ADVISORY OPINION NO. 2011-11

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether its recreation department is a charitable purpose for which it may lawfully solicit support.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a public agency that provides housing for veterans, most of whom have mental health conditions or substance abuse problems. The Agency is statutorily authorized to receive funds from "the federal government, ... from state appropriations, from resident contributions or from any other appropriate source, for the purpose of ... [the] improvement and renovation of physical facilities, personal care costs and medical, nursing and dental services."

A Legislative Rule authorizes the Agency Administrator or his/her designee, on behalf of the Agency "to accept or receive any donations, gifts or bequests offered or tendered to, or for the benefit of" the Agency. Further, "[a]ll such monies received or accepted shall be used for the specific purposes for which they were given or donated."

Another Legislative Rule creates a specific fund consisting "of donations and bequests to be expended for recreation for residents and special projects as directed by individual donor from miscellaneous organizations...." The Requester states that this restriction adversely affects funding for recreation since donors may not necessarily know specific needs to direct their donations accordingly.

The Agency considers recreational activities to be an important part of its resident care plan, and finds that it is good for veterans' morale to have a wide range of recreational activities. Further, the veterans' recreational needs have grown over the years. The Requester concludes: ". "Without the ability to [solicit] ... support from outside sponsors, the [Agency's] Recreational Department remains very limited in what it can offer our veterans due to the constraints of relying solely on donations."

According to the Requester, "no state or federal funds are allocated for any recreational programming although the three recreational staff receives wages using state monies."

CODE PROVISIONS 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.

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 rules governing solicitation of charitable gifts provide, 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 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 ... 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 ... seeks to solicit funds for use by the agency for any other purpose, then the state government agency ... 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.
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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....

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.

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.

158 C.S.R. § 7.

ADVISORY OPINION

The Ethics Act prohibits public servants from soliciting gifts unless the solicitation is for a charitable purpose. Neither the Act nor the Legislative Rule defines "charitable purpose". Instead, the Commission determines on a case by case basis what constitutes a charitable purpose. 158 C.S.R. § 7.6.2 and 6.7.

The Agency desires to solicit funds to underwrite the cost of its own recreation department. The Commission has previously 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]". Advisory Opinion 2005-02 (approving solicitation by a County Board of Health for a public health program that it administers).

In Advisory Opinion 2005-02, the Commission also established a general guideline recognizing "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."

Given the Agency's mission, the Commission hereby finds that the Agency provides a public service to the State. Providing a home for otherwise homeless veterans, who made the ultimate sacrifice, serves an overriding public purpose distinguishable from other governmental agencies. Accordingly, the Commission finds that the Agency's operations meets the "charitable purpose" exception of W.Va. Code § 6B-2-5(c).

In Advisory Opinion 93-08, the Commission held that a City recreation program designed for community youth constituted a charitable purpose for which the City could solicit. Similarly, in Advisory Opinion 96-19, the Commission found that the operation of recreation facilities constitutes a charitable purpose, and authorized the City to solicit support for the operation of the municipal swimming pool. The Commission noted that the revenue generated by pool admissions and activities was insufficient to offset the cost to operate the swimming pool, as is the case with the Requester's Agency.

The Commission agrees with the Requester that it boosts the morale of veterans to have access to recreational opportunities. Thus, the Commission finds that the Agency's recreation department also serves a "charitable purpose". As a result, the Agency may solicit for donations to underwrite the costs of the recreation department and its related programming, with certain conditions.

Specifically, the Commission notes that the Ethics Act prohibits a public servant from using public resources for the private gain of another. Although the proposed solicitation is permissible, the Agency must comply with other rules governing solicitations so that its actions comply with the Ethics Act. Indeed, the Agency's enabling legislation provides:

> The money so collected shall be placed in special accounts according to the source of funds and limitation on the use of the funds. These accounts shall be administered by the director of the [agency]. These funds shall be deposited in the state treasury and paid out only on such vouchers as may be authorized and approved by the director of the [agency], in the same manner and under the same restrictions as are now provided by law for the disbursement of funds by that [agency]. These funds shall only be used as directed or restricted by the source of the funds.

Therefore, the Agency's fundraising efforts must not only comply with the conditions herein imposed, but must also conform to its own statutory limitations. The Ethics Act sets the minimum standard of conduct. When the Legislature or an agency imposes a stricter standard, then public servants must comply with the stricter requirements.

Further, in soliciting businesses or companies, the Agency must not endorse a particular product or business. This action would constitute the prohibited use of office for private gain. Should the Agency seek to solicit individuals or entities subject to its regulatory authority, or from a vendor or potential vendor, it must conform its solicitation to the conditions set forth in the Legislative Rule. *See* 158 C.S.R. § 7.7.

Finally, the Requester must abide by the following conditions: 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; supervisors must not solicit their subordinates for a contribution; and the Agency may not solicit resident veterans for contributions to the recreation department, neither shall the Agency use any resident veterans to solicit for its otherwise permissible fundraisers.

Conclusion

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 public agencies unless and until it is amended or revoked, or the law is changed.

R. Kemp Morton, Chairperson