ADVISORY OPINION NO. 2010-05

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Institution of Higher Education asks whether, pursuant to the Ethics Commission's Guideline for Public Employee Recognition Events, it may expend more than $25.00 per fiscal year to recognize certain employees for special achievements; provided, that, the sum total of expenditures does not exceed an amount equal to $25.00 multiplied by the total number of public employees at the Institution.

FACTS RELIED UPON BY THE COMMISSION

On December 4, 2008 the Ethics Commission issued a Guideline governing public employee recognition events. The stated purpose for doing so is specifically set forth in the Guideline and reads:

> The Ethics Commission has received numerous inquiries seeking guidance in regards to what amount of public funds, if any, may be used for this purpose. The Ethics Commission believes that the responsibility for deciding whether public funds should be expended for this purpose ultimately lies with the head of an agency or the elected official or appointed board to whom the head of an agency reports.
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> In order to provide uniform guidance as to what level of spending for this purpose complies with the Ethics Act, the Ethics Commission hereby finds that the expenditure of public funds for all events to recognize employees does not violate the Ethics Act if an agency expends no more than $25.00 per employee per fiscal year. This money may be allocated between one or more events or activities which are held to recognize employees and promote employee morale. It may be used to purchase light refreshments, meals or mementos of appreciation.

The Guideline further reads:

> This guideline recognizes a spending threshold which the Ethics Commission has determined to be acceptable under the general limitations in the Ethics Act against use of public office for private gain. This guidance does not establish or confer any employee benefit. The head of an agency or its governing body must determine whether any such expenditure is consistent with fiscal responsibility and whether appropriated funds are authorized for this purpose.

The Requester states that it would like the option of allocating an amount greater than $25.00 per fiscal year to a particular event or to recognize a particular employee or employees, so long as the amount used for this purpose during a fiscal year does not exceed the sum total of $25.00 per employee per year.

The Requester offers the following by way of example. If they have 100 employees, then by their calculation they may spend up to $2,500.00 per year. The Requester asks whether this amount may be spent on one employee or in the alternative whether they may spend $500.00 on five employees, so long as they do not exceed $2,500.00 per year. The Requester states that it is not seeking to use this money for a supplemental salary increase or bonuses. Instead, it would like the option of recognizing certain employees for their achievements by giving them something of value in excess of $25.00 such as free parking for a year, a gift certificate or other memento of appreciation.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-2(d) reads in relevant part:

> The Commission shall, in addition to its other duties:
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> …
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> (2) Prepare and publish manuals and guides explaining the duties of individuals covered by this law; and giving instructions and public information materials to facilitate compliance with, and enforcement of, this act.

W. Va. Code § 6B-2-5(b) reads in relevant part:

> A public official or 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.

ADVISORY OPINION

The Ethics Commission adopted the Guideline for Public Employee Recognition Events due to a significant amount of requests received by Ethics Commission staff in regard to whether public funds could be used for employee recognition events. For example, agencies would ask whether it would violate the Ethics Act to use public funds to purchase soft drinks and hamburgers to host a potluck luncheon for the purpose of boosting employee morale.

The Commission adopted the Guideline in question to give clear and consistent guidance on this question in regard to the application of the Ethics Act. In adopting the Guideline, the Commission considered whether the expenditure of public funds to recognize employees serves a public purpose. Consistent with the Guideline and prior

opinions, the Commission reaffirms its finding that expending a reasonable amount of public funds for employee recognition events serves a public purpose and therefore does not violate the Ethics Act.

As the Commission notes in the Guideline, “The Ethics Commission believes that the responsibility for deciding whether public funds should be expended for this purpose ultimately lies with the head of an agency or the elected official or appointed board to whom the head of an agency reports.” Further, the Guideline only recognizes a spending threshold which the Ethics Commission has determined to be acceptable under the general limitations in the Ethics Act against use of public office for private gain. The guidance does not confer any employee benefit. As the Commission stated in the Guideline, “The head of an agency or its governing body must determine whether any such expenditure is consistent with fiscal responsibility and whether appropriated funds are authorized for this purpose.”

The Guideline states that it does not violate the Ethics Act for public agencies to expend no more than $25.00 per employee per fiscal year for employee recognition related events. The Requester asks whether it would be consistent with the Guideline to expend more than this amount on one or more employees in lieu of expending up to $25.00 per employee; provided, that, the total amount expended for this purpose does not exceed an amount equal to or less than $25.00 per employee.

The Commission finds that an agency’s decision to allocate more than $25.00 to one or more employees, in lieu of expending up to $25.00 per employee per fiscal year, does not violate the Ethics Act so long as the expenditure on any one employee does not exceed $100.00 and the total amount expended for this purpose during the fiscal year does not exceed the sum total of $25.00 per employee.

For example, if an agency has 10 employees, then it may expend up to $250.00 (10 x $25.00) for this purpose. An acceptable allocation of funds for purposes of complying with the Ethics Act would be to expend $100.00 to recognize one employee for outstanding achievement by providing a plaque or similar commemorative item and then allocating the remaining $150.00 for employee recognition events such as a luncheon. An employee who receives a plaque or other item valued at $100.00 may still participate in the lunch or other similar event. The value of the plaque does not need to be offset by the value of the food this employee may consume at the luncheon; provided, that, the total sum expended during the fiscal year for employee recognition events, including the award of plaques and similar items, does not exceed $25.00 per employee.

The Commission takes this approach to ensure that a public agency does not interpret the guideline as a basis to make a significant award to an employee, in excess of $100.00, when the guideline is not intended to create an employee benefit or to allow giving something of significant value to one employee. Moreover, the $100.00 limitation under the circumstances presented is consistent with the $100.00 threshold established by the Commission in its Guideline for Retirement Gifts and Events.

If an agency expends up to $100.00 on one employee, the following limitations also apply: (1) there must be a rational basis for the decision; (2) the decision must be based upon objective job-related criteria; (3) any awards given must be reasonable in proportion to the nature of the accomplishments being rewarded; and, (4) the Requester and other similarly situated public agencies seek guidance from the State Auditor to ensure the expenditure does not violate any other laws governing the expenditure of public funds. *See also* A.O.s 2008-07 and 2008-09. Further, the Requester should consult with its attorney to obtain a legal opinion as to whether any gift or award of appreciation given constitutes a taxable fringe benefit.

Once again, the Commission notes that the Guideline is intended to be a practical means of providing guidance on this issue in regard to the application of the Ethics Act. The Guideline is not intended to supplant the authority of public agencies to implement legally authorized employee incentive programs or supplemental pay increases if authorized by law. For example, W.Va. Code § 29-6-7(b) specifically gives the Director of the State Division of Personnel authority to:

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> (6) Develop programs to improve efficiency and effectiveness of the public service, including, but not limited to, employee training, development, assistance and incentives, which, notwithstanding any provision of this code to the contrary, may include a one-time monetary incentive for recruitment and retention of employees in critically understaffed classifications. The director, in consultation with the board, shall determine which classifications are critically understaffed. The one-time monetary incentive program shall continue until June 30, 2009. The director shall report annually on or before December 31, commencing in the year 2007, to the Joint Committee on Government and Finance. The annual report shall provide all relevant information on the one-time monetary incentive program and the understaffed classifications in state agencies;
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> (7) Establish pilot programs and other projects for a maximum of one year outside of the provisions of this article, subject to approval by the board, to be included in the annual report;

Moreover, the Guideline does not confer an employee benefit. Agencies must decide on a case-by-case basis whether money may be expended for this purpose in regard to the application of its own authority, budget and spending authority. Further, the Commission would certainly defer to any specific guidance on this issue from the Legislature through the enactment of a law specifically addressing this issue.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
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