

Advisory Opinion 2021-05

Issued on April 1, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Administrator** asks whether the County may have paid advertisements on its tourism website and whether it may give local hotels free advertising on the same website.

Facts Relied Upon by the Commission

The Requester is a County Administrator. She states that a County Commissioner wants the County to create its own tourism website and to sell advertising space on it. The County would use hotel occupancy tax proceeds and the advertising revenues to pay for creating and administering the website¹. The purpose of the website is to promote tourism in the region. Hotels and other lodging facilities in the County which are statutorily charged with collecting and remitting the hotel occupancy tax would receive free advertising while other businesses that want to advertise on the website would be charged a fee.

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.

ADVISORY OPINION

Sale of Advertising

The Ethics Commission has applied W. Va. Code § 6B-2-5(b)(1), which prohibits the use of office for the private gain of public servants or others, to restrict public servants from

¹ W. Va. Code §§ 7-18-1 through 7-18-15 authorizes counties and municipalities to impose and collect this tax. The revenues, per Code, are to be used to promote tourism. *Id.*

promoting or endorsing commercial products and services unless there is an overriding public benefit.² The Ethics Commission must determine, therefore, whether advertisements on the County's tourism website would constitute an impermissible endorsement.

In Advisory Opinion 2004-24, the Ethics Commission held that a state agency may sell advertising to defray the cost of publishing a quarterly newsletter. Similarly, in Advisory Opinion 2014-15, the Ethics Commission held that a state agency may sell advertising to defray the cost of wellness tools on its website and that the sale of advertising did not constitute an impermissible endorsement.³

In Advisory Opinion 2017-20, the Ethics Commission found that a reasonable citizen would not find that a municipality was promoting a restaurant by participating in a "Coffee with Cops" event at the restaurant when the purpose of the event was to promote community relations and outreach programs. The Commission held, therefore, that the law enforcement officers' participation in the event was not an improper endorsement of the restaurant.⁴

The Ethics Commission reaffirms its prior Opinions and likewise finds that a reasonable citizen would not construe advertisements on the County's tourism website as an endorsement of one business over another.

The Ethics Commission holds that a County may have paid advertisements on its tourism website.

The sale of the advertisement must be made in a fair and even-handed manner. The County should consider including a disclaimer on the tourism website stating that the advertisements should not be construed as an endorsement by the County of any business.

Free advertising for hotels

The County states that it wants to give free advertising to hotels and other lodging facilities because these entities are responsible for collecting and remitting the hotel occupancy tax. Counties and cities are required by Code to use the proceeds from the

² 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 1995-05 and 2015-04.

³ See also Advisory Opinion 2018-01 (holding that a County Commission may sell sponsorships for park benches. The Commission directed in that Opinion that the "sales solicitations must be made in a fair and even-handed manner.") and Advisory Opinion 2015-21 (holding that a state agency may allow advertising to be streamed on monitors in its lobby, but the agency had to include a disclaimer that it was not endorsing the products or services).

⁴ In contrast, in Advisory Opinions 2003-03 and 2003-09, the Ethics Commission held that a city and a county may not allow advertising on their publicly owned vehicles used in the course of conducting county business.

tax to promote tourism in their respective regions. The Code expressly states: “The Legislature also finds that the support of convention and visitor’s [sic] bureaus, *hotels*, [emphasis added] and regional travel councils is a public purpose for which funds may be expended.” W. Va. Code § 7-18-14(b)(3).

The Ethics Act permits the expenditure of public funds when there is a legitimate government purpose for the expenditure and the expenditure is authorized by law.⁵ The Ethics Commission has held that an “expenditure . . . may constitute the unlawful use of [public] office for private gain if the overriding benefit is to the public official or employee as opposed to the agency or public.” Advisory Opinion 2018-03.

The Legislature has expressly authorized the expenditure of public funds to support tourism and hotels.⁶ The Ethics Commission finds that giving free advertising to hotels on the County’s tourism website for the purpose of promoting tourism in the region does not constitute use of office for private gain as the Legislature has authorized the expenditure of the funds to promote tourism and the expenditure is for a public purpose. **The Ethics Commission holds that the County may give free advertising on its tourism website to hotels in the region.**

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.

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

⁵ Advisory Opinions 2020-04 and 2020-14.

⁶ The Code defines “hotels” for purposes of the article, in relevant part, as “any facility, building or buildings, publicly or privately owned (including a facility located in a state, county or municipal park), in which the public may, for a consideration, obtain sleeping accommodations. The term includes but is not limited to, boarding houses, hotels, motels, inns, courts, condominiums, lodges, cabins and tourist homes.” W. Va. Code § 7-18-3(c).