

**ADVISORY OPINION NO. 2004-09**

**Issued On June 3, 2004 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

A **State University** asks for guidance on participating in a wellness program, and whether the program coordinator can receive a free annual membership to the YMCA.

**FACTS RELIED UPON BY THE COMMISSION**

A local YMCA is offering a ten per cent (10%) discount on memberships, if paid through payroll deduction. Any employer may participate, so long as a minimum of 50 employees join together. The University is permitted to "partner" with another state agency in the area.

The YMCA asks that an employee of the institution serve as coordinator, responsible for publicizing the discount program in an effort to obtain the necessary 50 memberships. The YMCA offers a free annual membership, valued at over \$400, to the coordinator. An employee selected by the Classified Staff Council has agreed to act as coordinator, and inquires if he may accept the free membership.

**CODE PROVISIONS RELIED UPON BY THE COMMISSION**

WV 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 .....

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 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.

**ADVISORY OPINION**

Ordinarily, the Ethics Act prohibits public servants from using their public positions for their own private financial gain or the private financial gain of another person. However, in Advisory Opinion

2001-19, the Commission determined that this prohibition does not apply to a wellness program which is part of an effort to "reduce the agency's overall health care delivery cost, even if the program results in immediate financial gain to its members."

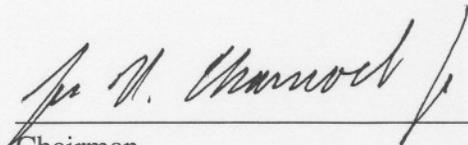
The Commission further determined that the prohibition in the Ethics Act against accepting gifts does not apply in a situation where the financial benefit to public servants involves an inducement to participate in a program which ultimately benefits their agency.

Further, in Advisory Opinion 2002-04, the Commission authorized a County Commission to underwrite YMCA membership for county employees and county officials, noting that "wellness programs are being recognized as part of an agency's efforts to increase the health and welfare of its personnel, while reducing agency expenses."

For these same reasons, employees of a State University may participate in this discount program without violating any prohibition in the Ethics Act. Moreover, because the agency employer is the primary beneficiary of significant participation in this wellness program, an employee may serve as coordinator, either on the employer's time or on his own time.

However, an employee serving as coordinator for this program on government time is subject to the prohibition against using his public position for private gain. Therefore, just as state employees are prohibited from cashing in frequent flyer miles from official travel for their own benefit, an employee authorized or assigned to perform the coordinator duties on his employer's time is prohibited from accepting a free YMCA membership.

In Advisory Opinion 90-161, the Commission concluded that a City Councilman selling tickets to a private University's basketball games could accept free tickets valued at \$700 as an incentive for selling a certain number of tickets. Likewise, if the employee here wishes to volunteer his personal time to serve as coordinator, the YMCA membership would be considered compensation for his services, and not a gift from an interested person.

  
Chairman