

Advisory Opinion 2021-03

Issued on March 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **Lobbyist** asks whether the \$25 gift limit applies to charitable contributions made to a nonprofit to recognize a legislator and whether the contribution is a reportable lobbyist expenditure.

Facts Relied Upon by the Commission

A lobbyist is employed by an organization which annually recognizes persons for their achievements in supporting the organization's mission and the population it serves. The organization's 2021 award winners included two members of the West Virginia Legislature. In lieu of giving a gift to the members of the Legislature, the organization offered to make a monetary donation in their name to a registered nonprofit organization in West Virginia.

One of the two members of the Legislature opted to have a charitable contribution made on his behalf to a homeless shelter in his county, and the organization donated \$50 to it in the Legislator's name. The Legislator did not request that the organization make the donation on his behalf but merely selected a nonprofit recipient ("donee") at the request of the organization. The organization states that its intent in making the donation was to support local programs that assist people in need in these unusual times.

The Legislator received nothing of value in return for the donation and, to the best of the lobbyist's knowledge, neither the Legislator nor his immediate family members are employed by the nonprofit donee.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(i) states, in relevant part:

"Political contribution" means and has the same definition as is given that term under the provisions of § 3-8-1 et seq. of this code.

W. Va. Code § 6B-1-3(o) states, in relevant part:

"Thing of value", "other thing of value," or "anything of value" means and includes: (1) Money, bank bills, or notes, United States treasury notes and other bills, bonds or notes issued by lawful authority and intended to pass and circulate as money; . . . (9) donation or gift; . . . or (13) every other thing or item, whether tangible or intangible, having economic worth.

“Thing of value”, “other thing of value” or “anything of value” shall not include anything which is de minimis in nature nor a lawful political contribution reported as required by law.

W. Va. Code § 6B-2-5(c) states, in relevant part:

(c) *Gifts.* - (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

- (A) Is doing or seeking to do business of any kind with his or her agency;
- (B) Is engaged in activities which are regulated or controlled by his or her agency; or
- (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. . . . The provisions of subdivision (1) of this subsection do not apply to:

- (A) Meals and beverages;
- (B) Ceremonial gifts or awards which have insignificant monetary value;
- (C) Unsolicited gifts of nominal value or trivial items of informational value;

W. Va. Code R. § 158-7-4.1 states:

4.1. For purposes of the Ethics Act, W. Va. Code § 6B-2-5(c)(2)(C), a nominal gift is any gift with a monetary value of twenty-five dollars (\$25.00) or less.

W. Va. Code § 6B-3-1(3) states, in relevant part:

"Expenditure" means payment, distribution, loan, advance deposit, reimbursement, or gift of money, real or personal property or any other thing of value; or a contract, promise or agreement, whether or not legally enforceable.

W. Va. Code § 6B-3-4(c)(1) states, in relevant part:

Except as otherwise provided in this section, each report filed by a lobbyist shall show the total amount of all expenditures for lobbying activities made or incurred by on behalf of the lobbyist during the period covered by the report. The report shall also show subtotals segregated according to

financial category, including meals and beverages; . . . contributions; gifts to public officials or employees or to members of the immediate family of a public official or employee; and other expenses or services.

W. Va. Code § 6B-3-4(f) states, in relevant part:

If, during the period covered by the report, the lobbyist made expenditures or expenditures were made or incurred on behalf of the lobbyist in the reporting categories of meals and beverages, living accommodations, travel, gifts or other expenditures, other than for those expenditures governed by subsection (g) of this section, the lobbyist shall report the name of the public official or employee to whom or on whose behalf the expenditures were made, the total amount of the expenditures, and the subject matter of the lobbying activity, if any

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Gift Rules

The Ethics Act and related Legislative Rule restrict the types of gifts that public officials and employees may accept from lobbyists and other persons whose financial interests are or may be affected by the performance or nonperformance of a public official or employee's duties. W. Va. Code § 6B-2-5(c)(1) and W. Va. Code R. §§ 158-7-1 through 157-7-9. The restrictions apply to gifts accepted directly or indirectly. *Id.* There is also a provision which limits the monetary value of nominal gifts to \$25 or less per calendar year. W. Va. Code R. § 158-7-4.

In Advisory Opinion 1990-191, the Ethics Commission held that an association may give a gift to a nonprofit in the name of a public official because there would be no financial benefit to the public official. In the instant situation, a \$50 charitable donation was made by an organization in the name of a member of the Legislature to recognize him for his service. Neither the Legislator nor any of his immediate family members are employed by the nonprofit donee,¹ and the Legislator did not derive any financial benefit from the donation.

The Ethics Commission hereby reaffirms its 1990 holding and finds that a charitable donation made in the name of a public official does not, for purposes of the Ethics Act, constitute a gift to the public official when neither the public official nor any of his or her family members is employed by the nonprofit or otherwise financially benefits from the donation. Hence, the gift of a donation to a nonprofit in the name of a public official is permissible, and the \$25 gift limit does not apply.

¹ The Ethics Act defines "immediate family" as a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren, and dependent parent or parents. W. Va. Code § 6B-1-3(f)

Reporting of charitable contribution

The Ethics Act requires lobbyists to report expenditures made on public officials or on their behalf. W. Va. Code § 6B-3-4(f). For example, the Act requires lobbyists to report expenditures for meals and beverages for public officials. The Act also requires lobbyists to report contributions.

In Advisory Opinion 1990-147, the Ethics Commission considered the requirements for the reporting of political contributions by lobbyists. The Ethics Commission held that lobbyists must report political contributions made to public officials and their campaign committees but not to political action committees. While the Ethics Commission has interpreted the Act as requiring the reporting of *political* contributions by lobbyists to public officials, the Ethics Commission has not addressed whether the reporting requirements apply to *charitable* contributions made on behalf of a public official.

The Legislature has expressly defined “political contribution” in the Ethics Act,² and the Act contains subsequent references to political contributions. For example, the Act exempts from the definition of “thing of value” lawful political contributions.³ The Ethics Act does not, however, separately define the term “contribution.”

The Ethics Act directs lobbyists to report contributions. The Ethics Commission finds that if the Legislature had intended this reporting requirement to apply only to “political contributions,” the Legislature would have said that. Because the Legislature uses both the terms “contribution” and “political contribution” in the Act, the Ethics Commission finds that the intent of the Legislature was to require lobbyists to report charitable contributions made by lobbyists or their employers on behalf of public officials.⁴

This conclusion is consistent with the rules of statutory construction employed by the West Virginia Supreme Court which has stated:

Ordinarily, when we construe a statute, we give effect to each word employed in a legislative enactment. “It has been a traditional rule of statutory construction that `the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning[.]”

² W. Va. Code § 6B-1-3(i)

³ W. Va. Code § 6B-1-3(o). See also W. Va. Code § 6B-2-5(c)(1) which states, in relevant part: “That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution”

⁴ Based upon the context and vagueness of the term “contribution,” in the Act, the Ethics Commission finds that this provision of the statute is open to construction. See *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998) (“A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” (quoting *Hereford v. Meek*, 132 W. Va. 373, 386, 52 S.E.2d 740, 747 (1949))).

Osborne v. US, 211 W. Va. 667, 567 S.E.2d 677 (2002) (quoting *Keatley v. Mercer County Bd. of Educ.*, 200 W. Va. 487, 495, 490 S.E.2d 306, 314 (1997)).

The Ethics Commission finds that lobbyists must report a contribution made on behalf of a public official to a nonprofit on their lobbyist expenditure report.

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, including whether there is express or implied authority for the expenditure.

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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission