

## **Advisory Opinion 2020-08**

**Issued on April 2, 2020, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **Chief Deputy Sheriff** asks whether her badge is considered part of her uniform and whether the badge may be included in photographs in campaign material.

### **Facts Relied Upon by the Commission**

The Requester is employed as a chief deputy for a county sheriff's office. She is currently running for Sheriff in the same county. The Requester posted a photo of herself teaching a class in a local school on her Facebook campaign page. The Requester was wearing a polo shirt and khaki pants with her badge and firearm visible in the picture. Any identifying information on the badge, including her department, is unrecognizable. The Requester states that she removed the photo from her campaign page when she was notified that it presented an issue.

The Requester is aware of the Ethics Commission's decision in Advisory Opinion 2019-14 holding that a city police officer may not include pictures of himself in uniform in his campaign material. The Requester states she believed that her photo was compliant because she was in civilian clothes and anyone viewing the photo could not tell what agency she served. The Requester asks the Commission whether the photo may be included in campaign material.

### **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b) states, 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.

W. Va. Code R. § 158-6-5 states, in relevant part:

5.2. Improper Use- Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

### **Advisory Opinion**

The Ethics Act, at W. Va. Code § 6B-2-5(b)(1), prohibits public officials from knowingly and intentionally using their public office for their own or another person's private gain. This Code section excepts from this prohibition the incidental use of public resources "for personal or business purposes resulting in de minimis private gain . . . ."

In Advisory Opinion 2019-14, a city police officer asked whether he could include pictures of himself in uniform in his campaign material. The Commission held that the officer's uniform conveyed the endorsement of his police agency and, therefore, including the pictures in campaign material would violate the Act's private gain provision. The Ethics Commission reasoned that it has "historically held that law enforcement officers must exercise caution in using the authority of their office for outside activities." The Commission cited to its Legislative Rule, which imposes limitations on the use of titles and uniforms by law enforcement officers in soliciting for charity "due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers." W. Va. Code R. § 158-7-8.1.

The Commission also cited to a decision of the Seattle Ethics and Elections Commission, which held that a police officer could not wear his uniform in campaign advertising.<sup>1</sup> The Seattle Ethics and Elections Commission reasoned that "[t]he uniform is a part of the equipment issued by the City to police officers to perform their duties" and that the "uniform . . . is a facility of a public office that may not be used to assist a candidate, or to promote or oppose a ballot issue."

The Requester here asks whether her badge may be included in campaign pictures when she is not wearing a uniform. The Commission finds that she may not. The badge represents the same indicia of authority as does the uniform. In fact, many sections of the West Virginia Code contemplate that a badge and uniform are to be treated similarly. See W. Va. Code § 7-26-5(b) ("For purposes of uniformity, the bureau may establish a standard badge and uniform to be worn by all sheriffs and deputy sheriffs."); W. Va. Code § 61-1-9 ("[A]ny person not a law-enforcement officer or law-enforcement official who shall wear the uniform prescribed for such persons, or the badge or other insignia adopted for use by such persons with the intent to deceive another person, is guilty of a misdemeanor . . . ."); W. Va. Code § 51-10A-4(c) ("A bail bond enforcer may not: wear, carry or display any uniform, badge, shield or other insignia or emblem that implies that the bail bond enforcer is an employee, officer or agent of this state, a political subdivision of this state or the federal government."); W. Va. Code § 15-5-18 ("A peace officer, when in uniform or displaying a badge or other insignia of authority, may arrest without a warrant any person violating or attempting to

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<sup>1</sup> RE: Request for Elections Advisory Opinion No. 95-2A-0302-1, Use of Title, 1995 WL 870081, at \*2.

violate in such officer's presence any order, rule or regulation made pursuant to this article.”).

**The Ethics Commission holds that the badge should be treated in the same manner as the uniform and therefore may not be included in campaign photographs.**

The Requester also asks whether photographs containing the badge may be included if the identifying information on the badge is not recognizable. The Commission declines to create an exception based on the quality of photographs used in campaign materials.

**Finally, this Opinion is prospective only. The instant request involved an issue of first impression that arose out of the Ethics Commission's recent decision in Advisory Opinion 2019-14, and application of this Opinion retroactively would produce inequitable results.**

*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  
West Virginia Ethics Commission