ADVISORY OPINION NO. 2013-40

Issued On August 1, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Appointed Member of a Statewide Task Force** asks whether the Ethics Act permits him to solicit financial support for the Task Force from the business community and foundations.

FACTS RELIED UPON BY THE COMMISSION

The Requester serves as an appointed member of an early childhood development Task Force which was created by Executive Order. The Executive Order asserts that "nothing is more imperative to West Virginia's future than the well-being of its children, and it is incumbent on West Virginia to ensure that our youngest citizens have every opportunity to develop, learn, and contribute to society in a healthy and safe environment. .. ". The Task Force is charged with studying early childhood services in the State and producing a development plan for early childhood development in West Virginia.

The Executive Order states that the Task Force "shall" collaborate with public and private organizations and seek "financial support for the work of the Task Force from the Claude Worthington Benedum Foundation and other charitable foundations, the Legislature, corporations, and other non-government entities... ". The Claude Worthington Benedum Foundation is a regional philanthropy which makes grants in the areas of education, economic development, health and human resources and community development.

The Requester serves as a Trustee for the Claude Worthington Benedum Foundation. He states that he receives a modest fee from the Foundation as its Director, which would be wholly unaffected by his involvement with soliciting funds for the Task Force. The Requester is also an appointed member of the State Board of Education. Respondent states that he does not stand to benefit either personally or financially from the work of the Task Force. To his knowledge, he will not solicit funds from any firm that does business with the Task Force or the State Board of Education.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> 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.

W.Va. Code§ 6B-2-5(c) states in relevant part:

> 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.

The Commission's Legislative Rule governing solicitation of charitable gifts,158 W.Va.C.S.R. § 7.6, states in relevant part:

> 6.1. Public officials and public employees may solicit gifts for a charitable purpose when there is no resulting direct pecuniary benefit to the public official or public employee or an immediate family member.
>
> 6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.
>
> * * *
>
> 6.5. A reasonable amount of public resources may be used for a charitable solicitation or fund-raising drive that is conducted in furtherance of the West Virginia State Employees' Coordinated Campaign or a fund raising campaign officially approved by either the executive, legislative or judicial branch of State Government or the governing body of any political subdivision.
>
> * * *
>
> 6.7. State government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged. If a state government agency or governing body of a political subdivision seeks to solicit funds for use by the agency for any other purpose, then the state government agency or governing body of a political subdivision must first seek permission from the Executive Director of the West Virginia Ethics Commission or the Ethics Commission through issuance of a formal Advisory Opinion. The Executive Director or Ethics Commission may only authorize such a

solicitation if it serves a public purpose. This provision does not apply to the solicitation of donations by a member of the Legislature or a member of the Board of Public Works who is soliciting funds for a regional or national organization conference or other function in accordance with W.Va. Code§ 68-2-5(c)(6) and § 68-2-5(c)(7).

158 W.Va. C.S.R. § 7.7, Manner of Solicitation and Use of Funds reads, states in relevant part:

> 7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:
>
> 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;
>
> 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.
>
> 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.
>
> 7.3. Solicitations should be conducted, and acknowledgments made, in a fair and even-handed manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.
>
> 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.

ADVISORY OPINION

The subject of solicitations by public servants for charitable purposes has been addressed by the Ethics Commission many times over the years, most recently in Advisory Opinion 2012-08 in which the Commission provides a thorough analysis of this

area of the Ethics Act and its corresponding Legislative Rule. In Advisory Opinion 2005-02, the Commission held that "[a]s 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." The Commission further held that "the overriding purpose of the solicitation must be to provide a benefit to the public as opposed *to* defraying the internal administrative costs of the [Agency]."

In Advisory Opinion 2005-02, 2010-17 (non-precedential) and 2011-11, the Ethics Commission found that the overriding purposes of the solicitations were indeed to provide a benefit to the public. These purposes include: a public health program administered by a County Board of Health; a recreational department for the homeless by an agency tasked with housing veterans; public broadcasting throughout the state by an agency tasked with administering on-air broadcasting to offset its own operating costs. In Advisory Opinion 2010-07, the Commission found that the agency could not solicit funds on behalf of its non-profits, absent clear statutory authority.

The Commission has also held that where the public agency's enabling legislation authorizes it or where there is express statutory authority for a public entity to solicit private funds, it may do so. See Advisory Opinion 2012-49 wherein the Commission found that the County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority may solicit for their respective entities, based on their enabling legislation. See *also* Advisory Opinion 2011-11 wherein the Commission found it was permissible for a public agency that provides housing for veterans to solicit, since its enabling legislation authorizes it. Likewise here, the Executive Order makes it clear that the Task Force is expressly authorized to engage in fundraising.

Therefore, the Commission finds that the Task Force is authorized to solicit funds on two grounds. First, the overriding purpose of the solicitation does indeed serve a public purpose and provides a significant public benefit of educating the children of West Virginia. Second, the Executive Order expressly authorizes the Task Force to engage in fundraising.

Next, the Commission will consider what limitations, if any, apply to such fundraising efforts. In soliciting businesses, the Requester shall not endorse a particular product, company or business. This action would constitute the prohibited use of office for private gain. Should the Requester solicit funds from vendors, entities subject to the regulatory control of the State Board of Education, or previous or potential participants in its programs, the solicitation must conform *to* the conditions set forth in the Legislative Rule. See 158 C.S.R. § 7.7 and Advisory Opinion 2012-49. Here, there is no indication that the Requester will solicit funds therefrom. Nevertheless, the Commission takes this opportunity to restate that there are limitations upon the manner in which solicitations are made to such entities. Finally, a public servant may never solicit a contribution from which he or she may personally benefit; a public servant may never coerce a contribution from any source; and, supervisors shall not solicit their subordinates for a contribution.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, et seq., 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 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