ADVISORY OPINION NO. 2013-28

Issued On July 11, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Public Employee** asks whether a group of employees may use a state-owned parking garage for a garden and distribute produce and flowers to community groups.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an employee of a State agency that administers programs that benefit the citizens of West Virginia. He serves as chair of a "cross-bureau, problem-solving collaborative and work force development group". The group plans to create a roof-top garden on a small unused section of a state parking garage; construct planters from agency materials; and, water the plants from the agency's water source. Employees will volunteer their time to cultivate the plants. Ultimately, the group will distribute the fruits, vegetables and flowers to community groups served by the public agency.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads:

> A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

ADVISORY OPINION

In Advisory Opinion 2013-31, citing numerous precedential advisory opinions, the Commission authorized a public agency to allow a private foundation to participate in a public program. In doing so, the Commission stated that the financial benefit to the private foundation would result in an overriding public benefit sufficient to legitimize any resulting private gain. The Commission noted that "even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain."

The Commission hereby finds that the use of public resources to provide produce and flowers to community groups serves an overriding public purpose and is permissible so long as the flowers and produce are: provided free of charge to client community groups, without favoritism, and not to any member of the cross-bureau, problem-solving collaborative and work force development group .

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak
Jonathan E. Turak, Acting Chairperson