

Advisory Opinion 2020-09

Issued on May 7, 2020, by

The West Virginia Ethics Commission

Opinion Sought

A **Retired City Police Officer** and candidate for sheriff asks whether he may include photographs of himself in uniform in his campaign material.

Facts Relied Upon by the Commission

The **Requester** served as a city police officer for more than 20 years, having recently retired with the rank of Captain. He is now employed with the City as a building inspector. He is also a candidate for sheriff in the same county.

The Requester is aware of the Ethics Commission's decisions in Advisory Opinions 2019-14 and 2020-18 which held that law enforcement officers may not include pictures of themselves in uniform in their campaign materials. He asks whether this prohibition applies to him since he is no longer a police officer.

Provisions Relied Upon by the Commission

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

(j) "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

(k) "Public official" means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating, or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person. The term "public official" includes a public servant volunteer.

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

In Advisory Opinion 2019-14, a city police officer asked whether including pictures of himself in his police uniform in his campaign material would violate the private gain provision of the Act. The Commission found that including the pictures of himself in uniform would violate the Act's private gain provision in that the officer would be conveying the endorsement of his police agency. In Advisory Opinion 2020-08, the Commission held that a chief deputy's "badge should be treated in the same manner as the uniform and therefore may not be included in campaign photographs."

The Requester asks whether these Advisory Opinions apply to him since he has retired from the police department. The Ethics Act, at W. Va. Code § 6B-2-5(b)(1), prohibits public employees and public officials, as defined in the Act at W. Va. Code § 6B-1-3 (j)-(k), from knowingly and intentionally using their public office or the prestige of office for their own or another person's private gain. The definitions of "public official" and "public employee" do not include former or retired public officials or employees.

Therefore, with few exceptions¹, the provisions of the Ethics Act, including W. Va. Code § 6B-2-5(b)(1), do not apply to former or retired public officials or employees. The Act applies instead to the conduct of a person while he or she is holding a public official or employed as a public employee. In this instance, the Act applies to the Requester's conduct while he was working as a city police officer.

The Commission recognizes that the Requester is now working for the City in a new capacity as a building inspector. The Requester's conduct as a building inspector is subject to the Act. For example, the Requester is prohibited from using the resources of that department for his campaign. The police uniform depicted in the uniform which the

¹ These exceptions are found in W. Va. Code §§ 6B-2-5(e), (f) and (g), which prohibit former public officials and employees from disclosing confidential information, representing clients before their former agencies (revolving door), and other post-employment limitations. Another provision of the Act, at W. Va. Code § 6B-3-2(e), restricts certain public officials and employees from registering as a lobbyist for one year after their termination from public employment or service.

Requester wants to use in campaign material is not used by him as a building inspector. Therefore, the holdings in Advisory Opinions 2019-14 and 2020-08 are not applicable to the Requester because he is not currently a city police officer.

The Ethics Commission holds that the Ethics Act does not prohibit a retired city police officer who is also a candidate for sheriff from wearing his uniform in his campaign material.

The Requester should be mindful, however, of relevant provisions of law outside of the Ethics Act, which the Ethics Commission does not have authority to interpret or enforce. W. Va. Code § 8-14-24, for instance, states, in relevant part:

A police officer, upon honorable retirement, is authorized to maintain at his or her own cost a complete standard uniform from the law-enforcement agency of which he or she was a member and shall be issued an identification card indicating his or her honorable retirement from the law-enforcement agency. The uniform may be worn by the officer in retirement only on the following occasions: Police Officer's Memorial Day, Law-Enforcement Appreciation Day, at the funeral of a law-enforcement officer or during any other police ceremony. The honorably retired officer is authorized to acquire a badge of the law-enforcement agency from which he or she is retired with the word "retired" placed on it.

Further, W. Va. Code § 61-1-9 states, in relevant part: "[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")

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