

ADVISORY OPINION NO. 99-28

Issued On October 7, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Director of a Regional Service Agency (RESA)** asks whether he may accept a computer software company's invitation to attend, at its expense, a business conference in California.

FACTS RELIED UPON BY THE COMMISSION

The computer software company sells instructional software for children. The company has extended an invitation to the Director to attend a conference in California at the company's expense. The trip would allow the Director to learn more about a new instructional product being offered by the company. Two of the counties which comprise the RESA currently use and are pleased with software supplied by the company.

The conference would run from noon on Thursday to noon on Saturday. The trip would take four, perhaps five days, depending on flight arrangements. The Director expects to learn more about the company's products, including the theoretical concepts upon which they are based. The conference includes "quality programs on other significant educational topics."

The company has given the Director an access code so that he can use and experiment with its software programs over the Internet. Company sales representatives could be expected to make a presentation at the RESA's offices, or in Charleston, to provide additional product information to the requester, other interested RESA personnel and its board members.

WV CODE PROVISIONS RELIED UPON BY COMMISSION

WV Code 6B-2-5(c) (1) provides in pertinent part that...No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

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

WV Code 6B-2-5(c)(2) provides in pertinent part that...The provisions of subdivision (1) of this subsection do not apply to:

- (C) Unsolicited gifts of nominal value.

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The Ethics Act provides that public servants may not accept gifts of more than nominal value [\$25 or less] from interested persons. Interested persons include lobbyists and those who do business with, are regulated by, or are otherwise financially interested in the activities of the public servant's agency.

The Act's prohibition against accepting gifts applies to individual public servants and not to public agencies. An agency may accept a gift from an interested person - even though it is of more than nominal value. Travel which results in more benefit to the agency than the public servant will be considered "official" travel and will be treated as a gift to the agency. The personal benefit the individual traveler receives is not objectionable - it is legitimized by the overriding public benefit to the agency.

In Advisory Opinion 92-35 the Ethics Commission ruled that travel which resulted in a significant increase in the traveler's job related skill or knowledge could be considered "official" travel and established the following criteria for determining whether travel would be considered "official" travel:

1. The trip must be necessary to fulfill an existing agency need.

The first consideration must be whether the trip will significantly enhance the traveler's occupational skill or knowledge or provide important information needed by the agency to meet its official mandate. Public employees and officials who have been offered trips should consult with their supervisor or agency head for guidance in making this judgment.

If the trip was conceived and scheduled by the agency prior to and independent of the offer of payment from a third party, then it is likely that the trip is necessary to the agency's official activities.

*The skill, knowledge or information to be gained from the trip should meet a clear **immediate** need of the agency. The information should be of immediate value to current or planned activities of the agency rather than theoretically valuable to activities that are neither current nor planned for the foreseeable future.*

2. The trip must be appropriate for the proposed traveler.

A trip is appropriate for the traveler who needs and will use the information or job skill enhancement or who is the agency employee most suitable to acquire and transfer the information or skill to other appropriate agency personnel.

3. The site of the proposed trip must be appropriate.

Central to this inquiry is a consideration of whether the trip is a reasonable means of meeting the agency's needs. For example, it would not be reasonable for the agency to send its personnel to an out of state resort to obtain information that is readily available locally. Similarly, it would not be reasonable to permit an interested person to provide agency personnel such a trip.

4. The trip must offer a reasonable return on the time spent.

The trip should represent a reasonable investment of the traveler's time when weighed against the information acquired or the degree of improvement in job skills. A five day trip comprised of two travel days and three days of light class work would not be a reasonable way to acquire information or skills which could be adequately presented in a one day seminar.

This consideration also applies to part-time officials and employees who might travel outside official work hours. If they accept inappropriate free trips offered because of their public positions they may violate the Ethics Act's prohibition against using the prestige of office for private gain.

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

If the incidental personal benefit to the traveler outweighs the benefit to the agency, then the trip is in reality a gift to the traveler and not the agency. In such a case the trip should not be accepted because it is a gift to the individual of more than nominal value.

A safe rule would be to limit acceptance to only expenses that the agency itself would accept for reimbursement, i.e. reasonable food, travel, lodging, and attendance fees. First class airfares, deluxe accommodations, and other perks not associated with the basic travel, meals, and lodging required by the trip would increase the incidental benefit to the traveler.

Because the trip offers the Director personal benefits of more than nominal value, the Ethics Act says he may not personally accept the offer. However, if the travel will result in overriding public benefit to the agency - the agency may accept the gift of official travel and the greater public benefit to the agency legitimizes the private or personal benefit to the traveler.

The first question to consider is whether the trip is necessary to fulfill an existing agency need. If the trip satisfies this and the other criteria established by the Commission in A.O. 92-35, then the Director may accept the offer.

The Director wants to attend the conference for two reasons. First he will learn more about the company's new product and the educational concepts and principles underlying the product. Second, he expects the conference to provide general information on other significant educational topics.

The Director and other RESA personnel can, without any travel, use and experiment with the new product on the Internet by using the access code supplied by the company. However, the Director believes that only the trip will afford him the chance to learn about the underlying educational concepts and principles of the software, information he feels the company's local sales representatives are not competent to understand and explain.

The trip may enhance the Director's general knowledge of significant educational topics. Travel to maintain or enhance general professional competence may be a legitimate expenditure of an agency's own funds, but it does not satisfy the more demanding standards established for accepting a gift from an interested person.

The Commission's criteria require that the trip be necessary to fulfill an existing agency need. The skill, knowledge or information to be gained from the trip should meet a clear **immediate** need of the agency. The information should be of immediate value to current or planned activities of the agency rather than theoretically valuable to activities that are neither current nor planned for the foreseeable future.

As far as its immediate needs are concerned, the trip offers the RESA little beyond helping the Director understand the teaching concepts and principles underlying this one vendor's software program. It must therefore appear that the RESA has a clear and immediate need for the Director to understand those concepts and principles, if the offer is to be accepted.

Prior to the company's offer, the RESA had no plans to seek out and evaluate available software programs. It appears that the RESA will not accept the opportunity to attend the conference, if it must pay to attend. There is no suggestion that the RESA is willing to pay to have the requester make similar fact finding visits to other software vendors.

Based on the facts presented, the Commission finds that the proposed trip is not necessary to fulfill an existing agency need and therefore does not rise to the level of "official travel". It is not necessary to consider the other criteria. Because the trip lacks the overriding public benefit of official travel, it would be a violation for the requester to accept the company's offer.


Chairman