ADVISORY OPINION NO. 2013-16

Issued on June 6, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Solid Waste Authority** asks if it may accept donations to fund a training seminar from regulated companies, including a regulated company that is currently negotiating a long term land lease and potential private-public partnership with the Authority.

FACTS RELIED UPON BY THE COMMISSION

The requester is a County Solid Waste Authority. Established pursuant to W. Va. Code§ 22C-4-1, it has broad powers and duties and responsibilities regarding the management of solid waste. For example, the findings and purposes section reads, in relevant part, as follows:

> Therefore, it is the purpose of the Legislature to protect the public health and welfare by providing for a comprehensive program of solid waste collection, processing, recycling and disposal to be implemented by state and local government in cooperation with the private sector. The Legislature intends to accomplish this goal by establishing county and regional solid waste authorities throughout the state to develop and implement litter and solid waste control plans.
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> It is further the purpose of the Legislature to reduce our solid waste management problems and to meet the purposes of this article by requiring county and regional solid waste authorities to establish programs and plans based on an integrated waste management hierarchy. In order of preference, the hierarchy is as follows:
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> (1) *Source reduction.* -- This involves minimizing waste production and generation through product design, reduction of toxic constituents of solid waste and similar activities.
>
> (2) *Recycling, reuse and materials recovery.* -- This involves separating and recovering valuable materials from the waste stream, composting food and yard waste and marketing of recyclables.

W. Va. Code§ 22C-4-1.

Additionally, the Authority regulates certain businesses, and contracts with others. See W. Va. Code§§ 22C-4-23(6) and 22C-4-30.

The Authority, at the request of citizens, plans to host a three day backyard composting event training seminar which is expected to cost $3,000. Participants will be required to pay a minimal fee (less than $50) to offset expenses. The Authority has agreed to provide $1,500 toward the event.

Based on advice obtained from the Ethics Commission, the Requester did not directly solicit co-sponsors from companies that it regulates. Instead, the Authority sought co-sponsors on its Facebook account, in its electronic newsletter, and in local media outlets. Nonetheless, three regulated companies have offered to be co-sponsors, at $500 each. All three companies have contracts with and regularly conduct business with the Authority. Further, one of the companies is currently negotiating a long term land lease and potential private-public partnership with the Authority.

In addition to the unsolicited offers from regulated entities, the Authority has received in response to its solicitation, donations from two unregulated entities totaling $150. It has also received free publicity from two local newspapers as well as free access to a meeting room for the event from the local County Commission.

The Requester asks if it is allowed to accept the co-sponsorship funding from the three regulated companies.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5 (c) reads:

> (1) 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 is subordinate to the soliciting official or employee: *Provided, however,* That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution. No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:
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> (A) Is doing or seeking to do business of any kind with his or her agency;
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> (B) Is engaged in activities which are regulated or controlled by his or her agency; or
> (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

Title 158, Series 7, Section 7. Manner of Solicitation and Use of Funds reads:

> 7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:
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> a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;
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> b. A vendor which has a contract with the agency, is bidding on a contract or is in the process of soliciting business from the agency.
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> 7.2. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated persons or vendors, is permissible; Provided, That the written solicitation may not be directed solely to persons under the regulatory authority of, or vendors, of the public official, employee or agency. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.
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> 7.3. Solicitations should be conducted, and acknowledgments made, in a fair and evenhanded manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.
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> 7.4. Under no circumstances should anyone soliciting a contribution for a charitable purpose state that contributors will receive some special treatment from a government agency or its employees, or any other sort of quid pro quo as a consequence of making a donation.

W. Va. Code§§ 22C-4-23(12) authorizes a Solid Waste Authority to:

> Receive and accept from any source such grants, fees, real and personal property, contributions, funds transferred from a solid waste facility and funds of any nature as may become available to the authority, in order to carry out the purposes of this article including but not limited to the development, operation or management of litter control programs and recycling programs ....

ADVISORY OPINION

The Ethics Act generally prohibits public agencies from soliciting for their operational needs. *See* Advisory Opinion 2012-08 and opinions cited therein (Municipal Police

Department may not solicit donations to purchase a police dog or gun racks for police cars.) Instead, agencies may only solicit for charitable purposes unless their enabling legislation authorizes it. See Advisory Opinion 2012-49 (County Farmland Protection Boards authorized by statute to solicit funds to accomplish the agency's purposes).

The Commission clarified its position in Advisory Opinion 2005-02, wherein it held:

> As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and (2) Those which serve a public purpose or provide a significant public benefit.

Given the above-referenced legislative findings, the Commission hereby finds that the backyard composting event constitutes a public purpose and provides a public benefit. Normally, since the three regulated companies responded to a general solicitation in compliance with the relevant legislative rule, the Commission would conclude that the Requester may accept funding from them. Indeed, with two of the three companies the Commission finds this permissible.

As to the company that is currently negotiating a long term land lease and potential private-public partnership with the Authority, however, there still remains the question of whether the Authority's acceptance of a donation constitutes use of public office for the personal gain of another, which is also prohibited by the Act. Notwithstanding the fact that this company, like the other two, responded to a general solicitation, given its unique relationship with the Requester, accepting funding and allowing the company to co-sponsor the event would create an appearance of impropriety that the Ethics Act seeks to avoid.

Thus, the company that is currently negotiating a long term land lease and potential private-public partnership with the Authority may **not** co-sponsor the event and the Authority may **not** accept any funds from such company for the event. The Requester may, however, accept funding from the two other regulated companies so long as it otherwise complies with the remaining provisions of the legislative rule set forth above.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 68-1-1, *et seq.* and W. Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman