

Form #3

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2007 JUL 26 PM 4:15

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Robin B. Perdue
Deputy Secretary
Department of Administration

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 26, 2007

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Ethics Commission, 210 Brooks Street, Suite 300,
Charleston, WV 25301 (304) 558-0664

LEGISLATIVE RULE TITLE: ~~"Gifts."~~ Title being amended to read, "Solicitation and Receipt
of Gifts and Charitable Contributions by Public Employees and
Officials."

1. Authorizing statute(s) citation W.Va. Code §§ 6B-1-2(e), 6B-2-2a, 6B-2-5

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 8, 2007

b. What other notice, including advertising, did you give of the hearing?

Sent proposed rule to the WV Division of Criminal Justice Services, associations composed of law enforcement personnel and various lobbyists representing public interest groups. Posted proposed rule and Notice of Public Comment Period on the Ethics Commission web site. Also a Charleston Gazette article referenced fact that there would be a public hearing on the rule.

c. Date of Public Hearing(s) *or* Public Comment Period ended:

Public hearing - June 7, 2007 Public Comment Period - June 8, 2007

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

QUESTIONNAIRE

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Attached X

No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 26, 2007

- f. Name, title, address and **phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Theresa M. Kirk

Legal Counsel

210 Brooks Street, Suite 300

Charleston, WV 25301

(304) 558-0664

Fax (304) 558-2169

tkirk@wvadmin.gov

- g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached

BRIEF SUMMARY OF PROPOSED RULE
Title 158, Series 7

The West Virginia Ethics Act, W.Va. Code § 6B-2-5(c) places limitations on the receipt and solicitation of gifts, including charitable gifts, by public officials. The Ethics Commission is also charged with interpreting the Ethics Act through the issuance of formal advisory opinions.

This rule attempts to incorporate the rules established by the Ethics Commission on the receipt and solicitation of gifts through its advisory opinions. In general, the rule: (1) clarifies the law as it relates to the receipt of honorarium; (2) further defines when public officials or employees may accept payment of expenses from interested third parties for their attendance at a conference or seminar, either as a participant or speaker; (3) sets forth guidance on soliciting for charity; (4) clarifies that the \$ 25.00 gift limitation is for a calendar year; and (5) further clarifies under what circumstances public officials and employees may accept a ticket to a charitable, cultural, political or sporting event.

The rule further incorporates the Commission's current ruling made in Advisory Opinion 2007-01 which limits the solicitation of gifts for charity by law enforcement officers and associations composed primarily of law enforcement officers. In addition to incorporating the limitations established by Advisory Opinion 2007-01 into the proposed rule, the rule also prohibits law enforcement officers or their associations from conducting telephonic or oral solicitations. The Commission proposes these additional limitations on law enforcement officials due to the unique authority of law enforcement officials, including the power to carry a firearm and to make arrests.

STATEMENT OF CIRCUMSTANCES
Title 158, Series 7

The West Virginia Ethics Act, W.Va. Code § 6B-2-5(c) places limitations on the receipt and solicitation of gifts, including charitable gifts, by public officials. The Ethics Commission is also charged with interpreting the Ethics Act through the issuance of formal advisory opinions.

Series 7 was enacted in 1992. It has not been amended since that time. The new rule incorporates the Commission's existing rules on gifts as established through its past advisory opinions. Further, the Commission recently established additional limitations on the solicitation of charitable gifts by law enforcement officers through the issuance of Advisory Opinion 2007-01. After the issuance of the opinion, the Commission decided that the limitations on solicitations by law enforcement officers should be incorporated into a Legislative rule in order that the law enforcement community, members of the public, and Members of the Legislature could formally participate in establishing a fair rule which balances the interests of the public and law enforcement community.

TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION

SERIES 7
SOLICITATION AND RECEIPT OF GIFTS
AND CHARITABLE CONTRIBUTIONS BY PUBLIC EMPLOYERS AND OFFICIALS

FILED
2007 JUL 26 PM 4:15
OFFICE OF THE CLERK
WEST VIRGINIA
SECRETARY OF STATE

§ 158-7-1. General.

1.1. Scope. -- ~~These legislative rules establish~~ This legislative rule establishes the rules governing the solicitation and receipt of the guidelines concerning gifts for by persons covered by the WV Governmental Ethics Act.

1.2. Authority. -- W. Va. Code § 6B-2-2(a), § 6B-2-5(b), 6B-2-5(c) and, § 6B-2-2(o),.

1.3. Filing Date. -- ~~April 29, 1992.~~

1.4. Effective Date. -- ~~June 1, 1992.~~

§ 158-7-2. Honorarium.

2.1. For the purposes of this section, the term "honorarium" means payment given in recognition of published works, appearances, speeches and presentations which is not intended as consideration for the value of such services. These payments are not legally or traditionally required such as in an employment contract.

2.2. The Ethics Commission will use the following guidelines in determining whether the amount of an honorarium is reasonable and permitted under W. Va. Code § 6B-2-5:

- a. the length of time spent on preparing or researching material for the presentation,
- b. the amount of time for actual presentation,
- c. the distance to be traveled to make the appearance, speech or presentation,
- d. the public official's or public employee's experience, qualifications and educational background, and
- e. the usual and customary fee paid to others for similar work.

2.3. ~~It is unlawful for all elected public officials to accept an honorarium except as set out in subsections 2.4 and 2.5~~

of this rule. It is unlawful for a full-time elected official to receive an honorarium unless he or she:

a. Donates it to a recognized charity or the State Treasury; and,

b. Files a notice with the Ethics Commission identifying the honorarium, the date received and the group to whom it was donated.

2.4. An A part-time elected public official may accept an honorarium if it is given for an appearance, speech or presentation made of a professional nature not related to the official's public position. An example would be a professional such as a Physician, Certified Public Accountant, Pharmacist or Attorney speaking at a conference or seminar in his or her field.

~~2.5. An elected public official may receive an honorarium and donate it to a recognized charity or the State Treasury. Such public official must file notice with the Ethics Commission identifying the honorarium, the date received and the group it was donated to.~~

2.6. 2.5. Any public employee who receives an honorarium shall seek his or her supervisor's approval and take annual leave or leave without compensation from his or her public employment during the time he or she prepares for or makes such presentation, speech or appearance.

~~2.7. 2.6.~~ A public official or employee may not use public time, facilities, equipment or personnel in the preparation or presentation of a private presentation, speech or appearance.

§ 158-7-3. Receipt of Free Admission, Travel and Lodging expenses to attend an educational to Seminar/Conference Seminar or Conference.

3.1. A public official or public employee may accept from an interested third party a reduced rate for or free admission to a privately sponsored conference or seminar, and reimbursement for reasonable meals, travel and lodging expenses, if his or her attendance will result in benefit to the governmental agency he or she serves by enhancing his or her job related skills and the performance of his or her public job responsibilities under each of the following:

a. Attendance by the public official or employee must fulfill an existing agency need by significantly enhancing the attendee's occupational skill or knowledge

to provide important information needed by the agency to meet its official mandate;

b. The seminar or conference must be appropriate for the proposed attendee. A trip is appropriate for the attendee if he or she will use the information or job skill enhancement and is the person most suitable to acquire and transfer the skills or information to other appropriate agency personnel.

c. The site of the proposed trip must be appropriate. A public employee or official may not accept payment for attendance at the seminar or conference and related costs if the same information is readily available locally.

d. The seminar or conference must offer a reasonable return on the time spent. Attendance at the seminar or conference should represent a reasonable investment of the public official or employee's time when weighed against the information acquired or the degree of improvement in job skills or knowledge; and;

e. The benefit to the agency must be significantly greater than the incidental benefit to the traveler.

3.2. Public employees and appointed public officials shall obtain permission before attending a privately sponsored conference or seminar for which a third party pays, in whole or part, their attendance fees, travel or lodging expenses. Permission to attend the seminar or conference and reimbursement for costs must be obtained in the following manner:

a. A public employee must obtain permission to attend the seminar or conference from the head of his or her agency.

b. An appointed public official must obtain permission from the governing body on which he or she serves or the public official to whom he or she reports.

3.3. Food and lodging expenses are "reasonable" if the expenses are limited to the usual and customary basic charges of the hotel and are comparable to those charged to other participants and hotel guests. Travel expenses are "reasonable" if the expenses are comparable to those ordinarily charged to other similar travelers.

3.4. A public official or public employee may not accept payment or reimbursement for other expenses such as golf fees, carriage rides or health club fees if the total value of the fees exceeds twenty-five dollars (\$25.00) unless these amenities are

normally part of the standard hotel room charge and incidental to the use of the hotel room.

3.5. A public official or public employee may not accept payment from an interested third party for food, lodging or travel expenses for a guest; Provided, That, a public official or public employee may take a guest to a privately sponsored seminar if no additional costs are incurred by the third party payer for the guest's travel, lodging or attendance at the seminar.

§ 158-7-4. Nominal Gifts.

4.1. For the purposes of this section "nominal" gift means a gift with a monetary value of twenty-five dollars (\$25) or less. For purposes of the Ethics Act, W.Va. Code § 6B-2-5(c)(2)(B), a nominal gift is any gift with a monetary value of twenty-five dollars (\$25.00) or less. Some examples of nominal gifts include a T-shirt, hat, key chain, pen, pencil or any memento of that caliber. A public official or employee may accept from an interested party a nominal gift or gifts not exceeding twenty-five (\$25.00); Provided, That, the total dollar value of any nominal gift or gifts accepted from any one source may not exceed twenty-five (\$25.00) in one calendar year.

4.2. Certain hotel benefits are considered part and parcel of the room package and are not considered a "gift" to a public official or public employee. These are nominal benefits purchased with and incidental to the use of the hotel room.

§ 158-7-5. Reasonable Expenses for Panelist or Speaker.

5.1. A public official or public employee may accept payment or reimbursement for reasonable expenses for him or herself and for one guest for food, travel and lodging incurred in attending a meeting at which he or she participates as a panel member or speaker, but ~~it would be improper to may not~~ accept payment or reimbursement for other expenses such as golf fees, carriage rides or health club fees ~~unless such expenses are offered to all of the panelists or speakers unless these amenities are normally part of the standard hotel room charge and incidental to the use of the room.~~

5.2. ~~The Ethics Commission will consider expenses for food and lodging "reasonable" if the expenses are limited to the usual and customary basic charges of the hotel and are comparable to those charged other participants and hotel guests. The Ethics Commission will consider expenses for travel "reasonable", if the expenses are comparable to those ordinarily charged other similar travelers. Food and lodging expenses are "reasonable" if the expenses are limited to the usual and customary basic charges of~~

the hotel and are comparable to those charged to other participants and hotel guests. Travel expenses are "reasonable" if the expenses are comparable to those ordinarily charged to other similar travelers.

§ 158-7-6. Solicitation of Gifts for Charity.

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.~~ 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.

6.5. A reasonable amount of public resources may be used for a charitable solicitation or fund-raising drive that is conducted in furtherance of the West Virginia State Employees' Coordinated Campaign or a fund raising campaign officially approved by either the executive, legislative or judicial branch of State Government or the governing body of any political subdivision.

6.6. State government agencies and the governing body of political subdivisions may provide a voluntary payroll deduction program to those employees who elect to contribute to the West Virginia State Employees Coordinated Campaign through payroll deduction.

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. If a state government agency or governing body of a political subdivision seeks to solicit funds for use by the agency for any other purpose, then the state government agency or governing body of a political subdivision must first seek permission from the Executive Director of the West Virginia Ethics Commission or the Ethics Commission through issuance of a formal advisory opinion. The Executive Director or Ethics Commission may only authorize such a solicitation if it serves a public purpose. This provision does not apply to the solicitation of donations by a member of the Legislature or a member of the Board of Public Works who is soliciting funds for a regional or national organization conference or other function in accordance with W.Va. Code § 6B-2-5(c)(6) and § 6B-2-5(c)(7).

6.8. An association of public officials or employees is bound by the same ethical standards that apply to its constituent members.

6.9. Fund-raising activities based on an exchange of value, such as car washes or the sale of baked goods, are not gift solicitations and are permissible.

6.10. Raising funds for public employees seriously injured or killed while in the line of duty, and their affected family members, constitutes a charitable activity for purposes of the Ethics Act.

§ 158-7-7. Manner of Solicitation and Use of Funds.

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;

b. A vendor which has a contract with the agency or 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.

7.3. Solicitations should be conducted, and acknowledgments 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 or infer 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.

7.5. If public officials or employees solicit donations, or lend their name to a fund-raising activity, the donations or proceeds may not be used:

a. For the direct benefit of the public officials, employees or their immediate families, including college scholarship funds; Provided, That, revenues generated may be used for charitable purposes from which the public officials, employees or their families benefit no more than the public at large.

b. To finance the operation of an association of public officials or employees through the payment of expenses for salaries for its officers, office space, and other related expenses.

c. To pay for lobbying expenses, including fees for professional lobbyists, to lobby for a pay increase or increased health or pension benefits for the public officials or employees; Provided, That, these expenditures may be paid with monies derived from dues or funds which have not been solicited from citizens or businesses.

7.6. Any association of public officials who solicits donations must keep a separate accounting of monies raised through charitable solicitation and the purposes for which the monies are used.

§ 158-7-8. Solicitation of gifts for charities by law enforcement officers.

8.1. The Ethics Commission finds that the interest of the public is served by having stricter limitations which govern solicitations by law enforcement officers due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers.

8.2. "Law-enforcement officer" means any duly authorized member of a law-enforcement agency who is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality thereof.

8.3. Law enforcement officers may not solicit for charity while in uniform, but may show identification upon request.

8.4. Public officials, employees or members of an association of law enforcement officers may solicit donations for charity while out of uniform and when they are off duty.

8.5. Law enforcement officers or associations composed of law enforcement officers may not provide signs, stickers, decals or other items of display by individual donors showing whether or not a donation has been made on account of any charitable contribution solicited on behalf of law enforcement officers or their association; Provided, That, certificates, plaques or other items of display which are not intended for display on motor vehicles may be distributed to

donors; Provided, Further That, an association may provide to its members who are currently serving as law enforcement officers, or who previously served as law enforcement officers, a sign, sticker, decal or other item of display, including those items intended for display in a motor vehicle, which demonstrate that a present or former law enforcement officer is a member of an association or fraternal group composed primarily of law enforcement officers.

8.6. Law enforcement officers or associations composed of law enforcement officers may not conduct telephonic or oral solicitations in their official capacity.

8.7. Law enforcement officers may not pick up a donation while in uniform.

8.8. Law enforcement officers may wear their uniforms while participating in fund-raising activities based on an exchange of value such as a sale of baked goods or a car wash. Further, they may wear their uniforms while participating in a fund-raising event such as a motorcycle ride, walk or other activities where the public, for a fee or donation, is invited to join a law enforcement officer as part of a fund-raising activity for charity.

8.9. Law enforcement officers may deliver proceeds raised for charity to the intended recipient while in uniform and while on duty.

~~158-7-7.~~ § 158-7-9. Free Tickets.

~~9.1. The provisions of W. Va. Code '6B-2-5 which state that a public official or public employee may accept free tickets or admission to those charitable, cultural or political events for which free tickets or admission are customarily extended as a courtesy of the office he or she holds do not apply to sports events: Provided, That public officials and public employees may accept complimentary tickets to sporting events, if the tickets are incidental to the conduct of their official or ceremonial rules. A public official or public employee may accept free tickets or admission to those charitable, cultural or political events for which free tickets or admission are customarily extended as a courtesy to the office he or she holds; Provided, That, the tickets are given by a sponsor of the event, not a third party who has purchased tickets from an event sponsor. The \$25.00 monetary limitation does not apply to tickets accepted for these events.~~

9.2. A public official or employee may accept a ticket for him or herself and a ticket for one guest to a charitable,

cultural or political event to which is otherwise permissible under this section and the Ethics Act the public official is otherwise permitted to accept a ticket in accordance with this section.

9.2. 9.3. A public official or public employee may not accept a ticket, do not apply to any sporting events, when the value of the ticket exceeds \$25.00 unless the public official or employee has an official or ceremonial duty to perform at the sporting event. the tickets are incidental to the conduct of their official or ceremonial duties. A ceremonial duty is any duty performed before members of the public who are attending the sporting event. If the public official does not have a ceremonial duty, then the value of a ticket or tickets received from an interested party for a sporting event or events may not exceed \$25.00 in one calendar year.

9.4. A public official or employee may accept an additional ticket for a guest to a sporting event if he or she has a ceremonial role. If the public employee or official does not have a ceremonial role, then he or she may accept a free ticket for him or herself and one guest only if the combined value of both tickets does not exceed \$25.00.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Gifts

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Ethics Commission

Address: 210 Brooks Street, Suite 300
Charleston, WV 25301

Phone Number: (304) 558-0664 Email: tkirk@wvadmin.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No fiscal impact is anticipated.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use “-“)	Next Increase/Decrease (use “-“)	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Other			
2. Estimated Total Revenues	0.00	0.00	0.00

Rule Title: _____

Rule Title:

Gifts

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

The rule attempts to further define limitations on the acceptance and solicitation of gifts by public officials and employees. The Ethics Commission has the responsibility for rendering advice to public officials and employees on the meaning and interpretation of the Ethics Act. If the rule is approved by the Legislature, we anticipate an increase in the number of questions in the 12 month period following its adoption. It is anticipated that these questions may be fielded, or formal advisory opinions issued, by the existing staff at the Commission.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 7-25-07

Signature of Agency Head or Authorized Representative

Levin D. Brown

Robin B. Perdue

Robin B. Perdue
Deputy Secretary
Department of Administration

Public Hearing
Dated June 7, 2007
List of Participants, Comments
And Summary of Ethics Commission Response

John Dascoli - on behalf of the WV FOP and WV Sheriff's Association

Comment - The WV FOP and WV Sheriffs' Association are 100% against the proposed rule. No one gets favorable treatment with the decal. The restriction of all oral and telephonic solicitations would be the equivalent of the death penalty to these organizations and it is just absolutely unprecedented to have this type of restriction. Mr. Dascoli concluded his remarks by stating that "We are going to fight tooth and nail."

Response - In response to the comment concerning the decal, the Ethics Commission incorporates by reference its response to the written comments submitted by the WV Sheriff's Association and Sgt. E.R. Canfield, FOP Lodge No. 104. The general position of the Ethics Commission in regards to the decal is that: "The rule is not intended to address any known incidents of favoritism; instead, it is specifically intended to address a general perception among members of the public that it is helpful to display such an item in the event that they are stopped for a motor vehicle violation. While the law enforcement community may never have intended for the public to feel this way, based upon the experience of the Ethics Commission members, who are appointed to represent the citizens of West Virginia, this perception exists."

In response to the comment that the restriction of telephonic and oral solicitations "could be the end of law enforcement associations," the Commission incorporates by reference its written response to the WV Troopers Association wherein it sets forth that under existing law, no public official, including law enforcement officers, may solicit funds for their own benefit or the direct benefit of its members. Hence, the restrictions should not affect the administrative structure of the organizations.

John Corbett, Chief Executive Officer of Special Olympics
WV

Over the past 21 years, the law enforcement community in WV has been a very loyal and strong supporter of the Special Olympics program in the State. For those 21 years, WV State Lodge and Fraternal Order of Police, the local FOP lodges, various Deputy Sheriffs' Associations and the Law Enforcement Torch Run have provided funding and support to Special Olympics athletes. The funding provided by the law enforcement agencies has been instrumental in allowing the organization to provide year-round sports training and athletic competition for individuals with disabilities. When you start limiting law enforcement communities' involvement to help raise funds to support Special Olympics athletes, it will at some point have an adverse impact on the program. In addition to conducting telephone solicitations, officers also get actively involved with the organization. Example: Cops and Lobsters - police officers in uniform work at Red Lobster restaurants busing tables and asking members and customers to provide tips. The officers have never pressured a person to provide a donation.

Response: The proposed rule does not limit all forms of charitable solicitation and fundraising by law enforcement officers. Direct mailings are permitted. Further, law enforcement officers may engage in fund raising activities, in uniform and while using their official titles, when something of value is given in return. For example, hot dog sales, car washes, bingo games and the "Ride with Cops Program" remain permissible. Further, officers may wear their uniforms while acting as volunteer wait staff at a restaurant, such as the Red Lobster, where the proceeds for their service go to charity. Law enforcement officers may also volunteer their time to the Special Olympics in their personal capacity to solicit funds either in person or telephonically; provided, that, they do not use their uniform, title or rank to solicit funds. For example, if they volunteer for a Special Olympics phone bank they may state, "This is John X. I am calling on behalf of the Special Olympics." If they go door to door, they may identify themselves as "John X" who is soliciting on behalf of the Special Olympics. They may not wear their uniforms or identify themselves as officers.

Various amendments to the Rule in response to the public comments also address some of these concerns.

First, the rule is clarified that the ban on telephone and in-person solicitation is directed towards law enforcement officers using their official title, rank, uniform or badge in soliciting donations. It is not intended to limit their volunteer activities in their private capacities for the Special Olympics and other charitable organizations.

8.6. Law enforcement officers or associations composed of law enforcement officers may not conduct telephonic or oral solicitations in their official capacity.

Second, the rule is further clarified to reflect that law enforcement officers may wear their uniforms while participating in fund-raising events.

8.7 Law enforcement officers may wear their uniforms while participating in fund-raising activities based on an exchange of value such as a sale of baked goods or a car wash. Further, they may wear their uniforms while participating in a fund-raising event such as a motorcycle ride, walk or other activities where the public, for a fee or donation, is invited to join a law enforcement officer as part of a fund-raising activity for charity.

Sherry Goodman

States that she is an attorney who is appearing as a private citizen. She states that her background as a lawyer, including her previous employment by the WV Ethics Commission and the Lawyer Disciplinary Board, makes her sensitive to issues about the protection of the public, fiduciary duty concepts and the appearance of impropriety.

States she has been repeatedly solicited by telephone by law enforcement agencies and, more commonly, by telemarketers on behalf of the law enforcement agencies. At times when she receives these solicitation phone calls, she feels coerced and pressured to give. She expressed surprise when she received a receipt for donating to a law enforcement agency that it was not clear from the receipt that her contribution was tax deductible nor was it clear as to where the donated funds were going.

Ms. Goodman states that practicing attorneys in West Virginia have limitations imposed in regards to the form and content of legal advertising in order to avoid the appearance of impropriety. Similarly, she believes that

individuals in the law enforcement professions should have limitations imposed upon them to avoid the appearance of impropriety.

She believes the decal sticker is misleading. She believes it is akin in perception to buying a "get out of jail free card." She points out that law enforcement officers state that they would be angered if someone tried to point to a decal with the hopes of receiving special treatment. Goes on to state that if the officers claim to feel that way, then "Why give out decals in the first place?" Concludes with stating that she has no problem with giving to charity, but that she has a particular problem with this form of solicitation.

Response: The Commission believes that the proposed rule addresses the concerns raised by Ms. Goodman.

COPY

WEST VIRGINIA ETHICS COMMISSION
210 Brooks Street, Suite 300
Charleston, West Virginia 25301-1804

In re: Public hearing on proposed rule change regarding
telephonic and oral solicitations from law
enforcement officials.

The public hearing for the proposed rule change from
the West Virginia Ethics Commission was held pursuant to
notice in the above-entitled action on the 7th day of
June, commencing at 1:00 p.m. and concluding at 1:18
p.m., in the House of Delegates Chamber, Building 1,
State Capitol Complex, Charleston, Kanawha County, West
Virginia, before Kristi D. Johnson, Certified Court
Reporter and Notary Public, pursuant to the West Virginia
Rules of Civil Procedure.

*Kristi D. Johnson, CCR
Connie Doughty DeMuth & Associates
Certified Court Reporters
Post Office Box 701
Dunbar, West Virginia 25064
304-766-8708*

West Virginia Ethics Commission
Public Hearing

June 7, 2007

PAGE 2 APPEARANCES On behalf of the West Virginia Ethics Commission: KEMP MORTON Chairman LEWIS BREWER Executive Director THERESA KIRK Legal Counsel JACK BUCKALEW Member MARA WATSON Member CHARLES LOGAN Member C. JOAN PARKER, ESQUIRE Attorney SPEAKERS: JOHN F. DASCOLI, ESQUIRE Representing the Fraternal Order of Police and the West Virginia Deputy Sheriffs' Association JOHN CORBETT Executive Director, Special Olympics West Virginia SHERRY GOODMAN, ESQUIRE Member of the public CHARLES KINGERY President of the Fraternal Order of Police Gold Star Lodge No. 65	PAGE 4 1 June 7, 2007 2 PROCEEDINGS 3 MR. MORTON: My name is Kemp Morton. I am 4 the Chairman of the West Virginia Ethics Commission. 5 With me at the table here are Executive Director, Lou 6 Brewer; on my left, Assistant Counsel, Theresa Kirk; 7 member, Jack Buckalew; member, Mara Watson; member, 8 Charles Logan and Joan Parker. 9 As I said, this is a hearing on a proposed 10 rule change, which has been duly noticed as required by 11 law, and we're here to receive comments on the 12 amendments to the existing rule, which I think is just 13 generally a type of gifts under the act. We will 14 receive both oral and written comment which will be 15 taken under advisement by the Commission before the 16 proposed rule is submitted. We are holding the record 17 open until tomorrow for any further written comments 18 that anybody wants to file. 19 We have received written comments from the 20 Fraternal Order of Police dated 6/5/07 that will be 21 placed in the record. We've received a memo from the 22 West Virginia Troopers signed by John W. Smith, Vice 23 President, which will be received into the record. We 24 also have another communication dated today from Marvin				
PAGE 3 INDEX <table><tr><td>Proceeding</td><td>Page</td></tr><tr><td>Public Hearing</td><td>4</td></tr></table> Reporter's Certificate Pages 16-17	Proceeding	Page	Public Hearing	4	PAGE 5 1 Masters of the Masters Law Firm on behalf of the West 2 Virginia Troopers Association, which will also be placed 3 in the record. Oh, excuse me. We have a letter from 4 the West Virginia Sheriffs' Association dated June 1 of 5 this year which will also be received into the record. 6 We only have three speakers signed up, so I'm 7 going to limit you to ten minutes. I think you probably 8 can probably get everything said in ten minutes. You 9 may get some questions from various members of the 10 Commission and you'll be given opportunity to respond to 11 those questions. 12 John, are you ready to go? 13 MR. DASCOLI: Sure. 14 MR. MORTON: Since you're on the bottom of 15 the list we'll move you first. 16 MR. DASCOLI: Is this all right from here? 17 MR. MORTON: Well, if everybody can hear and 18 there is a reporter here. There is a microphone at the 19 podium there. 20 MR. DASCOLI: I don't have a lot of 21 commentary today. I have exchanged some emails back and 22 forth, the FOP has attended a couple of meetings, or at 23 least one of the meetings, leading up to this. I'm not
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1 sure you want the commentary of what the FOP says, but I
2 can tell you unequivocally that the West Virginia FOP on
3 their accounts and the West Virginia Deputy Sheriffs'
4 Association are totally, absolute, 100 percent against
5 this proposed rule in its current form.

6 You know, this case started out as a simple,
7 at least in my view, a simple decal case where the
8 Commission was concerned that police officers would give
9 favorable treatment because individuals who gave to
10 these organizations would place decals in their cars.
11 And, you know, we heard about this first rule right
12 before, I believe, the April meeting, and myself and a
13 couple of law enforcement officers, both current and
14 retired, showed up and the officers there expressed the
15 firm belief and fact that no one actually ever gets any
16 kind of favorable treatment for having a decal. In
17 fact, if you brought up such things, chances are you
18 were likely to get harsher treatment.

19 Now, that's where we started this process and
20 somehow magically in three Commission meetings, when we
21 were invited to actually work with the Commission and
22 try to reach some combinations that everyone could live
23 with, the Commission at the eleventh hour sprang a
24 restriction of all oral and telephonic solicitations,

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1 which could mean a death penalty to these organizations
2 and it's just absolutely unprecedented, as far as what I
3 can see so far in this country, to have this type of
4 restriction.

5 I know that you all aren't going to change a
6 thing today. I know it doesn't matter what we say or
7 what we do, you're not going to change this rule in any
8 way, shape or form and I'm just going to tell you that
9 we're going to fight it tooth and nail. Thank you.

10 MR. MORTON: Does anybody have any questions
11 for Mr. Dascoli?

12 Thank you very much.

13 Is it John Corbett? State your name for the
14 record and who you represent.

15 MR. CORBETT: My name is John Corbett, Chief
16 Executive Officer of Special Olympics West Virginia.

17 I just want to say that for the past 21 years
18 the law enforcement community in West Virginia has been
19 a very loyal, strong advocate supporter of the Special
20 Olympics program in this state. For each of those 21
21 years, law enforcement officers and organizations such
22 as the West Virginia State Lodge and Fraternal Order of
23 Police, the local FOP lodges, various Deputy Sheriffs'

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1 Associations and the Law Enforcement Torch Run have
2 provided funding and support to Special Olympics West
3 Virginia athletes. These are individuals who have
4 developmental disabilities; many of them also have
5 physical disabilities.

6 Funding provided by the law enforcement
7 agencies has been instrumental in allowing our
8 organization to provide year-round sports training --
9 athletic competition, excuse me, for individuals with
10 disabilities. For instance, we just conducted our
11 summer games here in Charleston this past weekend where
12 we brought in 700 Special Olympics athletes from 29 West
13 Virginia counties. These individuals were afforded
14 three days of competition, of fellowship, socialization
15 that they otherwise would not have. The West Virginia
16 State Lodge of Fraternal Order of Police provided \$5000
17 to this endeavor; the Law Enforcement Torch Run for
18 Special Olympics provided almost another \$3000. This
19 even typically runs \$80,000 to \$90,000. Special
20 Olympics athletes, nor their families, are never charged
21 to participate in any Special Olympics activity, thus we
22 rely on the generous contributions of organizations,
23 businesses and individuals.

24 Personally, I think when you start limiting

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1 law enforcement communities' involvement to help us
2 raise funds to support Special Olympics athletes, it
3 will at some point have an adverse impact on our
4 program. It may be that we limit the number of
5 activities, it may be that we limit the number of
6 participants. It's too early to tell, but I know that
7 these law enforcement members have been strong advocates
8 and have been our best friends for many years now.

9 In addition to conducting telephone
10 solicitations, officers also get actively involved with
11 our organization. We've done events such as Cops and
12 Lobsters where police officers are in uniform but work
13 at various Red Lobster restaurants in West Virginia
14 busing tables and asking members and customers to
15 provide tips. And I can say I personally observed
16 officers in action during this event and never once have
17 I felt a customer to be pressured to give a donation.
18 Some choose to donate, others choose not to.
19 Regardless, the officers say, "Thank you for your
20 consideration," as they walk out the door whether they
21 gave or not. We've also had officers on roofs of
22 restaurants vowing not to come down until X number of
23 dollars are raised to support Special Olympics athletes.
24 And again, these officers have never pressured any

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1 person to provide a donation.

2 I know that our office has never once in the
3 seven years I've been in this capacity received a
4 complaint regarding FOP solicitation methods. Now I
5 have received phone calls verifying that the FOP was
6 indeed soliciting on behalf of Special Olympics, but
7 never a complaint in that time.

8 Personally, I too have been contacted by
9 various law enforcement associations seeking support for
10 their various organizations in which they support. Many
11 times I've given and on occasion I have not given, but
12 never once have I ever felt pressured or coerced to make
13 a personal donation as well.

14 Let me just close by saying the law
15 enforcement community has been an integral part of
16 Special Olympics West Virginia for many years, and it's
17 our hope that this partnership continues into the
18 foreseeable future. The various law enforcement
19 associations and the hundreds of officers that have
20 supported our cause are a testament of their dedication
21 to serve the people that they protect. I simply smile
22 when I think of the thousands, the thousands of Special
23 Olympics West Virginia athletes that law enforcement
24 officers in this state have helped over the last 21

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1 years. The opportunities they've given them would not
2 have been possible without the tremendous amount of
3 support. If we start tallying dollars that have been
4 provided to our organization we are probably in excess
5 of a half a million dollars over the last 21 years that
6 law enforcement organizations have provided to our
7 organization.

8 Thank you for the opportunity to address the
9 Commission.

10 MR. MORTON: Thank you very much, sir.

11 Sherry Goodman? State your name, Sherry, and
12 who you represent and what capacity you're appearing.

13 MS. GOODMAN: Okay. My name is Sherry
14 Goodman and I am here as a member of the public. I'm a
15 lawyer, but I'm not here on behalf of anybody other than
16 myself.

17 I am a member of the public who has been
18 repeatedly solicited by telephone by law enforcement
19 agencies and probably more often by telemarketers on
20 behalf of the law enforcement agencies. My background
21 as a lawyer makes me sensitive to the issues about
22 protection of the public, fiduciary duty concepts and
23 appearance of impropriety. I was -- eleven and a half

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1 years I served as ethics counsel in a lawyer
2 disciplinary field for the Lawyer Disciplinary Board and
3 two years as counsel to the Ethics Commission and eight
4 years in the field of professional responsibility in
5 private practice.

6 Why I was asked by Lou Brewer to come was
7 probably because in 2001 I contacted the Ethics
8 Commission, I was no longer working there, I had been
9 repeatedly solicited by law enforcement telemarketers
10 who called and if I said that I was thinking about
11 giving something then they'd say they'd pick it up that
12 day and it felt coercive, pressured. And until I got
13 the receipt it was not clear to me that it was a non-tax
14 deductible contribution, which is something I don't
15 understand to this day as to that these are never tax
16 deductible if they are for charitable. And the receipt
17 itself seemed to indicate that it wasn't clear where my
18 money was particularly going. So I called the executive
19 director to complain and was discouraged from pursuing
20 it further and I dropped it and continued to be
21 solicited. So I was, in fact, unaware and I'm not in
22 any way responsible for these rules coming up. I was
23 unaware of it frankly until Mr. Brewer called me.

24 I did read the communication by Margaret

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1 Masters and one thing I noted, being in the lawyer
2 disciplinary field, is that lawyers have a rule against
3 in person or oral solicitation for employment. Now I
4 understand that in this case these are solicitations not
5 for employment, but they are for money, just like the
6 solicitation for lawyers is ultimately to be paid money.
7 And although for law enforcement it is ostensibly
8 charitable, it is a potential harm to the public, I
9 perceive, by someone in the position of power and trust
10 by virtue of their employment that's at issue and impact
11 to the public. For example, the concept of the sticker.
12 And truly, it is akin in perception to buying a get out
13 of jail free card. Not quite a quid pro quo but I find
14 it interesting that if it's pointless and in fact
15 displaying it will incur -- displaying it and pointing
16 it out if you get stopped incurs the ire of the law
17 enforcement official, why is it given out? In fact,
18 it's almost somewhat misleading. Here, we want you to
19 have this sticker to display but no one's told that by
20 the way, it doesn't mean anything. To me, that's an
21 example of the problems with this kind of solicitation.

22 I personally receive at least four calls a
23 year on my business phone and my cell phone, which they
24 get from my business phone, and although I'm a lawyer

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1 trained in adversarial practice, I'm also an average
2 member of the public when it comes to telemarketers. In
3 fact, I have a very hard time and particularly -- but it
4 is interesting that I have been solicited, and I don't
5 remember whether it's by telephone or simply by mail, by
6 Special Olympics and I always freely have no problem
7 giving to Special Olympics, and it's usually a
8 particular project.

9 But I do, I resent the solicitations by the
10 telemarketers on behalf of law enforcement officials.
11 And it isn't simply that my personal resentment it is
12 from my background and my experience that I see depart
13 from that form. I have no problem giving to charity; I
14 have a problem with this particular form of
15 solicitation.

16 Thank you.

17 MR. MORTON: Does anybody have any questions
18 for Ms. Goodman?

19 Carl, would you like to ask Sherry something?
20 Any of the other presenters?

21 Thank you.

22 Even though you haven't signed up, we have
23 some time here. Is there anyone else based on what they
24 heard or based on what they know that would like to make

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1 further comment to the Commission before we work on the
2 final version of this proposal of change?

3 Come forward, sir, and state your name.

4 MR. KINGERY: I don't necessarily have a
5 comment, but I do have a letter that I'd like to post.
6 I'm not sure how to do that.

7 MR. MORTON: Bring it forward and we'll put
8 it in the record.

9 This is a memo from Charles Kingery submitted
10 as President of the Fraternal Order of Police Gold Star
11 Lodge No. 65 with an attached petition signed by several
12 members of that lodge, I assume.

13 MR. KINGERY: Members of the lodge and some
14 others.

15 MR. MORTON: We will include that in the
16 record, sir. Thank you very much for your presentation.

17 Is there anything else? If not, we stand
18 adjourned.

19 Thank you again for coming. We appreciate
20 your participation and your help with this issue.

21 (WHEREUPON, the hearing was
22 concluded at 1:18 p.m.)

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REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, Kristi D. Johnson, Certified Court Reporter and
Notary Public within and for the County and State
aforesaid, duly commissioned and qualified, do hereby
certify that the foregoing public hearing of the West
Virginia Ethics Commission was duly taken by me and
before me at the time and place, and for the purpose
specified in the caption hereof.

I do further certify that the said hearing was
correctly taken by me in the Stenomask procedure and
that the same was accurately transcribed by me.

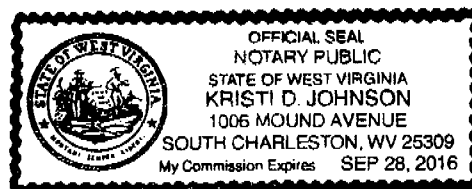
I further certify that I am neither attorney nor
counsel for, nor related to or employed by, any of the
parties to the action in which this hearing was taken,
and further that I am not a relative or employee of any
attorney or counsel employed by the parties or
financially interested in the action.

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Given under my hand this 7th day of June,
2007.

My commission expires September 28, 2016.

Kristi D. Johnson
Certified Court Reporter &
Notary Public



Kristi D. Johnson, CCR
Connie Doughty DeMuth & Associates
304.766.8708



West Virginia Sheriffs' Association

P.O. Box 3031
Charleston, WV 25331
Telephone: (304) 345-2232
Fax: (304) 345-2231

*"Serving West Virginia's
Sheriffs and citizens for
over 50 years"*

June 1, 2007

WV Ethics Commission
Theresa M. Kirk, Legal Counsel
210 Brooks St., Suite 300
Charleston, WV 25301-1804

RECEIVED
JUN 4 2007
PM 12:00

Dear Ms. Kirk,

On behalf of the West Virginia Sheriffs' Association, I am writing today to express our concerns to the WV Ethics Commission in regards to the proposed legislative rule changes in regards to WV Code 6B-2-5(c). In particular, we respectfully request the Commission to reconsider the area dealing with law enforcement associations providing donors or honorary members with a decal, sticker or other item for display.

The West Virginia Sheriffs' Association operates a professional direct mail honorary member program. With a paid membership, citizens of West Virginia are provided a sticker to display on their cars and businesses are provided a plaque. These items are simply to express a visual showing of support or patriotism. We compare our decals to citizens who display American flags or yellow ribbons of support for our troops on their cars. Most of our members are elderly and we in no way believe that they are donating to our cause with the expectation of being relieved of a speeding ticket. In addition, our mailings include a disclaimer statement that specifically states that the decal or membership card does not grant the individual special privileges. Funding received by the Association does not result in any type of direct pecuniary benefit to its members. Officers of the organization receive no compensation for their participation in the organization. We would agree with the Advisory Opinion that organizations such as this should not take their responsibilities lightly to ensure that actions of the group are held to the highest standards.

The Honorary Membership is a membership classification level within the association. The initial monies received from citizen members are not donations, but rather membership dues. At this time, the member receives a decal. Additional donations are later requested to fund our services. Members do not receive additional decals for these donations.

To enact rules that would prohibit our association from distributing decals or selling additional decals, would greatly impact our ability to continue to provide our most important community services. The West Virginia Sheriffs' Association is proud of the services we are able to present to the citizens of West Virginia. We offer a summer youth leadership camp for high school

students and offer a criminal justice scholarship program. Both of these programs, we are proud to say, do not operate from tax dollars, but are supported by our honorary member program.

Our programs are highly important to the Sheriffs of the state and to the citizens that fund them. The ability to provide citizens with a decal, sticker or display item allows them to express their support of the association, similar to others expressing support of country, military, or other charitable organization. We strongly feel that by passing legislation that singles out law enforcement associations is an infringement upon our First Amendment rights and on those citizens that want to display an expression of support for the men and women who put their lives at stake each day to keep the crime rate in West Virginia as one of the lowest in the country. Do you plan to impose this rule on other organizations that provide similar stickers, such as schools, little league ball teams and other non-profits?

In closing, we would like to again request the Ethics Commission to reconsider the prohibition of law enforcement associations providing donors with decals or other displays of support. We would suggest the legislative rule allow for displays of support, but that the literature provided by law enforcement associations include a standard statement that indicates no special privileges are bestowed upon those that make donations. I recently conducted an informal survey among other Sheriffs' Association Executive Directors across the nation concerning this proposed rule. There were several states that did not allow telemarketing, but no other state that responded imposed the restriction of not allowing stickers, decals and/or license plates.

Should you have specific questions, please do not hesitate to contact me. Thank you for your time and consideration.

Respectfully yours,

A handwritten signature in cursive script that reads "Melissa Garretson".

Melissa Garretson
WV Sheriffs' Association

To: WV Ethics Commission

From: Charles Kingery

Subj: PROPOSED GIFT RULE CHANGES

Commissioners,

I am writing to let you know just what kind of impact the proposed gift rule changes will have on our lodge's efforts regarding solicitation of funds. Gold Star Lodge #65 conducts fund raising efforts through two primary sources. These are the annual "Ride With Cops" program where members of the community are invited to join a motorcycle ride and rally led by local police officers and retired police officers. The second is through bingo and raffle events.

All of the money raised from these programs is returned to the community where we serve. The Ride With Cops" program raises funds for our annual Christmas party where we provide toys, food, clothing, and entertainment for underprivileged children in our community. These children are identified by grade school teachers, or civic leaders and organizations throughout both Cabell and Wayne counties who recognize these children based on greatest need. Last year, we purchased toys for and fed 278 boys and girls who otherwise would not have had a Christmas. Many of these children were also provided with winter caps and gloves to keep them warm in the winter months.

Gold Star Lodge #65 also raised money to provide Thanksgiving & Christmas dinners for a few underprivileged families. These families are chosen not by us, but by local civic or religious organizations. It is our goal to expand these efforts in the coming years as we are financially able to do so.

Through our Bingo and Raffle games, Gold Star Lodge #65 has been able to provide funds for local youth sports teams, help local churches raise money for building improvements, provided money to support the Wayne County D.A.R.E. program, and to fund youth leadership camps. Perhaps one day the children attending these youth leadership camps will even work in our State's capital.

In addition to these activities, Gold Star Lodge #65 has also provided funds for police officers and their families who have either been injured or killed in the line of duty. We have provided much needed money to assist family members of police officers who were deathly ill. In the case of our own Capt. Steve Hall, and the wife of Officer Curt Nethercutt the procedures which saved their lives may not have been possible without the financial support we were fortunate enough to be able to provide.

In short, the proposed rule changes will literally take food off the tables of poor families in our community, and take away the joy of hundreds of West Virginia children who otherwise would be unable to experience Christmas. I respectfully ask you to please consider your decision and the terrible impact the proposed changes will have on our

community. Please decline to make the proposed changes which will end our Lodge's ability to raise these vital funds. Thank you.

Fraternally yours,

A handwritten signature in dark ink, appearing to read 'Chas Kingery', written in a cursive style.

Charles Kingery,
President
Fraternal Order of Police,
Gold Star Lodge #65

Petition

We the undersigned, agree with and lend our support to the attached letter from Gold Star Lodge #65

NAME	CITY
DAREN M. MCNEIL	HUNTINGTON
LARRY M. Zimmerman	Huntington
Michael S Waugh	Huntington
Richard Knight	Huntington
Rick Johnson	Huntington
Philip DWATKINS	Huntington
Paul Hunter	Huntington
Paul Munchie	HUNTINGTON
Steve HALL	HUNTINGTON
John Williams	Huntington
Shawana Smith	Huntington
Opal Fortner	Huntington
Maria Hill	Huntington
Rodney A. Lee	Huntington
JOHN D FRANKS	HUNTINGTON
CRAIG PREECE	HUNTINGTON
Robert Keese	HUNT.
EDDIE BRADSHAW	HUNTINGTON
Brian M. ELLIS	HUNTINGTON
Timothy P. COHEN	HUNTINGTON
Benjamin Howard	Huntington
KENDRA R BECKETT	HUNTINGTON
Brenda J. Wausley	Huntington

SIGNATURE

Daren M. McNeil
 Larry M. Zimmerman
 Michael S Waugh
 Richard Knight
 Rick Johnson
 Philip D. Watkins
 Paul Hunter
 Paul Munchie
 Steve Hall
 John Williams
 Shawana Smith
 Opal Fortner
 Maria Hill
 Rodney A. Lee
 John D. Franks
 Craig Preece
 Robert Keese
 Eddie Bradshaw
 Brian M. Ellis
 Timothy P. Cohen
 Benjamin Howard
 Kendra R. Beckett
 Brenda J. Wausley

Petition

We the undersigned, agree with and lend our support to the attached letter from Gold Star Lodge #65

NAME	CITY	SIGNATURE
Curt J. Nethercutt	Huntington	<i>Curt J. Nethercutt</i>
SHANE BILLS	Huntington	<i>Shane Bills</i>
Ronnie Lusk	Huntington	<i>Ronnie Lusk</i>
Jason M. Young	Huntington	<i>J. M. Young</i>
J T Combs	Huntington	<i>J T Combs</i>
Don Underwood	Huntington	<i>Don Underwood</i>
Lt. Alan Rohrig	Huntington	<i>Lt. Alan Rohrig</i>
Beth, D. S. S. S.	Huntington	<i>Beth, D. S. S. S.</i>
K. CARICART	Huntington	<i>K. CARICART</i>
LEVI LIVINGSTON	Huntington	<i>LEVI LIVINGSTON</i>
JASON ASHENDRAH	Huntington	<i>JASON ASHENDRAH</i>
Eddie Prichard	Huntington	<i>Eddie Prichard</i>
Brian A. Lucas	Huntington	<i>Brian A. Lucas</i>
JE Combs #257	Huntington PD	<i>JE Combs #257</i>
J. Moore	Huntington PD	<i>J. Moore</i>
R. STINNETT	Huntington	<i>R. STINNETT</i>
R. SPEARS	HUNTINGTON	<i>R. SPEARS</i>
T. Backus	Huntington	<i>T. Backus</i>
J. Tolbert	Huntington	<i>J. Tolbert</i>
Darin Dempsey	Huntington	<i>Darin Dempsey</i>
Marion Palmer	Huntington	<i>Marion Palmer</i>



SENECA TRAIL LODGE NO. 104
P. O. BOX 506
ELKINS, WEST VIRGINIA 26241

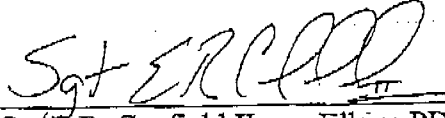
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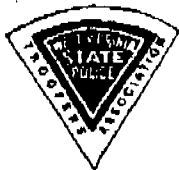
RECEIVED
2007 JUN -5 AM 7:38

West Virginia Ethics Commission
210 Brooks Street, Suite 300
Charleston, WV 25301

Reference changes to Title 158 Series 7

I would first like to say that I have never had the reason or desire to formulate some type of correspondence reference to any particular change to a law. The question of amending the legislative rule on ethics does not sit well with me. I am the secretary/treasurer of the Fraternal Order of Police Seneca Trail Lodge #104 and the idea of our soliciting contributions for our communities benefit to be jeopardized is not appreciated. We use the monies generated within the four counties encompassed in our lodge to benefit the people of our communities and have had the same contributors for years. We are a membership and as such feel the right is ours to send stickers and decals to our members as is prohibited according to §158-7-8. On that note also in all the years I have been a police officer I can't think of one incident where myself or anyone I know and work with has made a decision to write a ticket or make an arrest based on a sticker on the person's vehicle. If I have misinterpreted this section then by all means let me apologize but if not I believe your intentions are unjustified and unwarranted in this area. The gifts given and generated by the lodge which I am a member are collected to be given back to worthy children's clubs and organizations that are not under the guidelines of the state school system. I would hate that 15 years as a police officer and 8 years as a member of the military would end up as me simply being unethical for collecting money to give to 4H, or Babe Ruth, or The Hillsboro Soccer Club, or Hooked on Fishing, or The Boy Scouts. Unethical would be for someone to say that it was. Thank you and good luck with this issue for as police officers we will honor whatever decision is rendered.


Sgt E.R. Canfield II Elkins PD
Secretary/Treasurer FOP Lodge #104



West Virginia Troopers Association, Inc.

210 Chesapeake Avenue, Charleston, West Virginia 25311
Telephone 345-WVTA Fax 345-9884



2007 JUN -6 PM 1:42

RECEIVED

Local 2019

wvtaoffice@aol.com

www.wvtroopers.org

The West Virginia Troopers Association strongly opposes the proposed rule change **Title 15B-7**. The West Virginia Governmental Ethics Act was established to provide a code of ethical conduct to guide **public officials** and **public employees** and help them to avoid conflicts between their personal interests and their public responsibilities.

The Ethics commission's current proposed rule is specifically singling out the law enforcement associations wanting to expand their control into these organizations and associations by taking control on how they can fund such associations. The right to organize, advocate, engage in free expression and free association, the rights to equal protection and due process are basic civil rights that extend to all citizens. These rights have long existed for other public employees. It is very disturbing to think that just because a person is associated with law enforcement that you can not be afforded the same basic rights that are afforded to every other public employee. It is also very disturbing to see that those that strive to protect the citizens of this State are being targeted and the proposed rule is attempting to strangle the organizations funding mechanism. The citizens of this State voluntarily choose to support and contribute to the West Virginia Troopers Association and the objectives that have become so important some of which include the Bears Against Drugs Program (attempting to educate children with the dangers of drugs), providing additional life insurance for the membership, providing monetary college scholarships to dependants of active and retired members, providing legal and related assistance for the membership of the association.

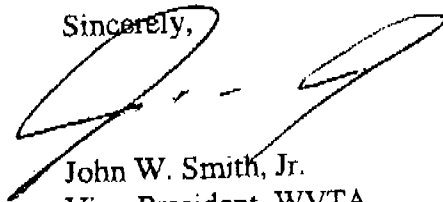
The Ethics Commission has cited that stricter limitations which govern solicitations by law enforcement officers due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers. Already in existence are criminal laws preventing any type of solicitation by members of the West Virginia State Police. Chapter (15-2-18), prevents a member of the West Virginia State Police to receive from any person, firm or corporation any money or other thing of value as a consideration for the performance of, or the failure to perform, his or her duties with a penalty of possible incarceration for up to four months and a fine of not less than twenty five dollars nor more than two hundred dollars. A criminal law also exist (15-2-19), preventing any person, firm or corporation, to give or offer to give any money or other thing of value to any officer of the West Virginia State Police as a consideration for the performance of, or the failure to perform, any duty of such officer or member of the department.

Members of the West Virginia Troopers Association that are comprised of both active and retired members of the West Virginia State Police are placed in a unique situation. The West Virginia Troopers Association provides an avenue for the

membership to voice unsafe working conditions, violations of Federal Wage and Hour issues, unsafe equipment, or providing representation during issues of discipline for violations of departmental policy. These are basic civil rights that are afforded to all public employees. Jack Buckalew, who currently sits on the Ethics Commission and formerly served as superintendent of the West Virginia State Police has had such opposition from the West Virginia Troopers Association.

I welcome any questions concerning this proposed rule and will gladly answer any questions and clear up any misguided information that was previously publicized.

Sincerely,



John W. Smith, Jr.
Vice-President, WVTA

RECEIVED
2007 JUN -6 PM 1:42



Local 2019

West Virginia Troopers Association, Inc.

210 Chesapeake Avenue • Charleston, West Virginia 25311
Telephone 345-WVTA • Fax 345-9884

wvtaoffice@aol.com

www.wvtroopers.org



June 7, 2007

West Virginia Ethics Commission

Hand Delivered

Gentlemen:

Please find attached to this correspondence the opinion of our legal counsel, Marvin Masters of The Masters Law Firm, relative to the proposed rule change Title 158-7. Please consider this an addendum to the response of the West Virginia Troopers Association.

Thank you.

The West Virginia Troopers Association



The *MASTERS*
Law Firm, Lc

June 7, 2007

John Smith, President
West Virginia Troopers Association, Inc.
210 Chesapeake Avenue
Charleston, West Virginia 25311

Dear Mr. Smith:

Pursuant to your request, we have reviewed the information you received from the Ethics Commission concerning their proposed Legislative Rule governing the acceptance and solicitation of gifts, including charitable contributions. Please be advised that for the following primary reasons, it is our opinion that the Ethics Commission's proposed Legislative Rule is unconstitutional under both the United States Constitution and the West Virginia Constitution as well as being otherwise unlawful insofar as it also exceeds the statutory authority of the Ethics Commission.

First, as a preliminary matter, while W.Va.Code § 6B-2-2 provides that "[t]he Commission shall propose rules for promulgation . . . to carry out the purposes of [the West Virginia Governmental Ethics Act, W.Va.Code, 6B-1-1 et seq.], it is our opinion that the Ethics Commission is not creating a mere Rule to carry out the purposes of the Act but rather in light of the scope, breadth, purpose and intent of the proposal is creating in effect an entirely new Law or a rewriting of the existing Statute. As such, we believe that the Ethics Commission is proposing a Rule which unconstitutionally usurps the power of the Legislature and clearly exceeds both the constitutional and statutory authority of the Commission. Further, we submit that such proposed "Legislative Rule" is arbitrary and capricious in light of its selective and unequal treatment of law enforcement personnel and its deprivation of the constitutional rights of such law enforcement personnel.

Second, it is our opinion that such proposal (regardless of whether classified as a "Legislative Rule" or Statute) is unconstitutional insofar as it deprives law enforcement personnel of their rights to free speech, expression and association and substantive due process and equal protection of the law as guaranteed by the First and Fourteenth Amendments of the United States Constitution and the parallel provisions of the West Virginia Constitution. See Texas State Troopers Ass'n v. Morales, 10 F. Supp.2d 628 (N.D.Tex. 1998); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Secretary of State of Maryland v. Joseph H. Munson Company, Inc., 467 U.S. 947 (1984); Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988).

As the above cases make clear, charitable solicitation is protected under the First Amendment to a greater degree or extent than commercial speech, and any regulations of such protected speech are subject to strict scrutiny—that is, such speech may be restricted only when the restricting law is narrowly tailored to further a compelling state interest. Ibid. Furthermore, a State may not prospectively silence speech except in extremely narrow and limited circumstances. Prior restraints of protected speech violate the First Amendment and, accordingly, any system of prior restraint of expression carries a heavy presumption against its constitutional validity. Id. Additionally, as with protected speech in general, the standard to be applied when determining whether such a law also violates the Equal Protection Clause is that of strict scrutiny. Id. In the present case, it is clear beyond any reasonable doubt that the proposed Legislative Rule is not narrowly tailored to further any governmental interest which the State might have, compelling or otherwise. (Indeed, the prohibitions and restrictions contained in the proposed Legislative Rule go far beyond the restrictions held unconstitutional in the above cited cases.)

It is our understanding that you will be forwarding a copy of this opinion letter to the Ethics Commission for its consideration. We hope that it assists you in successfully opposing the proposed Legislative Rule and in convincing the Ethics Commission of the impropriety of such Rule.

Sincerely yours,



Marvin W. Masters
Richard A. Monahan

MWM/RAM:klh

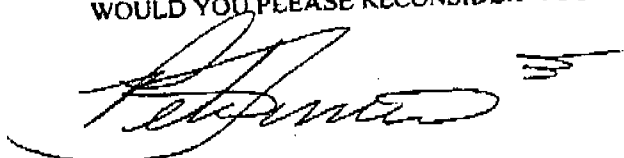
PETE TORRICO II
115 BURKETT AVENUE
BECKLEY WEST VIRGINIA 25801

WEST VIRGINIA ETHICS COMMISSION
210 BROOK STREET
SUITE 300
CHARLESTON WV 25301
FAX 304-558-2169

COMMISSION MEMBERS.

MAC'S TOY FUND, RALEIGH COUNTIES VERSION OF TOYS FOR TOTS, HAS RECEIVED THOUSANDS OF DOLLARS IN THE PAST FROM OUR LOCAL FOP. THE SUCCESS OF OUR PROJECT WOULD NOT BE POSSIBLE WITHOUT THIS FINANCIAL HELP.

WOULD YOU PLEASE RECONSIDER YOUR POSITION ON SUCH RULING.



PETE TORRICO II

RECEIVED
WV ETHICS COMMISSION
2007 JUN -8 AM 9:04



June 7, 2007

Members of the West Virginia Ethics Commission
210 Brooks Street, Suite 300
Charleston, WV 25301

Dear Concerned Members,

As the President/CEO of a non-profit organization that's survival relies heavily on the generosity of others, it is imperative that open access to fundraising remains. Phone and oral solicitation has long been a standard, highly recognized form of fundraising. Our community supports a variety of important initiatives through such solicitation. Very important for the children we serve is the ability of local law enforcement and F.O.P. lodges to solicit donations.

Over the last several years, we have directly benefited from the generous contribution of multiple local and state F.O.P. lodges. In addition to the direct support used to aid underprivileged children in need of medical rehabilitation and early intervention services, the F.O.P. gains irreplaceable funds and name recognition through the opportunities presented by phone and oral solicitation. Removing that ability will have a harmful impact on the now strong F.O.P. network and hinder potential donors ready and willing to contribute to this worthy cause.

Please reconsider thoughts to end all telephone and oral solicitation conducted by law enforcement officers or associations composed of law enforcement officers and local F.O.P. lodges. I strongly believe the result would do harm not only to the much needed F.O.P. organization, but also the many communication organizations that they support.

In the event that you would like to further discuss this issue or learn more about the significant positive impact that local law enforcement officers are making for the children in our community, please contact me directly at the phone number listed above. I would be honored to show you the direct, positive strides being made by the children we serve thanks to the generosity of the F.O.P. lodges.

Sincerely,

LORIE A. UNTCH
President/CEO

Serving Ohio, Marshall, Wetzel, Tyler, Brooke, and Hancock counties in West Virginia and Belmont, Jefferson, Harrison, and Monroe counties in Ohio.

RECEIVED
2007 JUN -8 PM 12:56
Easter Seals Rehabilitation Center
1305 National Road
Wheeling, WV 26003-5780
304-242-1390 phone
1-800-677-1390
304-242-1390 TTY/TDD
304-243-5880 fax
www.wv.easterseals.com



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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

Sgt. E.R. Canfield, II
Fraternal Order of Police
Seneca Trail Lodge No. 104
P.O. Box 506
Elkins, WV 26241

Dear Sgt. Canfield:

Thank you for your comment on the Commission's proposed rule amendments. The response of the Ethics Commission follows.

You state that you are opposed to the provision in the proposed Legislative Rule which prohibits law enforcement officers from providing stickers or decals to your members. Please be advised that the rule is not intended to limit members of an association, who are either past or present law enforcement officers, from receiving a decal or other similar item evidencing their membership in the association. Instead, it is only intended to prohibit the distribution of decals to members of the general public who make a contribution to a law enforcement agency or association composed of past and present law enforcement officers. To clarify this provision the Commission agrees to amend the rule to read:

8.4. Law enforcement officers or associations composed of law enforcement officers may not provide signs, stickers, decals or other items of display by individual donors showing whether or not a donation has been made on account of any charitable contribution solicited on behalf of law enforcement officers or their association; Provided, That, certificates, plaques or other items of display which are not intended for display on motor vehicles may be distributed to donors; Provided, Further That, an association may provide to its members who are currently serving as law enforcement officers, or who previously served as law enforcement officers, a sign, sticker, decal or other item of display, including those items intended for display in a motor vehicle, which demonstrate that a present or former law enforcement officer is a member of an association or fraternal group composed primarily of law enforcement officers.

We hope this amendment addresses the specific concern expressed.

Next, you state, [I]n all the years I have been a police officer I can't think of one incident where myself or anyone I know and work with has made a decision to write a ticket or make an arrest based on a sticker on the person's vehicle. Please be advised that likewise the Ethics Commission is unaware of any specific incident where a law enforcement officer has provided favorable treatment to an operator of a motor vehicle based upon a decal displayed in the vehicle which shows that s/he has made a contribution to a law enforcement agency or association. The Ethics Commission apologizes to the extent that you, or any members of the law enforcement community, have misperceived its intent in this regards. In the hopes of eliminating this misunderstanding in the future, the Commission takes this opportunity to set forth its rationale for this provision in the rule.

The rule is not intended to address any known incidents of favoritism; instead, it is specifically intended to address a general perception among members of the public that it is helpful to display such an item in the event that they are stopped for a motor vehicle violation. While the law enforcement community may never have intended for the public to feel this way, based upon the experience of the Ethics Commission members, who are appointed to represent the citizens of West Virginia, this perception exists. In turn, the Commission has a concern that members of the public may be influenced to respond favorably to a charitable solicitation by law enforcement officers or their associations based upon this misconception. When the Legislature enacted the Ethics Act in 1989 it specifically made a finding that it is the purpose of [Ethics Act] to maintain confidence in the integrity and impartiality of the governmental process in the state of West Virginia... W.Va. Code 6B-1-2(b). The Commission believes that the proposed rule further serves this purpose through the elimination of the subject practice.

You also express a concern about the effect of the rule on charitable fund raising by law enforcement officers and associations for charity. The rule is not intended to eliminate all forms of fund raising by law enforcement agencies or associations. Direct mailings are permitted. Further, law enforcement officers may engage in fund raising activities, in uniform and while using their official titles, when something of value is given in return. For example, hot dog sales, car washes, bingo games and the A Ride with Cops Program remain permissible. Further, officers may wear their uniforms while acting as volunteer wait staff at a restaurant where the proceeds go to charity.

The main purpose of the rule is to eliminate direct solicitations for monetary contributions when past or present law enforcement officers, either individually or through an association or other fraternal group, use their official title or uniform to solicit contributions. While in these instances they may be soliciting a contribution for a charitable cause, this fact must be weighed against the fact that members of the public may, consciously or subconsciously, feel compelled to contribute, not based upon the merits of the cause, but the public authority, including arrest powers, of the public official seeking the contribution.

It is also important to note that the rule is not intended to prohibit law enforcement officers from engaging in charitable solicitations in their private capacities as citizens. For example, law enforcement officers may participate in charitable activities through their churches or through civic groups such as the Lions Club and other civic organizations which are not

composed primarily of law enforcement personnel. In soliciting for these groups, they may engage in charitable solicitation and fund-raising

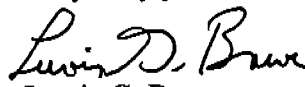
; provided that, they do not use their official title, uniform or create the appearance that their participation is related to their official position as a law enforcement officer. Law enforcement officers may also volunteer to be members of a telephone bank for a charitable organization so long as they do not use their law enforcement title when conducting a solicitation. For example they may state, this is "John X, I am calling on behalf of the Special Olympics (or other charitable group) to ask for your support." To ensure that the rule clearly sets forth that it is not intended to limit the activities of law enforcement officials in their private capacity as citizens, the Commission hereby amends the rule to read:

8.6. Law enforcement officers or associations composed of law enforcement officers may not conduct telephonic or oral solicitations in their official capacity.

In closing, a law enforcement officer is one [W]ho is authorized to maintain public peace and order, prevent and detect crime, make arrests and enforce the laws of the state or any county or municipality of the state. W. Va. Code, 15-11-2. It is the opinion of the Ethics Commission that the proposed rule in no way undermines the core responsibilities and duties of law enforcement officers. It is further the opinion of the Commission that the rule serves to bolster the confidence of citizens in this State in the integrity and impartiality of the government process.

Last, you write, a thank you and good luck with this issue for as police officers we will greatly honor whatever decision is rendered. The Ethics Commission thanks you for this statement of support and the respect it demonstrates for the process, while recognizing that reasonable people may differ in their opinions as to the impact and necessity of the proposed rule. Ultimately, that policy decision will be made by the Legislature through the rule-making process.

Very truly yours,


Lewis G. Brewer



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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 27, 2007

Melissa Garretson
WV Sheriff's Association
PO Box 3031
Charleston, WV 25331

Dear Ms. Garretson:

Thank you for submitting, on behalf of the WV Sheriff's Association, a response to the proposed rule. The response of the Ethics Commission follows.

You state in your letter that the Sheriff's Association provides decals to members of the public who pay money to become an Honorary Member. On behalf of the Sheriff's Association you further write, "To enact rules that would prohibit our association from distributing decals or selling additional decals, would greatly impact our ability to continue to provide our most important community services."

As you are aware, the Ethics Commission believes, based upon personal experience and the viewpoints expressed to them by others, that some citizens may have the perception that if they donate monies to an association of law enforcement officers, and receive a decal demonstrating their support, in turn, they may receive special treatment if pulled over for a traffic violation. While we commend the Sheriff's Association for adding a disclaimer that "the decal or membership card does not grant the individual special privileges," the Commission believes the most effective way of delivering this message, and eliminating any potential misconception, is simply not to provide a sticker or decal. The Sheriff's Association may provide a certificate, honorary membership card, magnet or other item which evidences membership, but which is not intended for display in a motor vehicle. Thus, this should satisfactorily provide a means of acknowledging members' support of your organization. (*See also*, Response provided to Sgt. Canfield, FOP Seneca Lodge 54 for clarification on this concern. Response incorporated herein and attached).

The Ethics Commission also has a concern that some law enforcement organizations, or telemarketing firms acting on their behalf, engage in fund raising activities in a manner which looks like they are selling decals as opposed to soliciting a charitable contribution. For example, one member of the Commission related that he

received a telephonic solicitation wherein the caller stated several times how he would get a decal for his donation; however, no mention was made by the caller about how the proceeds would benefit a charity. This example did not involve the Sheriff's Association or someone acting on behalf of the Sheriff's Association. However, the example serves to demonstrate how some law enforcement organizations may market a decal as having a value to the recipient. The inference created, regardless of whether it is accurate or inaccurate, is that the recipient of such a decal may receive more lenient treatment if they are pulled over while operating a motor vehicle. The Commission believes that the proposed rule effectively eliminates any appearance that decals are for sale.

You also state that you believe the prohibition against decals infringes upon the Association's First Amendment Rights. No case citations or other legal analysis is provided. It is the position of the Ethics Commission that there is no such infringement because the Commission only seeks to limit the use of a title which is conferred upon individuals due to their public position in the State of West Virginia as a law enforcement officer. The rule is intended to restrict the manner and use of a public title, not speech. Based upon this fact, the Commission believes that the proposed rule is Constitutional but will continue to research and analyze this issue. If you have any authority for your stated position, please provide such material for the Commission to review.

You also ask the question, "Do you plan to impose this rule on other organizations that provide similar stickers, such as schools, little league baseball teams and other non-profits?" Please be advised that we do not regulate little league baseball teams or non-profits, unless a non-profit has a membership base substantially composed of public officials. The Ethics Commission does regulate school boards.

The limitation on supplying decals does not extend to non-profit associations composed of public officials who do not exercise law enforcement powers or to school boards. This particular limitation only applies to law enforcement officers because of the unique public authority they have been delegated, including arrest powers. Based upon information and belief, there are no misconceptions amongst citizens that they may receive special treatment for contributing to other groups such as a historical society, even if they receive a decal. For this reason, the Commission declines to extend the rule to other public employees or groups.

Last, you state that recently you conducted an informal survey among other Sheriff's Association Executive Directors across the nation concerning this proposed rule. You then state, "There were several states that did not allow telemarketing, but no other state that responded imposed the restriction of not allowing stickers, decals and/or license plates." We appreciate your due diligence in this regard. As you know, at times it is helpful to look to other States for guidance when enacting legislative changes. As the Commission's proposed rule seeks to eliminate telemarketing by law enforcement officials or companies retained by law enforcement officials, it is helpful to know that other States have determined that it is in the public interest to limit this practice. In regards to the decals, we acknowledge that the proposed rule may set precedent on this

issue. The Ethics Commission believes that this limitation serves to "[M]aintain confidence in the integrity and impartiality of the governmental process in the state of West Virginia..." W.Va. Code § 6B-1-2(b). Based upon the personal experience of the Ethics Commission Members, the proposed rule ultimately best serves the interests of the citizens of West Virginia.

Very truly yours,

A handwritten signature in cursive script, reading "Lewis G. Brewer".

Lewis G. Brewer

Enclosure: Response to Sgt. Canfield, FOP Seneca Lodge 54



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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

Charles Kingery
Huntington Police Department
675 Tenth Street
Huntington, WV 25701

Dear Mr. Kingery:

Thank you for the public comment submitted on behalf of the Fraternal Order of Police, Gold Star Lodge # 65. The response of the Commission follows.

First, you express a concern about the proposed rule adversely affecting the "Ride with Cops" program where members of the community are invited to join a motorcycle ride and rally led by local and retired police officers. Please be advised that the proposed rule is not intended to interfere with this event. The proposed rule reads: 8.7. Law enforcement officers may wear their uniforms while participating in fund-raising activities based on an exchange of value such as a sale of baked goods or a car wash. This provision is intended to allow law enforcement officers to wear their uniforms if they are participating in a fund-raising event where something is offered in return, including the "Ride with the Cops" program. The only limitation is that law enforcement officers may not solicit participants to sign-up for this event, prior to the day of the event, while wearing a uniform. They may advertise the event via mailing, newspaper or other media, and give guidance to the public on where and how to register for the event. On the day of the event, law enforcement officers, either working the registration desk or participating in the ride, may wear their uniforms. To clear up any confusion on this issue, the Ethics Commission will amend 8.7 to read: Law enforcement officers may wear their uniforms while participating in fund-raising activities based on an exchange of value such as a sale of baked goods or a car wash. Further, they may wear their uniforms while participating in a fund-raising event such as a motorcycle ride, walk or other activities where the public, for a fee or donation, is invited to join a law enforcement officer as part of a fund-raising activity for charity.

Next you express a concern about the rule interfering with bingo and raffle games sponsored by your lodge. The same analysis set forth in the preceding paragraph applies to this situation. Hence, law enforcement officers may continue to sponsor bingo and

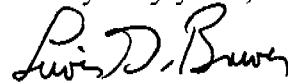
raffle games, and to wear their uniforms at these events; Provided, that, the games are operated in accordance with other applicable provisions which govern gaming in the State of West Virginia.

You also mention that at times funds raised by your lodge are used to assist police officers who have been killed or injured in the line of duty and the families of the affected officers. As you are aware, public officials may only use their official position and title to raise funds for charitable activities.

The Commission has never addressed whether raising funds for public employees killed or injured in the line of duty constitutes a charitable purpose as contemplated by the Ethics Act. The Ethics Commission takes this opportunity to consider this matter and agrees that this situation does constitute a charitable cause for purposes of the Ethics Act. As such, the Ethics Commission will amend the proposed rule to make this finding applicable to all public employees. The relevant section will now read: 6.10. Raising funds for public employees seriously injured or killed while in the line of duty, and their affected family members, constitutes a charitable activity for purposes of the Ethics Act.

We hope this letter is responsive to your request and that the proposed changes help to further address any concerns you have raised.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Lewis G. Brewer", written in a cursive style.

Lewis G. Brewer



STATE OF WEST VIRGINIA
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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

John W. Smith, Jr.
Vice-President, WV Troopers Association
210 Chesapeake Avenue
Charleston, WV 25311

Dear Mr. Smith:

You raise various matters in the public comment submitted on behalf of the Trooper's Association. The Commission will attempt to address each point separately.

You state: *It is very disturbing to think that just because a person is associated with law enforcement that you cannot be afforded the same basic rights that are afforded to every other public employee.* Please be advised that the Ethics Commission believes that stricter limitations should apply to solicitations by law enforcement officers due to the unique powers, including arrest powers, conferred upon them. The Commission's rationale for the Proposed Rule is further explained in the responses provided to the Sheriff's Association and FOP, Seneca Lodge No. 104, which are incorporated herein by reference and attached hereto.

You state: *It is also very disturbing to see that those that strive to protect the citizens of this State are being targeted and the proposed rule is attempting to strangle the organizations funding mechanism. The citizens of the State voluntarily choose to support and contribute to the West Virginia Trooper's Association and the objectives which have become so important some of which include the Bears Against Drug Program (attempting to educate children with the danger of drugs), providing additional life insurance for the membership, providing monetary college scholarships to dependents of active and retired members, providing legal and related assistance for the membership of the association.*

Please be advised that it appears that you are stating that the Troopers Association is soliciting money in some instances for the direct personal benefit of its membership. These instances include: *providing additional life insurance for the membership, providing monetary college scholarships to dependents of active and retired members, providing legal and related assistance for the membership of the association.* The Ethics Act states: "A public official or public official may not solicit any gift unless the

Act states: "A public official or public official 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." Please be advised that based upon the plain language in the Ethics Act, neither a public servant or an association of public servants, is authorized to solicit monies or contributions to benefit themselves.

The Commission previously provided guidance on this matter to public servants and law enforcement personnel in A.O. 2004-07 where it ruled in part, "Public servants, including law enforcement personnel and those engaged in regulatory activities, may not use the influence of their positions to further sales activities from which they benefit personally. To do so would violate the Act's prohibition against the use of office for private gain." The opinion goes on to state, "Funds raised by the Association or through activities which rely heavily on the prestige of its members may be only used for charitable purposes..." (A.O. 2004-07 attached hereto). The categories outlined in this paragraph are not causes which either the Ethics Commission, or based upon information and belief, the Legislature, have ever deemed to be charitable in nature within the plain language of the Ethics Act. The activities may instead be supported by other sources, such as membership dues from active and retired State Troopers. As a matter of note, the proposed rule reiterates that public servants may not use their titles or official positions to raise money for the direct personal benefit or to support the administrative operation of their associations. §158-7-7. This portion of the proposed rule is applicable to all public servants and mainly serves to reiterate what the Legislature has plainly stated in the Ethics Act.

Next, you state that the Troopers Association believes the proposed Legislative Rule is unnecessary because there are already laws which "prevent any type of solicitation by the State Police." You cite West Virginia Code § 15-2-18 which prevents a member of the State Police from working for private persons or entities unless authorized and coordinated through the WV State Police Superintendent. This code section further prevents a State Trooper from demanding a thing of value for the performance of his or her duties. You also cite West Virginia Code § 15-2-19 which prohibits a member of the public or business from bribing a State Trooper. After reviewing the statutes which you reference, it does not appear that they "prevent any type of solicitation by the State Police." As you are aware, the Commission's proposed rule does not impose an outright ban on charitable solicitations by law enforcement officers, it only imposes limitations on the manner of solicitations. The Ethics Commission is not of the opinion that the statutory provisions you cite impose the same or similar restrictions outlined in the proposed rule and hence declines to modify the rule based upon the statutory citations provided.

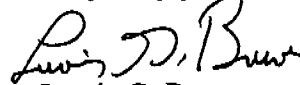
You state the Troopers Association provides an avenue for members to voice unsafe working conditions and violations of other personnel laws. You then state, "Jack Buckalew, who currently sits on the Ethics Commission and formerly served as superintendent of the West Virginia State Police has had such opposition from the West Virginia Troopers Association." It appears you may be suggesting that Jack Buckalew, one of our commissioners, has based his actions, not upon his own values and beliefs, but

a desire to undermine the Troopers Association. As funds raised through solicitation by law enforcement officials may only be used for charitable purposes, we do not anticipate that the proposed rule will undermine the financial stability of the Troopers Association.

Further, at its May 2007 meeting, the Commissioners voted unanimously to submit the proposed rule for Legislative Comment. (minutes attached hereto). The Commission's actions were not governed by any intent to undermine the Trooper's Association, but an intent to limit a practice which in the opinion of the Commission serves to make some citizens feel compelled to make a contribution when asked by a law enforcement officer, based upon the unique powers of law enforcement officers, including arrest powers. The Commission respectfully declines to accord any weight to the suggestion that Commissioner Buckalew took action based upon an alleged personal bias against the Troopers Association.

Last, the Trooper's Association submitted as part of its response a legal memorandum submitted by the Marvin Masters law firm. Several legal challenges to the rule are raised in the brief. A separate legal memorandum has been prepared in response, and is being provided as an enclosure with this response.

Very truly yours,


Lewis G. Brewer

Enclosures: Response to Sheriff's Association
Response to FOP, Seneca Trail Lodge No. 104
Response to Legal Memorandum
A.O. 2004 -07
Minutes from May 2007 Ethics Commission Meeting



STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION
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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

Pete Torrico, II
115 Burkett Avenue
Beckley, WV 25801

Dear Mr. Torrico:

Thank you for the comment on the Commission's proposed rule amendment. In response, the Commission respectfully declines to amend the rule. In further response, the Commission hereby incorporates its responses rendered to Charles Kingery, FOP Gold Star Lodge # 65 and the Easter Seals Rehabilitation Center. Copies of those responses are attached hereto.

Please call with any questions.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Lewis G. Brewer", written in a cursive style.

Lewis G. Brewer

Enclosures: Response to Charles Kingery, FOP Gold Star Lodge # 65
Response to Easter Seals Rehabilitation Center



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WEST VIRGINIA ETHICS COMMISSION
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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

Lorie A. Untch
Easter Seals Rehabilitation Center
1305 National Road
Wheeling, WV 26003

Dear Ms. Untch:

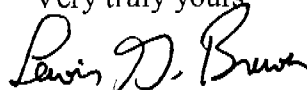
In your letter, you generally request that the Ethics Commission "[R]econsider thoughts to end all telephone and oral solicitations conducted by law enforcement officers or associations composed of law enforcement officers and local F.O.P. lodges." You then state that "I strongly believe the result would harm not only the much needed F.O.P. organization, but also the many [community] organizations that they support."

Thank you for your comment. Please be advised that the rule is not intended to harm the F.O.P. organization. Solicitations by public officials, including law enforcement officers, may only be made for a charitable purpose, not to support internal administrative structure. Presumably the F.O.P.'s administrative structure, as with other similarly situated organizations, is financially supported by membership fees paid by past and present law enforcement officers, not solicitations.

In regards to the limitations imposed upon in-person and telephonic solicitations, the Ethics Commission expresses regret that the limitation may adversely impact some of the fund-raising efforts of the Easter Seals and other worthwhile organizations. However, in the opinion of the Commission it must foremost consider the views of average citizens, their negative perception of the practice by law enforcement officers of soliciting them directly for funds, and the goal of the Ethics Act to maintain the confidence of citizens in government. Weighing and balancing these objectives, and as there are other means

available for the F.O.P. to continue to raise funds for charity, the Commission declines to amend the rule in response to your comment.¹

Very truly yours

A handwritten signature in cursive script, reading "Lewis G. Brewer".

Lewis G. Brewer

Enclosures: Response letter to Charles Kingery
Response letter to Sgt. ER Canfield, FOP 104

¹ (See Response Letter to Charles Kingery, Gold Star Lodge # 65 and Response Letter to Sgt. ER Canfield, FOP 104, incorporated herein by reference and attached hereto)



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LEWIS G. BREWER
EXECUTIVE DIRECTOR

July 26, 2007

John Smith
President
WV Troopers Association Inc.
210 Chesapeake Avenue
Charleston, WV 25311

**RE: Response to Legal Brief filed by The Masters Law Firm, PLLC
Proposed Legislative Rule, Title 158, Series Seven**

Dear Mr. Smith:

During the public comment period, a Legal Brief was filed in opposition to the Ethics Commission's proposed rule, Title 158, Series Seven. The brief was filed on behalf of the West Virginia Troopers Association by the Masters Law Firm. The following is intended as a formal Response to the brief.

I. SCOPE OF LEGISLATIVE RULE

The Masters Law Firm argues that the Legislative Rule exceeds the scope of the Ethics Commission's rule making power. The Ethics Commission respectfully disagrees.

The Ethics Act states that "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." The Ethics Act further requires states that "The Commission shall propose rules in accordance with the provisions of chapter twenty-nine-a of this Code to carry out the purposes of this article." W.Va. Code § 6B-2-2(a). As a preamble to the Ethics Act, the Legislature made various findings and also expressed its intent in regards to the purpose of the Act. In this regards it stated:

(a) The Legislature hereby finds that the holding of a public office or public employment is a public trust. Independence and impartiality of public officials and public employees are essential for the maintenance of the confidence of our citizens in the operation of a democratic government. The decisions and actions of public officials and public employees must be made free from undue influence,

favoritism or threat, at every level of government. Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or 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.

(b) It is the purpose of this chapter to maintain confidence in the integrity and impartiality of the governmental process in the state of West Virginia and its political subdivisions and to aid public officials and public employees in the exercise of their official duties and employment; to define and establish minimum ethical standards for elected and appointed public officials and public employees; to eliminate actual conflicts of interest; to provide a means to define ethical standards; to provide a means of investigating and resolving ethical violations; and to provide administrative and criminal penalties for specific ethical violations herein found to be unlawful.

(c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

(d) It is declared that high moral and ethical standards among public officials and public employees are essential to the conduct of free government; that the Legislature believes that a code of ethics for the guidance of public officials and public employees will help them avoid conflicts between their personal interests and their public responsibilities, will improve standards of public service and will promote and strengthen the faith and confidence of the people of this state in their public officials and public employees.

(e) It is the intent of the Legislature that in its operations the West Virginia ethics commission created under this chapter shall protect to the fullest extent possible the rights of individuals affected.

W. Va. Code, § 6B-1-2

As set forth in W. Va. Code, § 6B-1-2(e), the Legislature has statutorily charged the Ethics Commission with the duty of protecting to the fullest extent possible the rights of individuals affected by the acts of government officials and employees. The Ethics Act also provides that the commission may, by legislative rule promulgated in accordance with chapter twenty-nine-a of this code, define further exemptions from this section as necessary or appropriate. W.Va. Code § 6B-2-5(o). The Ethics Commission believes it is

within its implied and express powers to exempt all citizens from various defined forms of solicitation by law enforcement officials.

The Ethics Commission also finds that solicitation by law enforcement officials violates the prohibition against a public official or employee using his or her office or the prestige of his or her office for his or her own private gain or that of another person. W.Va. Code § 6B-2-5. Due to the unique powers exercised by law enforcement, when soliciting in their official capacities, the Commission finds that it amounts to a prohibited use of office. The Commission previously ruled in A.O. 2005-02 that it constituted the prohibited use of office for a County Board of Health to orally solicit donations from regulated businesses. In its opinion, the Commission ruled that written solicitations were permissible.

In conclusion, the Ethics Commission asserts that the plain language of the Ethics Act authorizes it to regulate the conduct in question. Further, when the powers of the Ethics Commission to propose rules are read *in pari materia* with its mandated duty to protect citizens to the fullest extent possible, it is clear that the proposed rule falls squarely within the express and implied rule-making powers of the Commission. To clarify its legal authority for proposing the rule, the Commission hereby amends the provision in the rule entitled "Authority" to reference W.Va. Code §§ 6B-2-2(a), 6B-2-5(b) and 6B-2-5(o).

II. CONSTITUTIONAL

A. General Overview

The Masters Law Firm argues that the proposed rule is unconstitutional "insofar as it deprives law enforcement personnel of their rights to free speech, expression and association and substantive due process and equal protection of the law as guaranteed by the First and Fourteenth Amendments to the United States Constitution and the parallel provisions of the West Virginia Constitution." In support of this argument, it cites various cases decided by the United States Supreme Court and other Federal Courts. The Ethics Commission avers in response that when the proposed rule is analyzed under applicable standards governing rights guaranteed to citizens under the United States Constitution, that the Legislative Rule withstands any Constitutional challenge.

Before examining the legality of the rule, it is necessary to review the limits the proposed rule places on charitable solicitations by law enforcement officers. First, the proposed rule prohibits law enforcement officers or associations composed of law enforcement officers from conducting telephonic or oral solicitations in their official capacity. Second, the proposed rule prohibits law enforcement officers from picking up a donation while in uniform. Third, the proposed rule prohibits law enforcement officers or associations composed of law enforcement officers from providing a decal, or other item customarily intended for display in or on a motor vehicle, in exchange for a donation.

It is important to note that the rule does not impose an absolute ban on charitable solicitation and fundraising by law enforcement officers. Law enforcement officers, using their titles and wearing their uniforms, may participate in fund raising events where something of value is given in return. For example, they may sponsor a walk, race or bingo night. Also they may serve as a volunteer wait staff at a restaurant. Further, the rule is not intended to limit law enforcement officers from soliciting in their personal capacities for organizations with which they are involved outside of the law enforcement profession. For example, if the officer or his or her family members belong to the Boy Scouts or a church, they have the same rights as other individuals to participate in fundraising; provided that they do so in their personal capacity and do not use their title or solicit while in uniform.

Additionally, if members of a fraternal lodge or the Trooper's Association wants to volunteer for a phone bank organized by the Special Olympics or other charitable groups, they may volunteer their time and participate in telephonic solicitation as long as they do not identify themselves as law enforcement officers. For example, they, like other volunteers for a charitable organization, may call a citizen and state, "This is John Smith. I am calling on behalf of the Special Olympics as part of their 2007 Fund Raising Drive." This solicitation is permissible because the individual, in this case, John Smith, is not identifying himself as a law enforcement officer but instead, is speaking as a private citizen. Law enforcement officers and their associations may also raise funds via direct mailing.

B. 1st Amendment – Free Speech

The Masters Law Firm argues that the proposed Legislative Rule impermissibly infringes upon the 1st Amendment Rights of law enforcement officers. The proposed rule seeks to limit the use of the position of persons who are public employees and who are statutorily charged with arrest powers. Relevant to the inquiry of whether the proposed rule violates any Constitutional provisions, is an examination of the underlying rationale for the rule.

The Ethics Commission finds, based upon the personal experiences of its Members, who are appointed to represent the interests of citizens, that citizens may, consciously or subconsciously, feel compelled to donate money when asked by law enforcement officers or an association primarily composed of law enforcement officers.¹ The Ethics Commissions further finds in order to uphold the spirit and intent of the Ethics Act, and its stated purpose of maintaining confidence in the integrity and impartiality of government, that there should be limits on the manner in which law enforcement officers may solicit.²

¹ W.Va. Code § 6B-2-1 sets forth requirements for person to be eligible for appointment to the Ethics Commission. Members of the Commission are appointed by the Governor and confirmed by the WV Senate.

² W.Va. Code § 6B-1-2.

The Ethics Commission specifically expresses its underlying rationale in the proposed rule where it states, "The Ethics Commission finds that the interest of the public are served by having stricter limitations which govern solicitations by law enforcement officers due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers." W.Va. C.S.R. § 158-7-8. The Ethics Commission also expresses its rationale for the proposed rule in its formal responses to the public comments. A general overview of its responses relative to this inquiry is:

- The Ethics Commission believes, based upon personal experience and the viewpoints expressed to them by others, that some citizens may have the perception that if they donate money to an association of law enforcement officers, and receive a decal demonstrating their support, in turn, they may receive special treatment if pulled over for a traffic violation. (Response to WV Sheriff's Association).
- The rule is not intended to address any known incidents of favoritism; instead, it is specifically intended to address a general perception among members of the public that it is helpful to display such an item [a decal] in the event that they are stopped for a motor vehicle violation. While the law enforcement community may never have intended for the public to feel this way, based upon the experience of the Ethics Commission members, who are appointed to represent the citizens of West Virginia, this perception exists. (Response to Sgt. E.R. Canfield, Fraternal Order of the Police).
- The rule is not intended to eliminate all forms of fund raising by law enforcement agencies or associations. Direct mailings are permitted. Further, law enforcement officers may engage in fund raising activities, in uniform and while using their official titles, when something of value is given in return. For example, hot dog sales, car washes, bingo games and the "Ride with Cops Program" remain permissible. Further, officers may wear their uniforms while acting as volunteer wait staff at a restaurant where the proceeds go to charity. (Response to Sgt. E.R. Canfield, Fraternal Order of the Police).
- The main purpose of the rule is to eliminate direct solicitations for monetary contributions when past or present law enforcement officers, either individually or through an association or other fraternal group, use their official title or uniform to solicit contributions. While in these instances they may be soliciting a contribution for a charitable cause, this fact must be weighed against the fact that members of the public may, consciously or subconsciously, feel compelled to contribute, not based upon the merits of the cause, but the public authority, including arrest powers, of the public official seeking the contribution. (Response to Sgt. E.R. Canfield, Fraternal Order of the Police).
- It is also important to note that the rule is not intended to prohibit law enforcement officers from engaging in charitable solicitations in their private

capacities as citizens. For example, law enforcement officers may participate in charitable activities through their churches or through civic groups such as the Lions Club and other civic organizations which are not composed primarily of law enforcement personnel. In soliciting for these groups, they may engage in charitable solicitation and fundraising; provided that, they do not use their official title, or uniform or create the appearance that their participation is related to their official position as a law enforcement officer. (Response to Sgt. E.R. Canfield, Fraternal Order of the Police)

- In regards to the limitations imposed upon in-person and telephonic solicitations, the Ethics Commission expresses regret that the limitation may adversely impact some of the fund-raising efforts of the Easter Seals and other worthwhile organizations. However, in the opinion of the Commission it must foremost consider the views of average citizens, their negative perception of the practice by law enforcement officers of soliciting them directly for funds, and the goal of the Ethics Act to maintain the confidence of citizens in government. (Response to Easter Seals)

The Ethics Commission has clearly articulated its underlying rationale for the proposed rule and further has carefully drafted the rule to address the specific concerns addressed. For this reason, as set forth below, the proposed rule withstands any Constitutional challenge.

1. Pickering-Connick Test

The United States Supreme Court and other Federal District Courts, have established tests for determining whether government conduct or regulations impermissibly infringe upon a public employee's 1st Amendment rights³. In conducting this analysis, it is important to remember that the government "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large," *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 465, 115 S.Ct. 1003, 130 L.Ed.2d 964 (1995). In this regard, "the government as employer indeed has far broader powers than does the government as sovereign," *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality).

³ The Ethics Commission submits that prohibiting a law enforcement officer from soliciting in uniform does not constitute speech nor expressive conduct for purposes of invoking 1st Amendment protections. In order to be speech, it must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [one asks] whether an intent to convey a particularized message was present, and whether the likelihood was great that the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citations and internal quotations omitted). See *Texas v. Johnson*, 491 U.S. 397 (1989). Applying this test, the Ethics Commission also submits that limiting the use of a public title is not speech. *Id.* Notwithstanding the failure of the Masters Law Firm to brief this issue or state why it believes the limitations affect speech, the Ethics Commission avers that this issue may be saved for another day because assuming that the limitations affect speech, still they withstand any Constitutional challenge.

To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing him or herself on this matter must not be outweighed by any injury the speech could cause to " 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Connick v. Myers*, 461 U.S. 138, 142 (quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1735, 20 L.Ed.2d 811 (1968)). As further explained in *Lee v. York County School System*, 418 F.Supp.2d 816, (E.D. Va. 2006), the proper determination of this issue is governed by a two-part test.

First, a court determines if "the speech at issue was that of a private citizen speaking on a matter of public concern." *Urofsky v. Gilmore*, 216 F.3d 401, 407 (4th Cir. 2000). This question turns on "whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.' " *Id.* at 407 (quoting *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986)). [Fn 9 omitted] If the speech does not involve a matter of public concern, but instead addresses a "personal interest," then the speech is not protected by the First Amendment. *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). In such a case, the court need not continue to the second step of the analysis and "scrutinize the reasons for" the regulation. *Connick*, 461 U.S. at 146, 103 S.Ct. 1684; see also *Urofsky*, 216 F.3d at 406 (stating that if the speech "does not touch upon a matter of public concern, the 823 state, as employer, may regulate [the speech] without infringing any First Amendment protection"). [Fn 10 omitted]

Lee at 824. The Fourth Circuit has further held that, "[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368 (C.A.4 (N.C.), 1998)

The first part of the analysis, whether speech involves a matter of public concern, must be determined on a case-by-case basis. A public employee's communications in his or her official capacity in an effort to raise funds for charity does not appear to be an instance where the speech is "in any way political or involv[ing] any matter of concern to the public," *Holland v. Rimmer*, 25 F.3d 1251, 1255 (4th Cir. 1994).⁴ In applying the

⁴ A federal district court in the fourth circuit, in conducting this inquiry held:

In our inquiry, we seek to determine "whether the 'public' or the 'community' is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a 'private' matter between employer and employee." *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985). This is a subtle, qualitative inquiry; we use the content, form, and context as guideposts in the exercise of common sense, asking throughout: would a member of the community be truly concerned with the employee's speech?

applicable test, it does not appear that a public employee's decision to use the prestige of their public position to support one charity over another by soliciting funds is a matter of public concern. Regardless, it cannot be forgotten that "Critical to a determination of whether a public employee's speech is entitled to First Amendment protection is whether the speech is made primarily in the employee's role as citizen or primarily in his role as employee." *Urofsky v. Gilmore*, 216 F.3d 401 (C.A.4 (Va.), 2000)(emphasis added).

The main purpose of the Ethics Act is to establish standards to govern the conduct of public employees in carrying out their public job responsibilities. The purpose of the proposed Legislative Rule is to impose additional limitations upon law enforcement officers using their official titles and positions to raise funds because the Ethics Commission believes, due to the powers they exercise as a result of their public job responsibilities, that such solicitations are inherently coercive.

The rule seeks to impose limitations on speech made by law enforcement officers in their official employment capacity. By virtue of their public position, law enforcement officers have a rank or title, and attendant powers, which flow directly from their public position. Hence, any speech in the form of a solicitation made by law enforcement officers where they specifically reference their public law enforcement title involves the regulation of conduct relating to their role as an employee. The Rule does not limit the ability of law enforcement officers to raise funds in their private capacity. For instance, if they belong to a church or non-law enforcement related charity, they have the same rights and standing as other members of the church or charity to act as volunteers for a phone bank for the purpose of telephonic solicitation or going door-to-door, provided that they do not wear their uniform or otherwise identify themselves in a manner so as to suggest they are using their law enforcement position. As the rule does not limit this category of activities which law enforcement officers, acting as private citizens, may participate in on their own time, the rule does not impact a matter of public concern because "the challenged aspect of the Act does not regulate the speech of the citizenry in general, but rather the speech of state employees in their capacity as employees." *Urofsky v. Gilmore*, 216 F.3d 401, 409 (C.A.4 (Va.), 2000). As any 1st Amendment challenge fails to satisfy the first prong of the *Pickering-Connick* analysis, the WV Ethics Commission may regulate the speech without infringing any First Amendment protection. *Urofsky v. Gilmore*, 216 F.3d 401, 406 (C.A.4 (Va.), 2000)

Second, even if a Court were to find that the speech in question involves a matter of public concern, still a government agency has the right to regulate the speech, provided that the regulation satisfies the second prong of the *Pickering-Connick* test. At this point in the analysis, the Ethics Commission, as a government agency, has the burden of proving that its interest in efficient management outweighs a public employee's interest in freedom of expression. *Miller v. Jones*, 444 F.3d 929, 935 (C.A.7 (Wis.) 2006). *Connick v. Myers*, 461 U.S. 138.

Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 -353 (C.A.4 (Md.), 2000)

The West Virginia Ethics Commission, pursuant to its statutory mission, has an interest in ensuring that public officials and employees do not use their public titles to solicit gifts for charity when a member of the public may feel coerced to contribute due to the powers conferred upon law enforcement officers by virtue of their public position. Law enforcement officers are authorized to maintain public peace and to prevent and detect crime. The efficient management of government requires public employees to adhere to an ethical code of conduct to maintain integrity in government. The Ethics Commission submits that its stated purpose for enacting the limitations on solicitation by law enforcement officers, as outlined in the proposed rule and through its formal responses to the public comments, demonstrates that its interests in ensuring that citizens do not feel coerced into giving to someone using their law enforcement title or wearing their law enforcement uniform, clearly outweighs a law enforcement officer's right, if any, to use their titles, conferred through their official positions, to raise funds. As the proposed rule withstands examination under the second prong of the *Pickering-Connick* analysis, it does not violate the 1st Amendment Rights of law enforcement officers.

2. Strict Scrutiny

The Masters Law Firm does not address whether the regulation in question should be subject to the *Pickering-Connick* standard. Instead, without providing any analysis, it states that "Charitable solicitation is protected under the First Amendment to a greater degree or extent than commercial speech, and any regulations of such protected speech are subject to strict scrutiny." Masters brief at 2. It then cites various cases including *Texas State Troopers Ass'n v. Morales*, 10 F.Supp.2d 628 (N.D. Tex. 1998)(hereinafter "*Morales*").

In the present case, the Ethics Commission has the power to regulate the ethical conduct of public employees through its interpretation and enforcement of the Ethics Act. The Legislature has specifically charged the Commission with this duty. Therefore, the Commission maintains that the *Pickering-Connick* test governs whether the proposed rule violates the 1st Amendment Rights of citizens employed as law enforcement officers. Notwithstanding its disagreement with the standard proposed by the Masters Law firm, the Ethics Commission takes this opportunity to distinguish the *Morales* case and to demonstrate that the proposed rule survives a strict scrutiny analysis.

In *Morales* the relevant facts differ from the present case. The State of Texas passed a Law Enforcement Solicitation Act which required private law enforcement association fundraisers to disclose to potential donors the percentage of the donation which would be withheld by the fundraiser. In support of its grounds for passing the Legislation, the State of Texas argued:

[T]he nature of solicitation by private law enforcement charities renders their requests for donations particularly susceptible to fraud because such organizations have names nearly identical to government law enforcement groups...The State also alleges that many solicitations by fundraisers for private law enforcement charities are deceptive

because they suggest that contributions will increase police presence or protection in the contributor's neighborhood.

Id. at 632. It appears that Texas was concerned with private law enforcement charities in relation to their potential for fraud. Further, by requiring them to disclose the amount of money the fund raiser retained, it appears clear that Texas had a concern about the allegedly low amount of money going to charity.

The United States District Court for the Northern District of Texas held that it saw no "logical connection between the disclosure requirements...and the prevention of a donors' confusion regarding whether they are being solicited by a government or nongovernment law enforcement charity," or in eliminating "the misperceptions of donors who are "fraudulently" misled to believe they will receive a quid pro quo for donations." Id. at 633 and fn. 1. Hence, it concluded that the statute was not narrowly tailored to address the State's concerns. Id.

The proposed rule and underlying rationale clearly differ from those present in *Morales*. The State of Texas did not pass its law due to a stated concern about the coercive effects of law enforcement solicitation. At the least, it failed to articulate this concern to the Court. In contrast, the proposed Legislative rule states that, "The Ethics Commission finds that the interest of the public is served by having stricter limitations which govern solicitations by law enforcement officers due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers." The intent of the Commission and its underlying rationale are further set forth in its formal responses to the public comments. The proposed rule survives a strict scrutiny analysis. Under this analysis, speech may only be restricted when "the restricting law is narrowly tailored to further a compelling state interest." Id. at 632.

The proposed rule is narrowly tailored to further a compelling state interest. It is narrowly tailored because it does not prohibit all fund raising activities by law enforcement officers, only in-person and telephonic solicitations. Additionally, the rule does not limit law enforcement personnel from soliciting in their capacity as private citizens. The rule serves a compelling state interest by protecting citizens from feeling coerced to give to a cause, even if it is a worthwhile cause. Limiting the use of an officer's official uniform survives a strict scrutiny analysis because the uniform is meant to convey to the public that there is a police presence in the community and that the person wearing the uniform and carrying a badge is an officer of the State. Eliminating the distribution of decals survives a strict scrutiny analysis because the decals are designated with wording or insignia conveying a relationship with public law enforcement officers. The Commission has expressed a valid concern that a misperception exists amongst members of the public that they may receive special treatment if they obtain a decal.

Support of the position of the Ethics Commission has been set forth in editorials in "The Intelligencer, Wheeling New-Register"(May 21, 2007) and the Charleston Daily Mail (May 7, 2007). (Articles attached hereto). The articles serve to further demonstrate

that the concerns raised by the Ethics Commission are shared by other members of the community. Regardless, when the Ethics Commission's stated purpose for the rule is examined, the rule survives the strict scrutiny analysis.

C. ASSOCIATION

As in the freedom of speech context, a public employee's corresponding right to freedom of association is not absolute. Logically, the limitations on a public employee's right to associate are "closely analogous" to the limitations on his or her right to speak. *Lilienthal v. City of Suffolk*, 275 F.Supp.2d 684, 693 (E.D.Va. 2003). A citizen's Constitutional Right to Associate is granted by the 1st Amendment. As the standard is similar, the argument set forth above will not be repeated herein. Instead, for the reasons set forth as to why the proposed rule survives a First Amendment Freedom of Speech challenge, it also withstands a First Amendment Freedom of Association challenge.

D. EQUAL PROTECTION

The Ethics Commission recognizes that any law that draws a distinction among people is susceptible to an equal protection challenge. While classifications based on race or national origin are subject to strict scrutiny, and classifications based on sex are subject to intermediate scrutiny, other classifications, like age and disability, are subject only to the rational basis test. *Lamb v. John Umstead Hosp.*, 19 F.Supp.2d 498, 503 (E.D.N.C. 1998). Under the rational basis test, a law will be upheld if it is rationally related to a legitimate government purpose. *Id.* See also *Shaw v. Murphy*, 532 U.S. 223, 225, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) and *Slade v. Hampton Roads Regional Jail*, 303 F.Supp.2d 779, 782 (E.D.Va. 2004).

The proposed rule, and the restrictions it places on law enforcement solicitation, is rationally related to the legitimate government purpose of limiting the exercise of police power by law enforcement officers when they are not using these powers to carry out their official job responsibilities. As the rule survives a strict scrutiny analysis, it readily survives application of the rational basis test.

F. SUBSTANTIVE DUE PROCESS

The Masters Law firm generally avers that the proposed rule impairs the substantive due process rights of law enforcement officers. Substantive due process protects an individual's general right to be free from the abuse of governmental power. Governmental actions violate substantive due process when they are so arbitrary and unreasonable as to "shock the conscience" or offend "a sense of justice." *United States v. Salerno*, 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). *General Textile Printing and Processing Corp. v. City of Rocky Mount* 908 F.Supp. 1295, 1304 (E.D.N.C., 1995) The proposed rule does not fall within the category of conduct which "shocks the conscience" and a good faith challenge to the rule cannot stand on this basis.

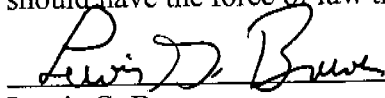
III. CONCLUSION

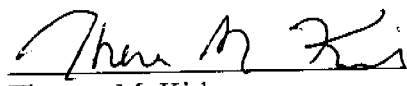
The Ethics Commission has submitted the proposed rule after dedicating much time to debating the merits of the rule, listening to public comment, and responding. The Ethics Commission believes that the rule serves the interests of the citizens of West Virginia and is drafted in a manner best suited to accomplish this goal.

Another State, the Commonwealth of Massachusetts, has also imposed limitations on solicitations by law enforcement officers by prohibiting the use of badges or uniforms to solicit funds from the public. (State Ethics Commission Opinion, EC-COI-93-6, opinion attached). It has further ruled that police officers may not use their official police rank because they have found an appointed public employee's official title to be a public resource for this purpose.⁵

The limitations imposed are also similar to limitations the Legislature has imposed upon itself for purposes of soliciting monies for regional conferences. W.Va. Code § 6B-2-5(c)(6). Pursuant to this provision in the Ethics Act, members of the Legislature may only solicit for regional conferences in writing. Additionally, such solicitations are required to contain the disclaimer that, "This solicitation is endorsed by [name of member]. This endorsement does not imply support of the soliciting organization, nor of the sponsors who may respond to the solicitation. A copy of all solicitations are on file with the West Virginia Legislature's Joint Committee on Government and Finance, and with the Secretary of State and are available for public review." These same requirements are imposed upon elected members of the Board of Public Works. W.Va. Code § 6B-2-5(c)(7).

Through its proposed rule and response to public comments, the Ethics Commission has clearly articulated its position on this matter. It now leaves to the sound discretion of the Legislature the determination of whether the proposed Legislative Rule should have the force of law through Legislative passage and Executive approval.


Lewis G. Brewer
Executive Director


Theresa M. Kirk
Legal Counsel

⁵ In West Virginia, most law enforcement titles and ranks are statutorily created.

(a) Chapter 15, Article 2 establishes the organization of the WV State Police and the ranks within the membership;

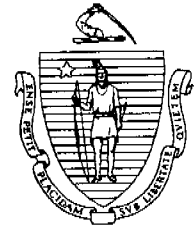
(b) The West Virginia Code sets forth that a "Deputy sheriff" means any person appointed by a sheriff as his or her deputy whose primary duties as deputy are within the scope of active, general law enforcement and as such is authorized to carry deadly weapons, patrol the highways, perform police functions, make arrests or safeguard prisoners... WV ST § 7-14C-2;

(c) The West Virginia Code also authorizes municipalities to have a paid police department. W.Va. Code § 8-14-12



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-371-9500, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-93-6

FACTS:

You are a police officer in the Town of ABC and the President of the ABC Police Relief Association (the Association). The Association is a private, voluntary organization of ABC police officers that raises funds for charitable purposes, including a drug and alcohol abuse prevention program and special events for children.

The Association wishes to solicit donations from ABC residents and businesses. It may wish to employ a professional solicitor for this purpose.

QUESTION:

What limitations does G.L. c. 268A establish for your and the Association's solicitation activities?

ANSWER:

You and the Association may solicit funds from the public, but §23(b)(2) of G.L. c. 268A prohibits police officers,^{1/} in their solicitation of funds from the public, from:

1. Making statements or engaging in conduct exploiting official police powers, i.e., that would lead reasonable persons to infer that good or bad consequences in official dealings with the police might flow from a decision whether or not to donate.

2. Using official resources of substantial value, including paid time as on-duty police officers, or (even when off-duty) official telephones, copying or fax machines, other public supplies or facilities, official stationery ~~or letterhead, any municipal seal or coat of arms, or badges or uniforms.~~

In addition, G.L. c. 68, §§18-35^{2/} and G.L. c. 41, §98E,^{3/} statutes not administered or enforced by this Commission, apply to your and the Association's solicitation activities.

DISCUSSION:

You and other ABC police officers are "municipal employees" for the purpose of the state conflict of interest law. G.L. c. 268A, §1(g). As such, you and they are subject to §23(b)(2) of the conflict law, which prohibits current public employees from using their "official position[s] to secure for [themselves] or others unwarranted privileges or exemptions which are of substantial value and are not properly available to similarly situated individuals."

Whenever public employees solicit anything of substantial value^{4/} for a non-governmental purpose, the Commission has consistently scrutinized the solicitation for compliance with §23(b)(2). In particular, we have examined whether public employees are soliciting from those with whom they have official dealings, and whether the solicitation is using public resources for non-governmental purposes. We must therefore analyze your solicitation activities in both of these respects.^{5/}

1. Soliciting from regulated persons.

The Commission has consistently held that §23(b)(2) prohibits public employees, in both their public and

MGLA 268A §23

private capacities, from soliciting anything of substantial value from persons within their regulatory jurisdiction⁸ for a non-governmental purpose, unless the solicitation is specifically authorized by law.⁷ See, e.g., *EC-COI-92-28* (Governor may not solicit donations to non-governmental entity from corporations subject to state regulation); *92-12* (state board member prohibited from privately soliciting individuals under his regulatory authority); *92-2* (legislator's financial aid committee prohibited from soliciting anyone with an interest in legislative business, broadly defined); *90-9* (state official prohibited from soliciting vendors of his agency to support political candidate). The Commission has based this conclusion on its long experience with what the opinions just cited call the "inherently exploitative" or "inherently coercive" circumstances of such solicitations. For examples of Commission enforcement actions presenting such circumstances, see *In re Pezzella*, 1991 SEC 526, 528 (disposition agreement fining Governor's staff member for unauthorized solicitation of Governor's appointee to advance friend's private interest); *In re Singleton*, 1990 SEC 476 (disposition agreement fining a fire chief for attempting to use his official position to solicit private business); *In re Burke*, 1985 SEC 248 (fining official for using his official position to obtain access for private purposes to persons his agency regulated);⁹ *In re Lannon*, 1984 SEC 208 (disposition agreement fining school superintendent for soliciting loans from subordinate teacher);⁹ *In re Antonelli*, 1982 SEC 101 (fining county treasurer for soliciting personal loan from banks seeking deposits of county funds); *Compliance Letter 82-2*, 1982 SEC 80 (soliciting city employees, vendors and city-regulated businesses for contributions to Mayor's wife's "birthday party" violated predecessors of §23(b)(2), [3]).¹⁰

~~Our usual concern about solicitation by public employees is exacerbated here by the substantial and~~
~~pervasive authority of police officers over all residents of and businesses in the municipality, including the statutory~~
powers to carry weapons and make arrests, see G.L. c. 41, §98, and to make warrantless administrative inspections of certain regulated businesses. See G.L. c. 140, §66; *Commonwealth v. Eagleton*, 402 Mass. 199 (1988). In this connection, we note that the Attorney General's Division of Public Charities has officially warned of the special problems that solicitations by police and firefighter organizations pose, and has cautioned citizens "not [to] feel threatened or intimidated by [such a] solicitation, or pressured to make a donation." Attorney General, *Report on Charitable Fundraising* 8 (Nov. 1992).

On the other hand, the Legislature has specifically addressed these solicitations by enacting G.L. c. 41, §98E, which provides in its entirety: "No person or persons shall solicit the public in any manner or form using the word 'police' or 'firefighter' or any derivative thereof without using the name or names of the city or town police or firefighters organization sponsoring such solicitation." Conscious of our duty to construe statutes relating to the same subject together "so as to constitute an harmonious whole consistent with the legislative purpose," *Saccone v. State Ethics Commission*, 395 Mass. 326, 334 (1985), we recognize that §98E in effect condones some solicitations by police and firefighter organizations, subject to the identification requirement it establishes. See *EC-COI-92-28* n.4; *92-12* n.10 (both suggesting that campaign finance law's exemption of elected officials from prohibition against compensated public employees' soliciting or receiving political campaign contributions, in G.L. c. 55, §13, in effect generally allows such officials to solicit political contributions in their private capacities for purpose of §23(b)(2)). In effect, notwithstanding our usual "per se" interpretation of §23(b)(2) as prohibiting all unauthorized solicitations by public employees of those they oversee, §98E allows private solicitations by police and firefighter associations under certain conditions.

It does not follow from §98E, however, that no other statute regulates solicitations by associations of police officers. "Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect." *Kargman v. Commissioner of Revenue*, 389 Mass. 784, 788 (1983). Certainly, G.L. c. 68, §§18-35 apply; these statutes are concerned, for example, with false or deceptive solicitations, and are enforced by the Attorney General's Division of Public Charities.

The same rule of construction applies to §23(b)(2) of the conflict law. See, e.g., *EC-COI-92-12* (comprehensive statutory regulation of campaign finance in G.L. c. 55 did not prevent applying §23(b)(2) to soliciting campaign contributions in some contexts). This is especially true in view of the courts' consistent recognition of the conflict law as "comprehensive legislation [enacted to] strike at . . . inequality of treatment of citizens and the use of public office for private gain." *Everett Town Taxi, Inc. v. Board of Aldermen of Everett*, 366 Mass. 534, 536 (1974); *McMann v. State Ethics Commission*, 32 Mass. App. Ct. 421, 427 (1992) (both quoting Special Commission on Code of Ethics, *Final Report*, H. 3650, at 18 [1962]). Here, §23(b)(2) at least forbids statements or conduct by police officers that exploit their official powers. Since §23 (as appearing in St. 1986, c. 12, §14) imposes liability for violations committed "knowingly, or with reason to know," the test is not whether the public employee subjectively intends the statement or conduct to be coercive, but whether reasonable

persons would infer from it that good or bad consequences in their official dealings with the police might flow from their decisions whether or not to donate.

Thus, examples of prohibited solicitation activities would include: representing that a donation (including purchasing tickets to a fundraising event or purchasing an advertisement in a publication) could result in preferential police treatment, or that failure to donate could result in police reprisals;^{11/} implying that a decision whether or not to donate could affect the timing or quality of police services;^{12/} and the practice (mentioned in our public request for comments, *see note 5 supra*) of sending stickers or decals intended for display on donors' private automobiles, from which, in our judgment, reasonable persons would infer the hope of favorable treatment — or of avoiding adverse treatment — by the police.^{13/} On the other hand, if police officers (personally and through their association and agents, *see part 3 below*) do not engage in such prohibited activities, and do not use official resources (*see part 2 below*), G.L. c. 268A will not prohibit them from soliciting funds for their private association from the public — whether through advertisements, telephone or door-to-door solicitations, or fundraising events.

2. Prohibited use of official resources.

We have also consistently held that §23(b)(2) prohibits public employees from using official resources for private purposes. *E.g.*, *Commission Advisory No. 4 (Political Activity)* (1992) (public resources “are intended for the conduct of public business, not for advancing the personal, private or political interests of public employees”); *Public Enforcement Letter 92-3* (“public resources may only be allocated for public business, and may not be utilized to address individual concerns of public employees”); *EC-COI-92-5* (using state seal or state coat of arms for campaign purposes “benefits a personal rather than a public interest,” hence prohibited by §23(b)(2)).

Far from limiting this principle, G.L. c. 41, §98E (quoted in part 1 above) supports it. That statute seems clearly intended to distinguish police officers' private solicitations from their public duties; that is the same purpose served by §23(b)(2) in prohibiting use of public resources for private purposes. While we recognize and commend the many beneficial purposes for which police associations raise funds, §23(b)(2) — and the principle it embodies, of public employees' accountability for their use of public resources — applies “even if [these purposes] are public-spirited in nature.” *Public Enforcement Letter 92-3*.

Therefore, police officers may not solicit for their private association while on duty. Even when off duty, they may not use official resources of substantial value, including official telephones, copying or fax machines, or other public supplies or facilities.^{14/} They may not use official stationery or letterhead, any municipal seal or coat of arms, or badges or uniforms, in their private solicitation activities, because these public insignia “could reasonably be perceived as an endorsement by a public agency of the solicitation[,] give[] the appearance that the solicitation is officially sponsored [or] foster a sense of credibility [that] the solicitation might not otherwise have had.” *EC-COI-92-5*. *See Public Enforcement Letter 89-4*, 1988 SEC 369; *In re Buckley*, 1983 SEC 157. For similar reasons, they may not use their official police rank,^{15/} since we have found an appointed public employee's official title to be a public resource for this purpose. *EC-COI-92-39* and cases cited.

3. Application to associations and agents.

Section 23(b)(2) applies not only to personal acts of public employees, but also to acts of their agents, so long as the public employees know or (in the words of §23) have “reason to know” of those acts taken on their behalf. Thus, we have previously applied §23(b)(2) to public employees' associational activities. In *Compliance Letter 82-2*, 1982 SEC 80, we attributed to Boston Mayor Kevin White the solicitation activities of a “Birthday Celebration Committee” composed of his close associates, since he knew the general nature of the solicitation activities, although he did not know exactly whom the “Committee” was soliciting.^{16/} More recently, in *EC-COI-92-23*, we advised Town Clerks that they would violate §23(b)(2) if their private association accepted funds from a private news service in return for the Clerks' calling the service with immediate election results.

We acknowledge the constitutional rights to associate and to solicit funds for charitable purposes. *See, e.g.*, *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). However, narrowly tailored regulation is permissible to promote the compelling government interest in the integrity of public employees. *See Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *National Treasury Employees Union v. United States*, 788 F. Supp. 4 (D.D.C. 1992). There is an important public interest in regulating even the off-

duty activities of police officers to promote public integrity, especially if (as here) the activities do not constitute "pure" speech. See *O'Brien v. DiGrazia*, 544 F.2d 543 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977); *Broderick v. Police Commissioner of Boston*, 368 Mass. 33 (1975); *Wilmarth v. Town of Georgetown*, 28 Mass. App. Ct. 697, 701-03, *further appellate review denied*, 408 Mass. 1103 (1990). We are satisfied that our narrow application of §23(b)(2) here, to prohibit both specific exploitation of official police powers and the use of official resources for the purpose of private solicitations, easily meets the constitutional standard.^{17/}

Therefore, this opinion's advice applies to police officers when acting through the Association and its agents, including any "professional solicitor" (defined in G.L. c. 68, §18) that it retains. We note that G.L. c. 68, §22 requires most contracts between charitable organizations and professional solicitors to be in writing and to be filed with the Attorney General's Division of Public Charities, and you would be well advised to include contract provisions that incorporate this opinion's conclusions in order to indicate reasonable efforts to seek compliance with §23(b)(2) by the association's professional solicitor.

DATE AUTHORIZED: January 26, 1993

^{1/}This advice applies to police officers' private solicitation activities whether taken personally or through their private association or agents, acting on their behalf with their knowledge or reason to know, as discussed in part 3 below.

^{2/}These statutes regulate charitable solicitations in general and are enforced by the Attorney General. You may obtain information about them from the Attorney General's Division of Public Charities.

^{3/}As discussed in part 1 below, §98E requires anyone soliciting the public using the word "police" or "firefighter" (or any derivative thereof) to use the name of the police or firefighters organization (here, the "ABC Police Relief Association") sponsoring the solicitation.

^{4/}Anything valued at \$50 or more is "of substantial value." *Commonwealth v. Famigletti*, 4 Mass. App. Ct. 584, 587 (1976); *Commission Advisory No. 8 (Free Passes)* (1985). Since amounts solicited for a common purpose are aggregated, *see EC-COI-92-23; 92-2*, we assume in this opinion that the total value of all the donations you solicit will be at least \$50 and thus "of substantial value."

^{5/}Because the application of G.L. c. 268A to solicitations by associations of police officers is an important question of first impression, we publicly invited legal arguments from any interested person. We acknowledge helpful submissions by the law firms of Sandulli, Grace, Shapiro & Horwitz (on behalf of the Massachusetts Coalition of Police, AFL-CIO); Roche, Carens & DeGiacomo; Brooks & Lupan; and Cosgrove, Eisenberg & Kiley, P.C. (on behalf of the Massachusetts Police Association).

^{6/}The Commission has reached the same conclusion about soliciting others with whom a public employee has official dealings, including subordinate employees and agency vendors. *See EC-COI-92-7*.

^{7/}General Laws c. 268A, §3(b) also prohibits a public employee from either soliciting or receiving anything of substantial value "for himself" from such persons. *See EC-COI-92-2*. Because your and the Association's solicitations seem from your facts to be on behalf of others than the member police officers themselves, this discussion focuses on §23(b)(2).

In addition, §23(b)(3) may apply. It prohibits a public employee from engaging in conduct that gives a reasonable basis for the impression that any person or entity can improperly influence him or unduly enjoy his favor in the performance of his official duties, but allows the employee to dispel any such impression by written public disclosure. However, its requirements are no more restrictive here than those of §23(b)(2), and in any event could be satisfied by written public disclosure to the police officers' appointing authority.

^{8/}The Commission relied primarily on §3 in this case, which was decided at a time when the Commission lacked authority to enforce §23. *See Saccone v. State Ethics Commission*, 395 Mass. 326 (1985); St. 1986, c. 12, §2, 6 (amending and reenacting §23 and conferring Commission jurisdiction to enforce it as of April 8, 1986). *See also In re Burke*, 1985 SEC 248, 249 nn.4 & 5, 253 n.12.

^{9/}The Commission relied on the predecessor of §23(b)(3) here, in circumstances where it would also find a violation of §23(b)(2) today. *See EC-COI-92-7*.

^{10/}We decline to abandon this longstanding interpretation of §23(b)(2) and its predecessors, as we have been urged on various grounds. In particular, any interpretation of "privileges" that excludes gifts of money is belied by the Legislature's 1986 reenactment of what is now §23(b)(2), *see note 8 supra*, adding the "knowingly, or with reason to know" and "substantial value" requirements, following our well publicized *Compliance Letter 82-2*. *See Lorrillard v. Pons*, 434 U.S. 575, 580-81 (1978) (when, after agency construes statute, legislature reenacts it without material change, legislature is presumed to adopt agency construction); *Commonwealth v. Miller*, 385 Mass. 521, 524 (1982) (same for judicial construction); 2B N. Singer, *Sutherland on Statutory Construction* §49.09 (5th ed. 1992). Furthermore, the "privilege" here may be best viewed, not as the gifts of money themselves, but as the special consideration from potential donors that police officers are able to obtain for private purposes by exploiting their official powers. Finally, any reading of the phrase "similarly situated individuals" (also added in the 1986 reenactment) to refer only to other police officers would deprive the

statute of much of its meaning; instead, we read it here to apply to others soliciting charitable donations.

¹¹In a civil action by the Attorney General under G.L. cc. 68, 93A, the Superior Court recently enjoined a professional solicitor for a police organization from "falsely" making such a representation. *Commonwealth v. G.M.C. Advertising, Inc.*, No. 91-3472 (Mass. Super., Suffolk Apr. 22, 1992). Our construction of §23(b)(2) forbids such representations whether they are true or false, if reasonable persons would infer that they might be true.

¹²See, e.g., *In re Singleton*, 1990 SEC 476, 477-78 (fire chief told contractor from whom he was soliciting private construction business that "it could take forever to obtain [necessary Fire Department] inspections").

¹³In *State Police Ass'n of Massachusetts v. Massachusetts Police Ass'n*, No. 79-2219 (Mass. Super., Middlesex 1979), a consent judgment enjoined an organization of municipal police officers and its professional solicitor from (among other things) falsely representing that automobile bumper stickers sent to donors would give them "a break" if stopped by a state police officer, a representation which the plaintiff state police union alleged to be the defendants' practice. We also note the following statement in a January 15, 1993 letter to this Commission from Kenneth T. Lyons, National President, International Brotherhood of Police Officers, NAGE, AFL-CIO: "I can assure you that many citizens respond . . . because they believe the window decals prove beneficial if they are involved in any kind of traffic violation."

¹⁴For example, the telephone number printed on the Association's stationery appears to be that of the Police Department. This use of public resources for your Association's private purposes must be discontinued (unless authorized by statute or bylaw).

¹⁵We believe they may truthfully answer questions asking whether they are police officers.

¹⁶By reenacting what is now §23(b)(2) following this widely publicized compliance letter, adding only requirements that would not alter the result, the Legislature is presumed to have adopted this construction of §23(b)(2). See note 10 *supra*.

¹⁷Since your facts indicate that the Association raises funds solely for charitable purposes, we need not consider here what effect, if any, G.L. c. 150E might have on our analysis if the Association engaged in collective bargaining.

ADVISORY OPINION NO. 2005-02

Issued On April 7, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Board of Health asks whether it may solicit funds from local businesses, groups or individuals to supplement public health programs.

FACTS RELIED UPON BY THE COMMISSION

A county or city may establish a local board of health in accordance with the provisions of W.Va. Code § 16-2-1 *et. seq.* The legal powers and duties of local boards of health include: protecting the health and safety of citizens of West Virginia, establishing and operating basic health services and programs, adopting rules consistent with state public health laws, assessing and collecting fees for permits and licenses, and enforcing the public health laws of this state. W.Va. Code 16-2-11.

CODE PROVISIONS RELIED UPON BY COMMISSION

W.Va. Code 6B-2-5 (b)(1) provides in pertinent part that... 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. 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© *Gifts*. – (1) 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...

ADVISORY OPINION

The Ethics Act prohibits public servants from soliciting gifts unless the solicitation is for a charitable purpose. A gift is something given voluntarily and without something given in return. Monetary contributions from local businesses, groups or individuals fall within the definition of gifts. The County Board of Health may solicit monetary contributions if the proceeds will be used for a charitable purpose.

Because the Ethics Act contains no definition of "charitable purpose", the Commission must decide, on a case-by-case basis, which activities are charitable. As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and, (2) Those which serve a public purpose or provide a significant public benefit. In past opinions, the Commission has held that the following programs or activities fall within these exceptions: A conference on Adult and Elder Abuse and

Neglect (Committee of State and County Public Servants - A.O. 94-14); An information booth promoting environmental protection and conservation. (A.O. 95-29); Programs to benefit disadvantaged youth (City Recreational Department - A.O. 93-08); Scholarships for the poor or disadvantaged (Association of public servants - A.O. 96-36); A bicycle safety program (City Chief of Police - A.O. 97-19); and, A program aimed at providing health care services to financially disadvantaged children (State Health Care Agency - A.O. 99-37).

Based upon its past opinions, the Commission finds that public health programs, which serve to protect the health and safety of West Virginia citizens, fall within the categories of activities or programs which are charitable. While funds which are received through solicitations may be used to support these programs, the overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying the internal administrative costs of the Board of Health. (See A.O. 95-43)

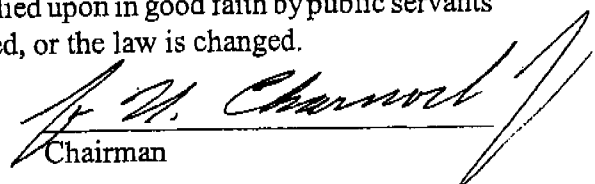
Even if the solicitation is permissible, the Board of Health must comply with other rules governing solicitations in order for its actions to comply with the Ethics Act. In soliciting businesses or companies, the Board of Health should not endorse a particular product or business. This action would constitute the prohibited use of office for private gain.

The Board of Health also regulates individuals and businesses. To avoid an appearance of conflict, members of the Board of Health and its employees should not orally solicit donations from individuals or businesses which the Board of Health regulates. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated individuals or entities, would be permissible. The written solicitation may also be in the form of a newspaper advertisement.

Any solicitations should be conducted and acknowledgments made in a fair and evenhanded manner. Each solicitation should contain a statement setting forth that donations are purely voluntary. Further, the Board of Health should not accept donations from any businesses or individuals against which the Board of Health has a pending enforcement proceeding or action.

In conclusion, it would not be a violation of the Ethics Act for the County Board of Health to solicit funds for public health programs, provided that the solicitations are conducted in a manner which is consistent with the guidelines summarized herein.

This advisory opinion is limited to questions arising under the Ethics Act, W.Va. Code §§ 6B-1-1, *et seq.*, 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.


Chairman

The Intelligencer & Wheeling News-Register

FIRST THINGS FIRST...

Monday, May 21, 2007

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SUBMIT NEWS

News

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Decals Legitimate Ethics Concern

By The Intelligencer

Most of us have gotten those telephone calls from paid solicitors seeking donations for charities supported by — or sometimes of benefit to — law enforcement officials. Sometimes the solicitors remind us that a donation will mean we'll be sent decals we can display on our cars, noting that we've made a contribution.

Come on, now. Let's have a show of hands from those whose minds have been crossed by the idea, just for a split second, that such a decal might be a nice thing to have the time we're pulled over for a traffic offense. We thought so.

Local and state police officers and sheriff's deputies insist that the decals don't mean anything to them. If you're guilty of a traffic offense, you're going to get a ticket, they emphasize. And we've never met anyone claiming to have gotten out of a ticket simply because he had one of the decals on his car.

Still, the thought does cross some of our minds ...

Members of the West Virginia Ethics Commission don't think we should have those thoughts. They don't think law enforcement agencies or anyone soliciting for them should be permitted to hand out the decals, as a matter of fact.

Ethics commission members want to go even further than that. They don't think law enforcement officers should be permitted to solicit for contributions to any cause while in uniform — and should not be allowed to identify themselves as officers when seeking donations via telephone.

We agree strongly with the commission's point that law enforcement officers are not to be asked for donations among public servants in terms of whether members of the public feel pressured or asked for donations. As one commission member, Jack Bucklew, put it, "It's unfair because they can put you in jail." Bucklew ought to know: He once served as commander of the West Virginia State Police.

We can understand police officers who maintain that they don't intend to make potential donors feel under any obligation. And various police agencies sponsor a variety of worthwhile charities. We'd hate to see donations to them dry up.

At the same time, Ethics Commission members are correct in their contention that members of the public should feel no compulsion to donate to law enforcement officials. Surely some means of allowing them to continue to solicit — while dropping the decals — can be found.

- National
- International

Sports

- Local
- WV Sports
- OH Sports
- National
- Sports Columns
- Ogden 20K Classic

SUBMIT SPORTS

Arts & Living

- Engagements
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- Features

SUBMIT A&L NEWS

Classified

- Local Classifieds
- National Classifieds
- OV Real Estate

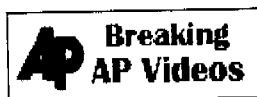
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Charleston Daily Mail

Fundraising is very unseemly

Troopers and the Ethics Commission take steps in ending this activity

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FOR years, the West Virginia Troopers Association has used telemarketing to peddle its products, which included car window decals. People bought the darned things to demonstrate on the road that they supported the people who might stop them.

It's always been a little bit icky. Now both the association and the state Ethics Commission have taken steps to curtail this fundraising activity.

The troopers group will switch from calling people at home to soliciting money by direct mail, said James Merrill, association president, who is a captain in the State Police.

"I think if this is less harassing on people, it's the way we want to go," Merrill said.

This is a long overdue change. The telemarketing company took 80 percent of the money it raised, while the troopers group received only 20 percent.

That is remarkably inefficient. Basically, the troopers have licensed their name to an out-of-state company.

Few people in the public realize that the company calling gets four times as much as the troopers. Ending the practice comes only after 12 years of this strange arrangement.

Meanwhile, the state Ethics Commission is about

to crack down on the fundraising abuses of associations of police, deputies and troopers. It is ironic that some of those in law enforcement are peddling window decals and bumper stickers.

Ethics Commission member Jack Buckalew, a retired superintendent of the State Police as well as a former state senator, blasted this fundraising.

"I think it's just totally unethical for a law enforcement group to use the authority of that office," Buckalew said. "They're using that influence, and it's just not right."

The commission wants to ban officers from soliciting for money whether in person or by phone. The commission also wants to ban the decals and bumper stickers, which some people believe will help them dodge tickets for speeding.

Other public officials may use their titles when soliciting funds. Officers of the law are different than other public officials, said Buckalew, who has been both.

"It's unique because they can put you in jail," Buckalew said.

Good point. It's time it was made.



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