ADVISORY OPINION NO. 2013-49

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Chief of Police** asks if either the Police Department or the City may seek and/or accept funds from a private foundation established by a local businessperson for the sole support of the Police Department.

FACTS RELIED UPON BY THE COMMISSION

A private businessperson and resident approached the City and proposed the creation and facilitation of a police foundation. This foundation would be funded by business leaders around the community who want to contribute funds to help the Police Department.

The foundation would be established and administrated through an area community foundation or through a local bank's investment group. In order to receive any money, the Chief of Police and the Mayor would jointly request funding from the foundation. Then, the foundation would decide if it will provide the funding. The foundation's funds could only be given to the Police Department.

Neither the Police Department nor any of their employees would be involved in soliciting funds for the foundation at any time.

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 ... [t]he 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) reads, 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 ....

158 W. Va. C.S.R. § 7.6 reads, 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.

6.7. 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 is it serves a public purpose.

158 W. Va. C.S.R. § 7.8 states, in part:

8.1. The Ethics Commission finds that the interest of the public is served by having stricter limitations which govern solicitations by law enforcement officers due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers.

8.2. "Law-enforcement officer" means any duly authorized member of a law-enforcement agency who is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof.

8.3. Except as otherwise provided for in these rules, law enforcement officers may not solicit for charity while in uniform, but may show identification upon request.

8.4. Public officials or employees may solicit donations for charity while out of uniform and when they are off duty.

8.6. Law enforcement officers or associations composed of law enforcement officers may conduct telephonic or oral solicitations in their official capacity; Provided, That, when conducting a telephonic solicitation, law enforcement officers may not identify themselves by rank or title or otherwise reference their rank or title during the conversation unless specifically requested by the person with whom they are having a conversation.

8. 8. Law enforcement officers may wear their uniforms while participating in fund-raising activities based on an exchange of value. Further, they may wear their uniforms while participating in a fund-raising event such as a motorcycle ride, walk or other activities where the public, for a fee or donation, is invited to join a law enforcement officer as part of a fund-raising activity.

ADVISORY OPINION

The Ethics Act and related Legislative Rule impose clear limitations on the solicitation of gifts by law enforcement officers. It is important to note that those rules do not bar law enforcement officers from soliciting for charity entirely. In fact, the rules give explicit permission for it in some circumstances. See 158 W. Va. C. S. R. §§ 7.8.6, 7.8.8. Here, though, only the foundation is engaging in solicitation. According to the Requester, "The [...] Police Department or any member at any time would not be involved in soliciting funds for this foundation."

This is an important distinction because W. Va. Code§ 6B-2-5(c) generally prohibits public officials from soliciting gifts to cover operating expenses. In Advisory Opinion 2005-02 the Commission established a case-by-case review of "charitable" solicitations and has been stringent in its holding 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]". 158 W. Va. C.S.R. §7.6.7, however, authorizes solicitation for statutorily-created agency programs intended to help the poor or disadvantaged. In all other cases, the agency seeking to solicit said funds must obtain the express permission of the Ethics Commission. The Ethics Commission and/or the Executive Director is permitted, but not required, to give permission only if the program is for a charitable or other public purpose as provided by 158 W. Va. C.S.R. § 7.6.7.

For example, in Advisory Opinion 2012-08, the Commission ruled that it would be improper for a police department to solicit funds for the purchase of a police canine and shotgun/rifle racks because the solicitation was not for an overriding public purpose. The Commission reasoned: "Rather, the desired solicitations appear to be more related to defraying internal administrative costs associated with purchasing the desired items."

See also Advisory Opinions 1992-06, 2001-14, and 2010-19. However, the Commission has just as often permitted solicitation due to the "overriding public purpose" doctrine or because of explicit statutory authority. *See, e.g.,* Advisory Opinions 2005-02, 2011-11, and 2013-40.

Here, though, the privately funded foundation is the only entity that could be involved in soliciting donations. Such private solicitations are outside the purview of the Ethics Act, and this type of private solicitation is not prohibited by the Act; the prohibition against solicitation by public servants would not apply to private solicitation, even if the solicitation is for the benefit of a public entity. Although in Advisory Opinion 2012-08 the Commission prohibited a police department from soliciting funds for the purchase of a police canine and shotgun/rifle racks, the Commission also rightly noted:

> Finally, the Commission's holding applies to solicitation by the Requester, and does not prevent the police department from accepting an unsolicited gift. As the Commission held in A.O. 90-176, government agencies may accept gifts as an entity if the acceptance of such gifts inures to the benefit of the public generally or is in furtherance of the operation of the office. See also A.O. 92-06. The key is that the gift is given to, and utilized by, the government agency, and is not for the personal, private gain of a particular public servant. See W.Va. Code§ 6B-2-5(c)(1).

It is important to note that while there may be some initial concern that this private organization would in effect become a *de facto* private solicitation arm of the Police Department in order to evade the stricter requirements placed on police officer solicitation, this concern is unfounded.

Such solicitation is already permissible under the West Virginia Code; the Ethics Act already permits longstanding police-affiliated groups such as the West Virginia Troopers Association, chapters of the Fraternal Order of Police, and the West Virginia Sheriff's Association to solicit donations that directly or indirectly benefit area police. Notably, both the West Virginia Sheriffs' and Troopers Association grant scholarships to dependents of law enforcement officials who apply for them, in a process similar to the one proposed in the instant situation.

Additionally, the concept of a Police Foundation designed to function in this fashion is not an unusual, or unethical, one. Police Foundations are becoming increasingly popular around the United States. Cities as diverse as Stamford, Connecticut[1], Burbank, California[2], Washington, D.C.[3], Gastonia, North Carolina4, and Riverton, Wyoming[5], all have police foundations set up in roughly the same fashion proposed here and for the same essential purpose: to provide money to assist the Police

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[1] www.stamfordpolicefoundation.org/index.htm
[2] http://burbankpolicefoundation.org/
[3] http://www.dcpolicefoundation.org/
[4] http://www. gastoniapolicefoundation.com/
[5] http://www.rivertonwy. gov/departments/police/police_foundation1/index.php

Department with items outside the normal budget. While generally not the most reliable source of data, Wikipedia contains a sizeable list of cities which have police foundations, none of which appear to have violated their respective state Ethics laws.[6]

Next, it is necessary to determine whether the actual interaction proposed here between the Mayor and Police Chief on one hand, and the Foundation on the other, constitutes solicitation or is more like applying for a grant. Different rules apply to each. The solicitation rules are described above. The grant process rules will be described below.

Here, the Police Chief and the Mayor must request the funds for specific projects from the foundation, and the foundation will then determine if it will provide funding. This process is more akin to a grant application process than it is a solicitation. While the Ethics Act does not specifically define grants, the *Oxford English Dictionary* defines them as "a sum of money given by an organization ... for a particular purpose."

Further, the process proposed here is difficult to distinguish from the process state and local governmental bodies go through when seeking funding from the federal government or from a charitable organization. For example, the Federal Emergency Management Agency (FEMA) requires applicants for the Assistance to Firefighters Grant Program to ex.plain what the proposed project is, and why the applicant cannot afford it themselves. Accordingly, the Commission concludes that seeking funds from a police foundation is to be treated as a grant application, not a solicitation, and the appropriate rules apply.

The question then becomes whether it is permissible for the Requester to apply for funding for Police Department needs and/or projects from the police foundation, and what restrictions apply to that process, if any.

In Advisory Opinion 2001-14, a State Agency asked whether it was permitted to: solicit financial support for work supplies for the project from vendors or other interested persons, or apply for grants from established grant programs underwritten by interested persons.

The Commission wrote:

> The Agency's project is not a charitable purpose and agency personnel may not solicit financial support for the project from vendors, regulated persons, licensees or the general public ... Agency personnel may, however, apply to existing grant programs for a grant to fund, or help fund, the project. *The existence of a grant program is an offer of financial assistance for those purposes for which the grant program was established.* The Commission finds that making an application for a grant from such a program is in effect an effort to accept an existing offer of

[6] http://en.wikipedia.org/wiki/Police_Foundation
[7] http://www.fema.gov/welcome-assistance-firefighters-grant-program

> financial aid and is not covered by the Act's gift solicitation provisions. (Italics added).
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> Therefore, it would not be a violation of the Ethics Act for agency personnel to seek a grant from an established grant program with eligibility criteria or parameters matching the agency's project ... [this ruling] is expressly limited to situations where ... the primary benefit from the grant will flow to the public .....This opinion does not deal with the propriety of seeking or accepting grants intended to shift the normal cost of conducting an agency's routine activities from budgeted tax revenues to vendors, regulated persons or licensees.

Thus, the Commission left for another day whether a public entity was permitted to seek or accept a grant for operational expenses. That day has dawned.

As mentioned at the outset, W. Va. Code§ 6B-2-5(c) prohibits solicitation of gifts to fund operating expenses. The Commission takes administrative notice that government agencies increasingly rely on grants from public and private sources to fund specific projects and operating expenses. The Commission now concludes that applying for a grant to fund operational expenses is permissible, and does not constitute solicitation of a gift. Accordingly, the Police Department or the City may seek and/or accept funds from a private foundation established by a local businessperson for the sole support of the Police Department without violating the Ethics Act.

City officials and employees must still comply with the prohibition against the use of public office for personal gain found in W. Va. Code§ 6B-2-5(b). For example, the Mayor and Police Chief may not apply for any grant that would directly benefit themselves of their immediate families. Additionally, any funds received from the police foundation become public funds. As stated in Advisory Opinion 2012-50, "Regardless of the source of funds, all funds in the possession of a government entity are part of the 'public coffers'. Without exception, money in the public coffers may only be expended by a government entity for an authorized purpose."

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this opinion invalid.

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 public servants and other persons unless and until it is amended or revoked, or the law is changed.

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