

Advisory Opinion 2021-02

Issued on March 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **Mayor** asks whether he may appear in a video promoting and soliciting donations for a local nonprofit drug and alcohol recovery center.

Facts Relied Upon by the Commission

The Requester is an elected Mayor. A local nonprofit drug and alcohol recovery center has asked him to appear in a video to promote the center and to solicit donations for it. He asks whether that is permissible.

Code Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) provides, 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)(1) provides, 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.

...

W. Va. Code R. § 158-7-6 provides, 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.

6.3. It is improper for a public official or public employee to solicit any gift or donation, including those for a charitable purpose, from a subordinate employee.

6.4. In soliciting a gift for charity in either their personal or official capacities, public officials and employees may use their titles; Provided, That law enforcement officers are subject to the limitations in section 8.

...

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.

6.8. Fund-raising activities based on an exchange of value are not gift solicitations and are permissible.

...

W. Va. Code R. § 158-7-7 provides, 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; and,

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 acknowledgements 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

Soliciting donations

The Ethics Act prohibits public servants from soliciting gifts, unless they are for a charitable purpose with no resulting direct pecuniary benefit conferred upon the public employee or official. W. Va. Code § 6B-2-5(c). The Requester will not receive a pecuniary benefit from the solicitation for the drug and alcohol recovery center. The Requester may, therefore, solicit donations for the center if it is a charitable purpose.

The Ethics Act does not define “charitable purpose,” however, the Commission has held, as examples, the following similar purposes to be charitable: a health care program for disadvantaged children (Advisory Opinion 1999-37); the study of early childhood development (Advisory Opinion 2013-40), and scholarships for poor or disadvantaged students (Advisory Opinion 1996-36).

The Commission holds that a drug and alcohol recovery center serves a charitable purpose under the Ethics Act and, therefore, the Mayor may solicit donations for the center.

Promoting a charity

The Ethics Commission has applied W. Va. Code § 6B-2-5(b)(1) to restrain a public servant from promoting or endorsing commercial products and services. In Advisory Opinion 2015-17, the Commission explained,

The Ethics Commission has steadfastly followed this general rule: “A public official may not endorse a particular product or business. A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit.” Advisory Opinion 2015-13, *citing* Advisory Opinions 95-05 and 2015-04. *See also* Advisory Opinions 2005-10, 2012-21 and 2014-15 [*emphasis added*].

In enacting the Ethics Act, one of the Legislature’s findings was that public officials who “seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government.” W. Va. Code § 6B-1-2(a).

In Advisory Opinion 2015-17, the Commission held that “public teachers and staff may not voluntarily appear in the software vendor’s case study video and articles without violating the prohibition against public officials’ commercial endorsements of a product or business.”

The Commission later held, in Advisory Opinion 2016-10, that allowing a private charity to recognize a public servant by name and title for a personal donation does not constitute a prohibited commercial endorsement of a product or business. In reaching this conclusion, the Commission found that a charitable cause is not the equivalent of a “commercial product” or “business.” Further, the Commission found that its conclusion “is consistent with the Commission’s Legislative Rule governing gifts which specifically permits the use of public job titles in soliciting gifts for charities.” W. Va. Code R. § 158-7-6.4. *Id.*

Therefore, the Commission holds that the Requester may appear in a video using his name and public title to promote and solicit donations for a local nonprofit drug and alcohol recovery center.

While use of a public job title for charitable purposes is generally permissible, there are restrictions. See W. Va. Code R. §§ 158-7-6.1 through 158-7-7.4, above.¹

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics 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 through 6B-3-11 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.

¹ The Legislative Rule governing the solicitation and receipt of gifts and charitable contributions prohibits public officials and employees from orally soliciting charitable donations from regulated persons and vendors. W. Va. Code R. § 158-7-7.1. The Ethics Commission does not, however, construe the restriction on oral solicitations as prohibiting a public official or employee from orally/verbally soliciting donations for a charitable purpose via a spoken message directed to the general public. The West Virginia Supreme Court has stated: “We have previously signaled that it is this Court’s duty ‘to avoid whenever possible a construction of a statute which leads to absurd, inconsistent, unjust or unreasonable results.’” *Taylor-Hurley v. Mingo County Bd. of Educ.*, 209 W. Va. 780, 551 S.E.2d 702, 709 (W. Va. 2001) citing *State v. Kerns*, 183 W. Va. 130, 135, 394 S.E.2d 532, 537 (1990). The Ethics Commission finds that construing the Legislative Rule as prohibiting a public official or employee from making a public statement in support of a charitable fundraising drive would be an unreasonable result as the Rule’s objective is to restrict coercive solicitations of regulated persons and vendors by public officials and employees. A message addressed to the general public, even if heard by regulated persons and vendors, is not the type of communication that the Rule is intended to restrict.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
WV Ethics Commission