ADVISORY OPINION NO. 2013-45

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipality** asks whether its Police Officers may participate in a program with a local restaurant wherein the Police Officers would hand out reward coupons to private citizens for performing good deeds.

FACTS RELIED UPON BY THE COMMISSION

A local fast food restaurant owner approached the Chief of Police about a program that the restaurant wants to implement wherein Police Officers would hand out coupons as rewards to citizen for their "good deeds". Such good deeds include, for example, helping another person across the street or wearing a bicycle helmet. The coupon would entitle the redeemer to a small sandwich with a value fry and drink which could be redeemed at the restaurant's franchises located throughout the State of West Virginia. The Police Officer's signature would be on the coupon. The municipality would **not** and has not **solicited** the restaurant for the reward coupons.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) provides:

> (1) 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

The Requester states that it will not solicit the restaurant for the rewards coupons. Therefore, the provisions of the Ethics Act which limit the solicitation of gifts are not at issue. W. Va. Code§ 6B-2-5(c)(1). Likewise, the Requester makes no indication that the reward coupons would be available to the Police Officers or any other public employees or officials. Presumably, the Police Officers would not award themselves these coupons. Therefore, the provisions of the Ethics Act governing a public servant's acceptance of gifts are not at issue. W. Va. Code§ 6B-2-5(c)(2).

Generally, however, the Ethics Act prohibits public officials from endorsing products pursuant to W. Va. Code§ 6B-2-5(b) which prohibits a public official from using his or her office for the improper private gain to another. In Advisory Opinion 2012-31, the Ethics Commission ruled:

> In the abstract, the Ethics Commission is unable to envision a circumstance where a public servant could appear, or be referenced, in an advertisement for a product, service or business without violating the Ethics Act. Nonetheless, public servants and entities are encouraged to contact the Ethics Commission for advice if such a situation arises and there is an argument that there is an overriding public benefit.

The first question here is whether a Police Officer handing out reward coupons which contain his or her signature amounts to endorsing the restaurant. In Advisory Opinion 98-22, the Commission held that it would not violate the Ethics Act for a State Agency to be referenced in a private industry brochure. The private company asked the Director of the State Agency to allow it to reference its work with the Agency in a brochure distributed to potential customers. This brochure did not contain a product endorsement from the State Agency. The Ethics Commission determined that no provision in the Ethics Act prohibits a public official from permitting a public company to reference its work with a state agency in a brochure "which does not contain a product endorsement from the agency or the public official". Further, in Advisory Opinion 2012-31, the Ethics Commission concluded that the Ethics Act permits a public servant or entity to be listed on a vendor's promotional materials solely as a previous customer. Any language that tends to refer to the public servant or entity as a "satisfied customer" or otherwise serve to promote or endorse the vendor is expressly prohibited.

By contrast, in Advisory Opinion 2000-21, the Ethics Commission explained that although a public authority may reference its work with a state agency in its brochure, it may not actively endorse a private business. For example, in Advisory Opinion 2000-19, issued the same day as 2000-21, the Commission ruled that a State Agency may not serve as a "reference account" for a Vendor's software if the endorsement tends to promote the Vendor's private business and no overriding public benefit for the State or its citizens has been demonstrated. In both opinions, the Commission found that each reference amounted to an endorsement because they included a "subjective evaluation of the product (training) [and software] in affirmative, if not laudatory, terms."

Here, the Commission finds that a Police Officer handing out reward coupons with his or her signature thereon would constitute a product endorsement by his act of personally handing out the coupons. A reasonable citizen may find that the Police Officer was actively promoting a private restaurant.

The inquiry, however, does not end here. The Ethics Commission explained, in Advisory Opinion 2012-31 and other Advisory Opinions that a public official **may** endorse products if it demonstrates that there is an "overriding public benefit" even if there is some private gain as well. Thus, even where there is some private gain, "[t]he Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain". Advisory Opinion 2012-31. Therefore, since the Commission determined that the facts at hand -a police officer handing out restaurant coupons with his/her signature - amount to a product endorsement, the Commission must decide whether the Requester demonstrated an overriding public benefit sufficient to justify the endorsement of a product.

The Commission has had multiple occasions to analyze whether an overriding public benefit permits the use of public office for what might otherwise be construed a prohibited endorsement. For example, Advisory Opinion 2005-04 involved an agency dedicated to facilitating small business development and the Commission found that the proposed agreement to link the State Agency's website with a software company was permissible because of the overriding public benefit of promoting small business growth and the State's economy.

Further, in Advisory Opinion 2012-10, the Commission found that a University may allow a vendor to use the University name and logo in its external marketing materials in exchange for the University's use of the Partner's information management system because the University had demonstrated an overriding benefit of obtaining critical free access to a system that greatly enhances the University Program's ability to produce quality reports.

Conversely, in Advisory Opinions 2000-19 and 21, a public employee asked if she could actively endorse a training program that she attended in the course of her employment. In that opinion the Commission found that endorsing a training program did not provide an overriding pubic benefit. Likewise in Advisory Opinions 2003-03 and 2003-09, the Commission ruled that public entities could not accept free emergency vehicles covered with commercial advertising.

Here, the Ethics Commission finds that the Requester has not demonstrated an overriding public benefit in handing out these coupons. The Ethics Commission commends the Requester's desire to reward the good deeds of private citizens, promote good relations between them and the Police Officers, and to encourage people to help others. The Ethics Commission finds, however, that such purposes do not rise to a level sufficient to overcome the prohibition against public officials actively endorsing private companies and products.

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 the Constitutions of the United States or West Virginia, nor 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

public agencies as hereinabove set forth unless and until it is amended or revoked, or the law is changed.

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