

ADVISORY OPINION NO. 2004-22

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks if it may sell electronic games to school employees and parents at a discounted price obtained to conduct a trial health promotion initiative.

FACTS RELIED UPON BY THE COMMISSION

The State Agency is responsible for providing health care services to public servants, including most public school employees. The Agency and a State University are jointly conducting a pilot study to determine whether a particular electronic game engaging participants in aerobic dance activity can serve as an effective tool in reducing childhood obesity.

The University has negotiated a 40% price reduction with the manufacturer to obtain the game systems which are being provided for use by the 85 students and two public school physical education programs participating in the test program. Parents of students not selected for participation in the program and school staff members have asked to purchase these games through the Agency at the price obtained under the pilot program.

CODE PROVISIONS RELIED UPON BY THE 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. . . .

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W. Va. Code § 6B-2-5(b)(1) prohibits public servants from using their public positions for private gain. The Ethics Commission has generally ruled that a public servant's effort to take personal advantage of a discount obtained by an agency would constitute use of office for private gain.

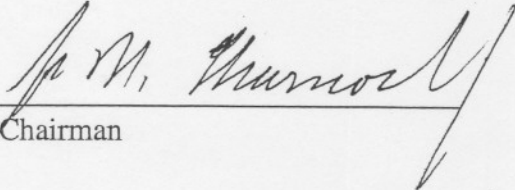
For example, in Advisory Opinion 96-08, the Commission observed that "when a fringe benefit that is not ordinarily available to the general public is used as a perquisite for agency employees, a distinct appearance of impropriety is created. This appearance is based on the public's inevitable perception that public servants are using their unique position of public trust for self-enrichment."

In Advisory Opinion 92-15, the Commission determined that it would be a violation of the prohibition in W. Va. Code § 6B-2-5(b)(1) for public employees to purchase merchandise through their agencies at the price negotiated under a State contract. The Commission reached a similar

result in Advisory Opinion 95-14, rejecting a request to permit public employees to purchase merchandise directly from vendors at the prices negotiated for purchases under a State contract. The Commission concluded that "since the public generally is not permitted to buy at State prices, it would be a use of office for private gain for a public employee to use his or her position to make personal purchases at State contract prices."

The Commission has further recognized that there are certain situations where discounts may be pursued by a State Agency, and exercised by eligible public employees, where the government expects to obtain a significant benefit through employee participation in the discounted activities. This exception to the general rule was explained in Advisory Opinion 2001-19 where the Commission approved a State Agency's proposal to obtain discounts from businesses providing health-related products or services as part of an effort to reduce the government's health care costs through a comprehensive wellness initiative.

This particular proposal involves a game system that is being evaluated to determine whether it is a cost-effective tool for promoting beneficial aerobic activity in overweight children. **Absent a reasoned medical determination that this system promotes wellness and reduces health costs for the State**, authorizing discounted purchases by employees of the State Agency, State University or participating boards of education, would violate the prohibition against use of public office for private gain.


Chairman