Advisory Opinion 2017-08

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A Director of a **State Agency** charged with providing health care benefits to public employees asks if his agency may contract with a private company to provide a wellness program that offers financial rewards to public employees.

Facts Relied Upon by the Commission

The Requester's agency was established, in part, to provide medical insurance and other healthcare benefits to state and local public employees. W.Va. Code§§ 5-16-1 through 5-16-26. The agency's statutory duties include providing statewide "wellness" programs and activities which are to include, but not be limited to, "benefit plan incentives to discourage tobacco, alcohol and chemical abuse and an educational program to encourage proper diet and exercise." W.Va. Code § 5-16-8. Further, the Requester is required to manage the day-to-day operations of the group insurance plans, including offering "cost containment" incentives. *See* W.Va. Code§ 5-16-3.

The Requester states that his agency has not begun the procurement process for a wellness program. The Requester envisions, however, a wellness program that would motivate public employees to get active and participate in their health and wellness by allowing employees to earn reward points for engaging in various healthy activities. The points would be redeemable for financial rewards.

The Ethics Commission has reviewed one prototypical wellness program which rewards healthy activities, such as getting flu shots, exercising and having vision and dental examinations. The rewards in this program include goods, such as pedometers, movie certificates, fitness apparel and bicycles. Additionally, an employee's reward points may be redeemed for a monetary donation to charities. The program also offers prizes in random drawings. This wellness program caps its benefits at $300 per employee's household.[1]

This prototypical program claims that it, "recently concluded a three-year study of how the program affected the productivity, as well as the healthcare usage and claims, of more than 8,000 ... employees. The study results showed that employees who were more engaged with ... [the program] had fewer unscheduled absences, lower overall health claims costs, and fewer visits to the hospital and to the emergency room." *Citation omitted.*

[1] Any tax implications are beyond the scope of the Ethics Act's jurisdiction and therefore will not be discussed herein.

The cost of the wellness program would be primarily borne by the State Agency, although participating public employees could share in the cost.

Provisions Relied Upon by the Commission

W. Va. Code§ 6B-2-5 provides in relevant part:

> (b) *Use of public office for private gain.* - (1) 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.

Advisory Opinion

The Ethics Commission has fashioned a long line of precedent holding that wellness programs do not violate the Ethics Act. In Advisory Opinion 98-28, the Commission held that a state agency would not violate the Act by contracting with a private vendor to establish a work place preventative health care program that provided financial incentives to public servants who participate in the program. The Commission determined that using public funds to improve health would not amount to the use of public office for private gain under W.Va. Code § 6B-2-5(b) because the program was intended to reduce the overall cost of the agency's operation, even if the program resulted in immediate financial gain to the public employees. The rationale for the holding in Advisory Opinion 98-28 was most recently reaffirmed in Advisory Opinion 2017-05.[2]

In Advisory Opinion 2001-19, the Commission held, "It would not be a violation of the Ethics Act for the Agency to secure, or its members to accept, discounts on health related services and products which are a part of a workplace preventive health care program."

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[2] In Advisory Opinion 2017-05, a manager of a legislative office asked whether his office would violate W.Va. Code § 6B-2-5(b) by joining a purchasing cooperative at the request of a vendor following the execution of a lease for office equipment. This action would result in a sales commission after the fact to the vendor's sales representative. The Commission held that the Requester would not violate the Act by joining the purchasing cooperative because the expectation of future benefits to the Requester's office, e.g., future discounts, justified the private benefit to the vendor's sales representative. Likewise, here the anticipated reduction in healthcare costs and other benefits to the Requester's Agency justify any financial gains to the public employees.

In Advisory Opinion 2001-19, the Commission determined that the private gain prohibition does not apply to a wellness program which is part of an effort to "reduce the agency's overall health care delivery cost, even if the program results in immediate financial gain to its members." In Advisory Opinion 2002-04, the Commission authorized a County Commission to underwrite YMCA membership for county employees and county officials, noting that "wellness programs are being recognized as part of an agency's efforts to increase the health and welfare of its personnel, while reducing agency expenses."

In Advisory Opinion 2012-20, a public university asked whether public funds may be used to purchase prizes or incentives, including gift cards, for wellness-related competitions or promotions and, if so, whether there was a limit on the amount of public funds the university may spend on each item purchased. The participating employees could also win prizes in random drawings conducted in conjunction with competitive events. In Advisory Opinion 2012-20, the Commission held that "public funds may be used to fund public wellness programs and to purchase incentives for participants in the program or wellness related events." [3]

Last, in Advisory Opinion 2014-15, the Commission held that the Requester could solicit advertisements to promote wellness because it "falls within the Ethics Act's definition of 'usual and customary duties ... [and) the advancement of public policy goals or constituent services"' under W.Va. Code§ 6B-2-5(b). Likewise, in the instant situation, pursuant to W.Va. Code § 5-16-3, using public funds for wellness programs is a usual and customary duty of the Requester.

The Ethics Commission holds that the Act does not prohibit the Requester's agency from contracting with a private company to provide a wellness program that provides financial rewards to public employees.

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, at W.Va. Code§§ 68-1-1 through 68-3-11, and does not purport to interpret other laws or rules.*

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[3] The prizes and financial incentives in the instant situation are not considered "gifts" under the Ethics Act at W.Va. Code § 6B-2-5(c). As noted in Advisory Opinion 96-36, "a gift [is] something given voluntarily and without compensation - something given without consideration in return. A gift does not involve an exchange of value ... the sale of raffle tickets, which offer a chance at a valuable prize, is not a solicitation of a gift." Further, the Requester's agency is not a person from whom a gift may be prohibited. See W.Va. Code§ 6B-2-5(c)(1).

Moreover, the West Virginia Ethics Commission's *Guideline on Public Employee Recognition Events* (2008) does not apply to the instant situation. The guideline limits a public agency to spending $25 per employee per year to improve morale. See Advisory Opinion 2014-21, which states "The $100 prize at issue is not for workplace achievement and is not to improve morale. Rather, the prize is awarded to a state employee for completing a specific task outside of his or her regular job requirements."

In accordance with W Va. Code § 68-2-3, 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.

/s/ Robert J. Wolfe, Chairperson
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