limited to the West Virginia State Employees' Coordinated Campaign for the year 1990.



Chairman