

## Advisory Opinion 2018-02

Issued on March 1, 2018, by

The West Virginia Ethics Commission

### Opinion Sought

A **County Commission** asks whether it may use public funds to buy lunches for county elected officials and their staffs for an annual working lunch meeting.

### Facts Relied Upon by the Commission

The County Commission (“County Commission” or “Requester”) wants to have an informal working lunch meeting with each elected county official (Sheriff, Assessor, County Clerk and Circuit Clerk) and their staffs. There will be a separate lunch meeting for each office.

The purpose of each lunch meeting is for the County Commissioners to learn more about the county offices and any concerns the elected officials or employees may have about the work of their respective offices. The Requester further states: “The overall intent of these meetings is to promote communication among the offices and good relations.”

The Requester wants to have the lunch meetings at a local restaurant. The stated purpose for holding the meetings at a local restaurant during the lunch hour is to enable the public officials and employees to speak freely with the County Commissioners and not be distracted by their job duties, including answering phone calls or assisting citizens who may visit to their county offices.<sup>1</sup>

The Requester wants to use county funds to pay for the lunches. There will only be one lunch per County office for this calendar year. The estimated cost per attendee at each lunch is \$15. The County Commission may host a similar lunchtime meeting in future calendar years for the same purpose.

### Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) provides, in pertinent part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does

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<sup>1</sup> The Requester understands that if it holds these meetings, it must determine if the attendance of a quorum of County Commissioners at the meetings complies with the Open Governmental Meetings Act.

not constitute use of public office for private gain under this subsection. 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.

## **Advisory Opinion**

### **Private Gain**

The Ethics Act, at W. Va. Code § 6B-2-5(b)(1), prohibits public officials from knowingly and intentionally using their public office for their own or another person's private gain. This Code section excepts from this prohibition the incidental use of public resources "for personal or business purposes resulting in *de minimis* private gain ...." There is also an exception for "[t]he performance of usual and customary duties associated with the office or position or the advancement of public policy goals ...."

If a public official or public employee makes an unauthorized expenditure, it may constitute the unlawful use of office for private gain if the overriding benefit is to the public official or employee, or another person, and not to the government agency. The Commission held in Advisory Opinion 2016-09 that "the Ethics Act permits the expenditure of public funds if there is a legitimate government purpose for the expenditure." Advisory Opinion 2015-12, *citing* 2012-27.<sup>2</sup>

The Ethics Commission's authority is limited to interpreting and enforcing the Ethics Act. The Commission does not have exclusive authority to decide if state or common law authorizes an expenditure by a local government agency or by the state of West Virginia. Instead, the Ethics Commission only has authority to determine whether a proposed expenditure violates the private gain provision of the Act.

In analyzing if a public servant complies with the Ethics Act when he or she makes an expenditure, the Commission considers, among other factors, whether the proposed expenditure is authorized elsewhere. In Advisory Opinion 2012-50, the Ethics Commission stated, "In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure."

As there is no bright-line test, the Commission must consider its prior precedent and applicable laws.

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<sup>2</sup> Stated another way, the Commission has held that the expenditure of public funds complies with the Ethics Act if the individual private gain is counterbalanced by an overriding public benefit. Advisory Opinion 2013-38.

## **Prior Ethics Commission Advisory Opinions**

In Advisory Opinion 1996-50, the Commission held: “[I]t would be a violation of the Ethics Act’s prohibition against use of office for private gain for the City to use general revenue funds to cater a Christmas luncheon for its employees.”

In Advisory Opinion 2001-01, a state health care agency asked if it would violate the Ethics Act if it gave free meals to agency personnel working unscheduled emergency overtime. The Commission held: “It would not be a violation of the Ethics Act for the Agency, in accordance with appropriate legislative authority, to provide or pay for employee meals when those employees are required to work unscheduled emergency overtime.”

In Advisory Opinion 2001-04, the Commission held it would not violate the Ethics Act for “public funds to be used to provide meals and beverages for the members of an agency’s board at the regular meetings of the board, if the agency’s enabling legislation authorizes it to provide meals to its board members, or to reimburse them for meal expenditures incurred while carrying out agency business.” In contrast, the Commission held “that it would be a violation for the County Commission, or its subordinate agencies, to use public funds to pay for commemorative social events such as Christmas parties or annual dinners.”

In Advisory Opinion 2001-18, the Commission ruled that an ambulance authority may not provide meals to its board members at the authority’s monthly lunchtime meetings. The Opinion states that the compensation of board members was statutorily set at \$20 per meeting. It ruled: “While noon meetings are clearly convenient, the Commission finds that free lunch is not necessary for Authority meetings and exceeds limits established for expense reimbursement. Free lunches are, therefore, not among the benefits included in the Board members’ lawful emoluments and may not be provided to them.”

In Advisory Opinion 2001-18, the Commission also considered whether the ambulance authority may provide free lunches to authority employees who were attending training sessions on their own time. The Commission ruled “[t]he Act would not prevent the Authority from offering meals and refreshments as an inducement to encourage employees to voluntarily attend such training sessions on their own time, without pay.”

In Advisory Opinion 2012-27, a state licensing board asked “under what circumstances the Ethics Act allows it to purchase meals for its members and staff, and, if permissible, what monetary limits apply.” The state licensing board had long meetings and stated it would normally order from inexpensive restaurants and work during the meals. Agency staff who were present also would eat the meals.

The Commission held that for purposes of the Ethics Act “[g]enerally, the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure.” It further held: “Based upon the facts presented, the Commission finds that it does not violate the Ethics Act for the Requester to provide a working meal to its

members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e. to accomplish its work.”

The Opinion also established the following guidelines for this type of expenditure by state boards:

1. State boards or commissions may spend a reasonable amount of public funds for meals at meetings when the meeting takes place at a time or is of such length that it makes the same reasonable.
2. The Ethics Act does not authorize any governing body to recess or adjourn a meeting and go to a restaurant (or other off-site location) to consume a meal paid for with public funds. Indeed, governing bodies should take care not to schedule public meetings at private locations unless those meetings take place in a public area fully accessible to the public at no cost to members of the public.
3. The agency may not order lavish meals; instead, it must exercise fiscal responsibility in expending public funds on meals for its members and staff.
4. The decision to purchase the meal must be based upon a legitimate government reason, *i.e.*, that the agency is having a working lunch or dinner in order that agency business may be conducted most efficiently and effectively.
5. The agency must determine whether it has funds to cover this expenditure.
6. The ruling in this opinion does **not** extend to local governmental officials and agencies, *e.g.*, City Council Members, County Commissioners or other local agencies. In A.O. 2001-18 the Commission found that the Ethics Act prohibits local government bodies from spending public funds for this purpose. [The restriction in Advisory Opinion 2001-18 was on appointed ambulance authority board members holding their regularly scheduled meetings over the lunch hour and using public funds to provide lunch to the members].
7. A State Board or Commission seeking to expend money for meals at its meetings should check with the Auditor’s Office to ensure that it does not run afoul of laws or regulations governing expenditures.

In Advisory Opinion 2012-50, a sheriff asked, in relevant part, if he could use concealed weapons funds to purchase meals for staff meetings. The Commission held “that public funds, including Concealed Weapons Funds, may **not** be used for staff meetings or meeting with other public officials, *e.g.* if the sheriff has a staff meeting with his deputies.” The Commission noted there may be exceptions to the rule: “For example, if an agency has offices around the State and twice a year brings all employees to Charleston for a meeting, then, under these circumstances, it may be permissible and applicable under Internal Revenue Service rules to provide a ‘working lunch’ if the lunch is provided for the convenience of the employer.”

In Advisory Opinion 2013-38, the Commission held that a county council “may not use public funds for a meal during a building dedication ceremony when the general public is not invited.”

In Advisory Opinion 2014-01, the Commission held that public funds could be used to provide boxed lunches to the public as well as to public officials during “County Day at the Legislature,” an event sponsored by a county Economic Development Authority.

In Advisory Opinion 2016-09, the Commission held that “state agencies may use public funds, within reason, to purchase kitchen appliances, such as water coolers, including water for the coolers, coffee makers, microwave ovens, toaster ovens and refrigerators for use by state employees at work because the individual private gain to employees is counterbalanced by an overriding public benefit to state agencies.”<sup>3</sup>

In Advisory Opinion 2016-14, the Commission held that the use of public funds by a municipal fire department to purchase coffee, when some of its public employees drank a small amount of the coffee, did not violate the Ethics Act as it was *de minimis*.

### **Other States**

In Ohio Op. Att’y Gen. No. 82-006 (1982), the Ohio Attorney General reasoned: “Since the decision to expend public funds to purchase coffee, meals, refreshments or other amenities is a legislative decision, it must be memorialized by a duly enacted ordinance or resolution and may have prospective effect only.” (holding that coffee, meals, refreshments and other amenities are fringe benefits which may properly be provided by units of local government to their employees as a form of compensation, if authorized by the officer or body having the power to fix the compensation of such employees).

In Ohio Op. Att’y Gen. 2-487 (1986), the Ohio Attorney General held: “The State Lottery Commission may expend public funds for the provision of meals for its employees and other persons at meetings of the Commission or at meetings related to the business of the Commission only where the Commission has determined that the provision of such meals is necessary to the performance of a function or duty expressly or impliedly conferred upon the Commission by statute and if its determination is not manifestly arbitrary or unreasonable.”

In Ark. Op. Att’y Gen. No. 2012-138 (Feb. 20, 2013), the Arkansas Attorney General was asked various questions, including if a county may use public funds to provide food items to employees for training sessions conducted over lunchtime. The Attorney General did not establish a bright-line test for determining if the expenditure was permissible. He further opined he did not have the ultimate authority to decide the issue as “testing both

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<sup>3</sup> The Commission, in Advisory Opinion 2012-50, provided a summary of its past holdings on what constitutes a permissible use of public funds under the Ethics Act. Some of these Advisory Opinions and others offer insight into the question presented here. For examples, see Advisory Opinion 2015-07 (meals for public officials at chamber of commerce meetings are not permissible), 2010-19 (funeral flowers are not authorized) and Advisory Opinion 2011-05 (meals at Rotary meetings are not authorized).

the existence of such authorization and its constitutional propriety falls ultimately to the judiciary ....” The Opinion states:

To reiterate, among the factors that bear on your question are whether a particular activity has been legislatively acknowledged as serving a public purpose, whether a challenged expenditure is reasonably related to that activity and whether the personal benefit accorded to individuals as a result of the expenditure might reasonably be described as incidental.

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Determining whether such conditions have been met necessarily involves a factual inquiry, rendering it impossible for me to provide a global answer to your question.

### **Authorized Expenditure – State of West Virginia**

The West Virginia Supreme Court, in determining when the State Auditor may refuse to pay a requisition, stated:

It is the duty of the Auditor to refuse payment of a requisition for expenditure of public funds,

- a. If there is no appropriation for the proposed expenditure;
- b. if there is no statute, State or Federal, authorizing the proposed expenditure;
- c. if the statute authorizing the proposed expenditure is unconstitutional;
- d. if the appropriation for the proposed expenditure is not for a public purpose;
- e. if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but the Auditor has reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain.

*State ex rel. Foster v. Gainer*, 166 W. Va. 88, 90–91, 272 S.E.2d 666, 667 (1980), citing 45 W. Va. Op. Atty. Gen. 583, 601 (1954). See also 65 W. Va. Op. Att’y Gen. No. 6 (July 2, 1993). (While the State Auditor does not approve the individual expenditures of county commissions, this Opinion is relevant in determining when a fiscal body may make or approve an expenditure.)

The State Auditor has an opinion on the Auditor’s website under Local Government section (under “Correspondence Search”) written by the State Department of Tax and

Revenue on October 17, 1996, to Brenda Lemon, Interim City Auditor, City of Charleston. The State Tax Department opined that the City of Charleston did not have authority to have a Christmas lunch for its employees. There is no [municipal] statutory authorization for the purchase of food for city employees except as follows: 1. Code § 8-12-5 (51) authorizes a city to expend funds for the advertisement of the city and the entertainment of visitors; 2. Code § 8-12-5 (52) authorizes a city to conduct programs to improve community relations and public relations generally and to expend funds for such purposes. Under both of these situations, food and any other expenses of a Christmas lunch would have to be available to the general public so that not only city employees are the recipients of the benefits.” (This opinion does not address the laws governing the expenditure of public funds for meals by county commissions.)

In 43 W. Va. Op. Att’y Gen. 556 (1950), the Attorney General was asked if county courts (county commissions) have implied authority to expend public funds to reimburse their officers for travel expenses for national association meetings. The Opinion states:

[W]e are of the opinion that a fiscal body can now expend money, if authorized to do so, whether such authorization is expressly given or arises by necessary implication.

The Opinion concludes:

We are therefore of the opinion that fiscal bodies such as county courts, municipal councils and boards of education have implied authority to expend public funds to reimburse their officers for expenses of travel to national association meetings, provided that it appears to such bodies that such expenses are reasonable and that attendance at such meeting was of commensurate benefit to the department the attending officer represents and to the public ....

An Attorney General Opinion also states: “In considering the validity of an appropriation by a county court to a local development corporation, it is necessary to determine (1) whether or not the appropriation is for a public purpose ....” 51 W. Va. Op. Att’y Gen. 759 (1966).

In analyzing what constitutes a public purpose, other West Virginia Attorney General Opinions state: “The authorities agree that what constitutes a public purpose is not easy to define, and that no definition has been framed that will fit all cases. 84 C.J.S. 65; 51 Am. Jur. 378.” 51 W. Va. Op. Att’y Gen. 330 (1965), and “What constitutes a ‘public purpose’ cannot be answered with a precise definition.” 51 W. Va. Op. Att’y Gen. 759 (1966). The West Virginia Supreme Court has held: “What constitutes a public purpose varies with changing conceptions of the scope and function of government.” *State ex rel. W. Virginia Hous. Dev. Fund v. Waterhouse*, 158 W. Va. 196, 215, 212 S.E.2d 724, 735 (1974)

## Conclusion

If state law gives a public official or employee express or implied authority to expend public funds for a specific purpose, then normally it does not violate the Ethics Act if he or she expends money for that purpose.<sup>4</sup> To determine if there is express or implied authority for the expenditure, the Commission must examine the West Virginia Code, common law, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office. Advisory Opinion 2012-50.

The Ethics Commission is unable to find any provision in the state Code establishing whether a county commission may expend public funds for a working lunch meeting. The Commission therefore concludes there is no express authority in the state Code for the expenditure.<sup>5</sup>

As there is no express authority to purchase the lunches, the Commission must next consider whether the Requester has implied authority to purchase the lunches. See 43 W. Va. Op. Att'y Gen. 556 (1950) (counties may make expenditures if they have express or implied authority). The Legislature has statutorily given county commissions various powers, including the authority to "supervise the general management of the fiscal affairs and business of each county." W. Va. Code § 7-1-5.

If the use of public funds to host an annual working lunch relates to the general management of the fiscal affairs and business of the county, it is arguably an authorized expenditure "by necessary implication." 43 W. Va. Op. Att'y Gen. 556. See also *State ex rel. Foster v. Gainer*, 166 W. Va. 88, 90–91, 272 S.E.2d 666, 667 (1980) (citing to whether there is a "public purpose" for an expenditure as one of five factors to consider if an expenditure is permissible). Based upon information and belief, neither the West Virginia Supreme Court nor the Office of the West Virginia Attorney General has issued an opinion answering the question of whether the general powers of county commissions to manage the fiscal affairs and business of the counties gives them implied authority to expend public money for working lunches.

In the absence of clear legal precedent defining the scope of the powers conferred on county commissions, the Ethics Commission is unable to determine whether there is implied (or express) authority for the expenditure.<sup>6</sup> **The Requester may consider**

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<sup>4</sup> One exception, as noted in *State ex. rel Foster v. Gainer*, is "if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but ..." there is "reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain." *Id.*

<sup>5</sup> The West Virginia Supreme Court has held: "The county court [commission] is a corporation created by statute, and can only do such things as are authorized by law, and in the mode prescribed." *Butler v. Tucker*, 187 W. Va. 145, 146, 416 S.E.2d 262, 263 (1992), Syllabus point 5, *Goshorn's Ex'rs v. County Court of Kanawha County*, 42 W. Va. 735, 26 S.E. 452 (1896).

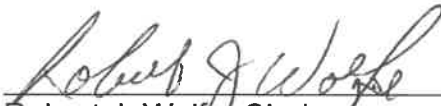
<sup>6</sup> The Commission finds this case is distinguishable from Advisory Opinion 2012-50 in which a sheriff proposed purchasing lunches with concealed weapons funds for staff meetings and/or meetings with other public officials or citizens. The Ethics Commission held that the lunches were not permissible. In making this finding, the Commission cited W. Va. Code § 61-7-4(c) which restricts the purpose for which the



**asking its County Prosecutor to request an opinion from the Office of the Attorney General as to whether county commissions have express or implied authority or a legitimate public purpose to expend public funds for a working lunch for county employees. The Requester may also want to seek guidance from the State Auditor's Office. If the Office of the Attorney General or Auditor's Office opines there is express or implied authority for the expenditure, then the expenditure of public funds for this purpose would not violate the Ethics Act.**

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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concealed weapons funds may be used. This Code provision states: "Any surplus in the fund on hand at the end of each fiscal year may be expended for other law-enforcement purposes or operating needs of the sheriff's office, as the sheriff may consider appropriate."