ADVISORY OPINION NO. 2012-08

Issued On March 1, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipal Police Department** asks whether the Ethics Act permits the solicitation of donations for the purchase of a police canine and shotgun/rifle racks for police cars.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a City Police Department who would like to obtain funding for two law enforcement needs: (1) a police canine; and, (2) shotgun/rifle racks for police cruisers. Although the Requester does not identify the anticipated cost of either need, it does outline proposed methods for obtaining funding for each.

For the shotgun/rifle racks, the Police Department desires to write a letter to local fraternal organizations requesting a donation to go toward the purchase of the racks. According to the Requester, the letter would provide them with the estimated cost of each rack, and the total number needed. The Requester further states that the letter would not request a specific amount of money, instead it would leave to the organization's discretion how much, if any, it wished to contribute.

With respect to the police canine, the Requester proposes partnering with a local media entity that will conduct the fundraising drive. The Requester states that the media partner would solicit the public for donations and handle the collection. At the conclusion of the fundraising drive, the media partner would then present the money to the Police Department.

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[.]

Finally, the Commission's Legislative Rule governing solicitation of charitable gifts, W.Va.C.S.R. § 158-7-6, 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.
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> 6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.
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> 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.
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> 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 § 6B-2-5 (c) (6) and § 6B-2-5 (c) (7).

ADVISORY OPINION

The permissibility of a law enforcement agency soliciting funds for the needs of their office is not a matter of first impression for the Commission. Indeed, the Commission addressed the specific question relating to police canines in Advisory Opinion 92-06, and held that public officials and employees "may **not** solicit monetary contributions from area businesses to help defray the cost of purchasing such a dog for the Sheriff's Department." (emphasis added). See a/so Advisory Opinion 90-176 (County Commission may not solicit funding from area businesses for law enforcement training).

In the years following the issuance of these opinions, the Commission established a Legislative Rule governing solicitation of charitable gifts. W.Va.C.S.R. § 158-7. In light of such, and given the amount of time since this issue was first addressed, the Commission takes this opportunity to review the rules relating to solicitation and its prior holding.

Solicitation by a Public Servant

The West Virginia Ethics Act states that "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." W.Va. Code§ 6B-2-5(c). Although the statute does not define "charitable purpose", the Commission's legislative rules provide that the Commission will make such a determination on a case-by-case basis. W.Va.C.S.R § 158-7-6.2.

As a general rule, the Commission is hesitant to approve a governmental agency's solicitation for its own operational needs.[1] However, the Commission has outlined certain circumstances in which a public entity may solicit such funds.

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W.Va.C.S.R. § 158-7-6.7.

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[1] This is distinguishable from those situations in which there is express statutory authority allowing the public entity to solicit private funds for operational needs. *See* e.g. W. Va. Code § 18B-2A-4(m); W. Va. Code§ 49-9-1?(b); W. Va. Code§ 5-1E-3(6).

The Commission further 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.

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]." A.O. 2005-02.

Requester's Specific Needs

The Requester seeks to solicit funds for shotgun/rifle racks and a police canine. The Requester has identified these as needs of the department, and has proposed two fundraising methods.

The Commission is mindful of the necessity of law enforcement agencies adequately protecting the public, and is appreciative of the Requester's efforts to achieve this objective. Unfortunately, budget restraints limit the ability of the Requester to purchase the desired items, and the Requester seeks to look to the local community for assistance.

In seeking outside monetary assistance, however, public agencies raise the potential for a coercive solicitation. For this reason, 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]". A.O. 2005-02.

Upon review of the Requester's desired solicitations, the Commission finds that the Requester fails to establish this overriding purpose. Rather, the desired solicitations appear to be more related to defraying internal administrative costs associated with purchasing the desired items. Accordingly, the Commission re-affirms its prior decision in Advisory Opinion 92-06, and finds that solicitations for the purchase of a police canine and shotgun/rifle racks are not permissible under the Ethics Act as they do not constitute charitable gifts.

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).

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 only by part-time elected prosecuting attorneys unless and until it is amended or revoked, or the law is changed.

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