Advisory Opinion 2017-05

Issued on March 2, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **Manager of a Legislative Office** asks whether he would violate the Ethics Act by joining a purchasing cooperative at the request of a vendor following the execution of a lease for office equipment that would result in a sales commission after the fact to the vendor's sales representative and a potential future benefit to the Requester's office.

Facts Relied Upon By the Commission

The Requester states that his office entered into a 12-month lease with a vendor for specialized office equipment. The rental payment under the lease is $2,170 per month, and the lease is renewable annually for four years. The Requester's office sought and received quotations from three potential vendors and selected the vendor that met the specifications and offered the lowest price.[1]

In the weeks following the execution of the lease, the vendor's sales representative asked the Requester's office to join a cooperative purchasing organization. The membership would be at no cost to the office; however, the vendor's representative would receive an additional commission for the office equipment which already has been leased. The Requester does not know the amount of the commission.

The vendor's representative indicated that, due to economies of scale available to members of a large purchasing group, the cooperative would enable the Requester to obtain better prices on a larger variety of products in the future. Additionally, the Requester's office would receive a credit in the amount of $2,000 from the vendor on future leases. The Requester states that the vendor supplies many different kinds of office equipment and his office has a lot of office inventory to maintain; therefore, the Requester believes that he may be soliciting bids for other equipment nearly every year.

The Requester states that joining the purchasing cooperative would not create a benefit to the office in regard to the current office equipment it leases; however, the Requester believes that membership in the cooperative will be mutually beneficial to his office and the vendor in the future.

[1] The Requester states that his office is not subject to the state's purchasing laws in W.Va. Code§§ SA-3-1 through SA-3-60.

Provisions Relied Upon By the Commission

W.Va. Code§ 68-2-5(b)(1) provides:

> 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 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.

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The Ethics Act prohibits a public servant from using public resources for the private gain of another. W.Va. Code§ 6B-2-5(b). The Commission recognizes that most business transactions with a public agency provide financial gains to vendors and sales representatives and that these financial gains do not violate the Act. The Commission has steadfastly held that a public agency may engage in activities where there is private gain to another when there is an "overriding public benefit" sufficient to justify the private benefit.[2]

For example, in Advisory Opinion 2016-09, the Commission held that state agencies may use public funds to purchase kitchen appliances, such as water coolers, *coffee* makers and refrigerators, for employees to use because "the individual private gain to the employees is counterbalanced by an overriding public benefit to state agencies."

Likewise, in Advisory Opinion 2015-22, the Commission found that a state agency would not violate the Ethics Act by using state employees to organize, plan and solicit funding for a private association's annual conference. The Commission reasoned that, although the attendees would receive private gain, the association's conference provided an overriding public benefit to the agency by enhancing the skill and professional competence of state personnel. *Id., citing* Advisory Opinion 2008-08.

Further, in Advisory Opinion 2014-11, the Commission found that a sheriff would not violate the Act by purchasing fitness equipment for his deputies. The Commission reasoned that "there is a direct benefit to the public in having strong and healthy officers since they are more capable of performing their duties. Any benefit that may inure to the officers is more than offset by the benefit to the public." The Commission has also held

[2] This rule is consistent with 158 CSR 7.3, which provides a five-part test to determine whether a public employee may allow an interested person to pay for his or her travel expenses incurred for attending an educational seminar. One requirement is the "benefit to the agency must be significantly greater than the incidental benefit to the traveler." *Id.* at 7.3.1e.

that a mayor would not violate the Act by storing his dump truck, asphalt spreader and roller at the city garage while the equipment was being used for the benefit of the city at large; however, the mayor could not store the equipment there permanently. Advisory Opinion 1995-39.

The Commission has held, conversely, that certain situations fail to meet the standard of "overriding public benefit" to justify a private gain. In Advisory Opinion 2006-13, the Commission held that a county would violate the Act by providing shuttle service to a private picnic. In Advisory Opinion 2012-50, the Commission found that, in general, a public body may not spend public funds on meals and beverages for its employees while they are at work. (There are exceptions, *e.g.,* when employees are working in emergencies, attending certain seminars or traveling.)

Further, in Advisory Opinion 2013-56, the Commission found that a sheriff would violate the Act by using public funds to take airplane flying lessons. The Commission found it "impossible to ignore the benefit that Requester will receive personally as a result of obtaining a life [time] license at public expense" given, in part, that the Requester had only two years left in his term.

In the present situation, joining the purchasing cooperative would not benefit the Requester's office in regard to the lease it holds for the existing office equipment, and the vendor's sales representative would receive a commission. However, the Commission finds that a credit in the amount of $2,000 on future leases and the expectation of lower prices on office equipment in the future justifies the personal gain to the sales representative.

The Ethics Commission holds that the Requester would not violate the Ethics Act by joining the purchasing cooperative because the expectation of future benefits to the Requester's office provides an overriding public benefit sufficient to justify the private benefit to the vendor's sales representative.

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 §§ 68-1-1 through 68-3-11 and does not purport to interpret other laws or rules. This opinion is based upon the specific facts of this request and may not be relied upon in other situations.

/s/ Robert J. Wolfe, Chairperson
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