

Advisory Opinion 2021-09

Issued on June 3, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **City Chief of Police** asks whether the City's Police Officers or Police Department may keep gift cards, valued over \$25, given to them by a citizen as an appreciation gift for their service.

Facts Relied Upon by the Commission

A citizen manages an apartment complex located within City limits. To show her appreciation for the City's Police Department, the citizen gave each Police Officer in the Department a thank you card containing gift cards from various restaurants in the area and a \$25 pre-paid Visa card from the apartment complex that she manages. The individual gift cards from the restaurants were less than \$25 each but collectively totaled approximately \$50. The total value of the gifts to each Police Officer is, therefore, approximately \$75.

The citizen also gave various gift cards to the Chief of Police and told him that the gift cards were to be used for the benefit of the Police Department. The gift cards were from a donut shop, a pizzeria, and a Mexican restaurant, and the combined value of these gift cards is approximately \$70.

Neither the Police Department nor its Officers asked the citizen to solicit or give them the gift cards. The citizen asked the local restaurants for the gift cards for the Police Officers on her own initiative. The citizen told the Chief of Police that she solicited and gave the gift cards to show her appreciation to the Police Officers and that she was inspired by a program in another state aimed at honoring first responders.

After the citizen gave the gift cards, the Chief of Police collected them from the Police Officers and requested this Advisory Opinion to seek guidance on their disposition.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(h) states:

"Person" means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.

W. Va. Code § 6B-2-5(c) states, in relevant part:

(c) *Gifts.* - (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose.... 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 or her official duties.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person.... The provisions of subdivision (1) of this subsection do not apply to:

- (A) Meals and beverages;
- (B) Ceremonial gifts or awards which have insignificant monetary value;
- (C) Unsolicited gifts of nominal value or trivial items of informational value;

W. Va. Code R. § 158-7-4.1 states:

4.1. For purposes of the Ethics Act, W. Va. Code § 6B-2-5(c)(2)(C), a nominal gift is any gift with a monetary value of twenty-five dollars (\$25.00) or less.

W. Va. Code R. § 158-7-3.2 states:

3.2. An interested third party is 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 or her official duties.

W. Va. Code R. § 7-7-7.1 states, in relevant part:

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. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

The West Virginia Ethics Commission Gift Guidelines, re-issued June 4, 2020, state, in relevant part:

Acceptance of certain gifts is permitted.

Notwithstanding the general prohibitions set forth in the prior section against public officials and employees accepting gifts, the Ethics Act provides that the following types of gifts **may** be accepted by public employees or public officials from lobbyists or others:

(A) Meals and beverages of any dollar value may be accepted if the person purchasing the meal is present;

...

(B) Unsolicited gifts of nominal value or trivial items of informational value are permissible if the value of any one item, or a combination of items from the same source, given to a public official or employee does not total more than \$25 in one calendar year. This exception and the \$25 limit apply to meals and beverages if the person purchasing them is not present;

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Gift Rules

The Ethics Act and related Legislative Rule restrict the types of gifts that public officials and employees may accept. W. Va. Code § 6B-2-5(c)(1) and W. Va. Code R. §§ 158-7-1 through 157-7-9. The restrictions apply only if the gift giver is a lobbyist or any person whom the official or employee knows or has reason to know:

1. Is doing or seeking to do business of any kind with his or her agency,
2. Is engaged in activities which are regulated or controlled by his or her agency, or
3. 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 or her official duties.

Id. Gift givers who fall within these categories are commonly referred to as “interested persons” or “interested parties” because they have interests which may be uniquely affected by the action or inaction of a public official or employee.¹

The Ethics Commission must determine whether the citizen who gave the gift cards is an interested person in relation to the Police Department or its Officers. Category one does not apply to this citizen as she is not doing business with the City. Further, the citizen is not a lobbyist so that category of restricted gift givers is inapplicable as well.

The Ethics Commission must determine however whether the citizen falls within the category of persons “whom the official or employee knows or has reason to know” is “engaged in activities which are regulated or *controlled* [emphasis added] by” the public official or employee’s agency. W. Va. Code § 6B-2-5(c)(1)(B).

In Advisory Opinion 2003-05, the Ethics Commission held that state troopers must comply with the gift rules when accepting gifts from any citizen in the state of West Virginia due to the state-wide law enforcement power exercised by the officers.² The Ethics Commission must therefore consider the law enforcement powers of city police officers in relation to the citizen who gave them the gift cards. West Virginia law, in relevant part, gives city law enforcement officers the following powers:

The chief and any member of the police force or department of a municipality, any municipal sergeant, and any municipal fire marshal shall have all of the powers, authority, rights, and privileges within the corporate limits of the municipality with regard to the arrest of persons, the collection of claims, and the execution and return of any search warrant, warrant of

¹ In Advisory Opinion 2003-05, the Ethics Commission used the designation “interested persons” to describe persons who fall within the categories of restricted gift givers.

² In Advisory Opinion 2003-05, the Ethics Commission held that the law enforcement powers of police officers are regulatory in nature, but after the issuance of Advisory Opinion 2003-05, the Legislature amended the Ethics Commission’s Legislative Rule, at W. Va. Code R. § 7-7-7.1, to clarify that not all law enforcement powers are regulatory in nature. Nevertheless, the Ethics Commission finds that the holding in Advisory Opinion 2003-05 still stands, for purposes applying the gift restrictions in the Ethics Act, due to the control exercised by state troopers over persons in the state.

The Ethics Commission analyzed what constitutes the regulatory authority of law enforcement officers in Advisory Opinion 2019-28 for purposes of applying another part of the Ethics Act that imposes limitations on public officials and employees, including police officers, from doing business with certain persons.

arrest, or other process, which can legally be exercised or discharged by a deputy sheriff of a county....

W. Va. Code § 8-14-3.

The citizen manages an apartment complex within City limits. When the citizen is physically present in City limits to perform her job duties at the apartment complex, she is subject to the jurisdiction of the City's Police Officers. For example, the City Police Officers must enforce traffic laws and laws against littering. While the citizen gift giver is presumably a law-abiding citizen, nevertheless, she is still subject to the *control* of the City's Police Officers. Additionally, the Police Officers have the power to make arrests or execute warrants at the apartment complex which the citizen manages.

The Ethics Commission finds that there is a sufficient nexus between the citizen and the Police Department to make her a person who engages in activities which are controlled by the Police Department. The citizen is therefore an interested party for purposes of the gift restrictions in the Ethics Act and related Legislative Rule, and the Police Officers and Police Department may only accept gifts from her within the gift limits prescribed in the Ethics Act, related Legislative Rule, and the Ethics Commission's Gift Guidelines. The fact that the citizen bundled gifts from local businesses does not change the analysis or conclusion.³

Gifts to the Police Officers

The citizen has given each Police Officer gift cards valued at more than \$25, an amount that exceeds the monetary gift limit established by the Ethics Commission's Legislative Rule⁴ and Gift Guidelines. Each Police Officer must do one of the following to comply with the gift rules:

- Return the gift cards.
- Keep one gift card valued at \$25 or less and return the rest.
- Donate all the gift cards to charity.
- Keep one gift card valued at \$25 or less and donate the rest to charity.⁵

³ Since the gift giver falls within the category of persons under the control of the City's Police Department, it is not necessary to analyze whether the other category of interested persons is applicable, i.e., those who have "financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties." W. Va. Code § 6B-2-5(c)(1)(B).

⁴ W. Va. Code R. § 158-7-4.1

⁵ This ruling is consistent with the Ethics Commission's ruling in Advisory Opinion 2003-05 in which the Ethics Commission ruled that law enforcement officers in an association may only use donations exceeding \$25 from interested persons for charitable purposes. The "buy-down" rule was discussed in Advisory Opinion 2008-05 in which the Ethics Commission ruled that a public official or employee may comply with the gift restrictions when accepting a \$55 ticket to a sporting event from a vendor by reimbursing the vendor \$30, the difference between a sporting event ticket value, \$55, and the \$25 gift limit.

Gifts to the Police Department

The Chief of Police also asks about the gift cards donated to the Police Department. In Advisory Opinion 1990-176, the Ethics Commission ruled that a gift to a government agency is permissible as it is considered a gift to the government if it is used for the benefit of the government agency and not for personal purposes. The gift cards from the citizen may only be kept and used by the Police Department if the Police Department uses them for a public purpose. For example, the Police Department may give the gift cards to citizens as part of Police Department programs aimed at improving community relationships. The Police Department should document the receipt of the gift cards and their disposition.

The Ethics Commission commends the citizen for her sense of community spirit and the Chief of Police for working with the Ethics Commission and the citizen to determine the proper disposition of the gift cards.

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, including whether there is express or implied authority for the expenditure.

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.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission