

## **Advisory Opinion 2018-04**

Issued on March 1, 2018, by

The West Virginia Ethics Commission

### **Opinion Sought**

A **State Agency Manager** asks what is a reasonable cost for meals for which public officials or public employees may seek reimbursement when the meals are consumed incident to the course of their public job duties. The Requester further asks whether it is appropriate to allow reimbursement for more expensive meals for senior staff and elected officials than those provided to other staff at the same lunch or dinner meeting.

### **Facts Relied Upon by the Commission**

The Requester states that he is seeking "guidance regarding standards or considerations for determining the 'reasonableness' of the costs for which public officials and employees may request reimbursement for meals consumed incident to the course of their duties" when they are not traveling.

### **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 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**

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. W. Va. Code § 6B-2-5(b)(1). The Ethics Act excludes from the private gain 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 " *Id.*

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. " *Id. citing* Advisory Opinions 2015-12 and 2012-27.<sup>1</sup> The Ethics Commission's authority, however, is limited to interpreting and enforcing the Ethics Act. The Commission does not have exclusive authority to decide whether state or common law authorizes an expenditure by a local government agency or by the state of West Virginia. 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."<sup>2</sup>

### **Reasonable Expense Reimbursement for Meals**

State public officials or employees may be reimbursed for meals if there is express or implied legal authority to use appropriated public funds for that purpose. For instance, in Advisory Opinion 2001-01, a state health care agency asked whether providing free meals to agency personnel working unscheduled emergency overtime would violate the Ethics Act if the Legislature authorized this expenditure. 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."

There appears to be no statute or Legislative Rule governing when or in what amounts public funds may be used for employee meals when the employee is not traveling. Further, there is no statute directing any branch of government to adopt rules governing this type of expenditure. In contrast, the Legislature has expressly directed the governor and other state officials to promulgate rules that govern the travel of state officials and employees and reimbursement therefor. W. Va. Code§ 12-3-11.

The Ethics Commission noted in Advisory Opinion 2012-27 that meals provided incident to a state licensing board meeting, pursuant to the guidelines set forth in the Opinion,

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<sup>1</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.

<sup>2</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.

should not be "lavish." In the absence of a statutory provision or other validly promulgated rule or regulation governing reimbursement amounts for this type of expenditure, the Ethics Commission finds that a state agency complies with the Ethics Act if it authorizes reimbursement for these expenditures at rates which do not exceed the reimbursement rates for meals set forth in West Virginia Travel Rules ("Travel Rules") which are promulgated by the West Virginia Division of Purchasing Travel Management Office. The Travel Rules use the rates prescribed by the United States General Services Administration ("GSA") on a yearly basis.

The GSA states on its website:

5 U.S.C § 5702 gives the Administrator of the U.S. General Services Administration (GSA) the authority to establish the system of reimbursing Federal employees for the subsistence expenses (lodging, meals, and incidentals) of official travel. The law governs how GSA sets rates today, and allows the GSA Administrator to establish locality-based allowances for these expenses with a reporting requirement back to Congress.

General Services Administration,  
<https://www.gsa.gov/travel/plan-book/per-diem-rates/frequently-asked-questions-per-diem#1> (Feb. 13, 2018, 1:40 PM).

The GSA website further states:

Per diem is the allowance for lodging (excluding taxes), meals and incidental expenses. The General Services Administration (GSA) establishes per diem rates for destinations within the lower 48 Continental United States (CONUS).

*Id.* The GSA publishes a "Meals and Incidental Expense (M&IE)" breakdown each fiscal year by geographic region.

For example, the M&IE expense for Charleston, West Virginia for this fiscal year is \$54.<sup>3</sup> A separate GSA table gives a monetary limit for each meal by region.<sup>4</sup> The current limits for meals for Charleston, West Virginia are:

- Breakfast - \$12
- Lunch - \$13
- Dinner - \$24<sup>5</sup>

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<sup>3</sup> GSA, [https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems\\_report&state=WV&fiscal\\_year=2018&zip=&city=](https://www.gsa.gov/travel/plan-book/per-diem-rates/per-diem-rates-lookup/?action=perdiems_report&state=WV&fiscal_year=2018&zip=&city=) (Feb. 13, 2018, 1:40 PM).

<sup>4</sup> GSA, <http://www.gsa.gov/mie> (Feb. 13, 2018, 1:50 PM).

<sup>5</sup> For the M&IE breakdown there is an allowance for incidental expenses. For Charleston, it is \$5. This fact, however, is not relevant to the Commission's analysis of a reasonable meal expense.

**In conclusion, the Ethics Commission finds that if a public official or employee is legally authorized to seek reimbursement for a meal, while traveling or not traveling, and is reimbursed for the meal at a rate that does not exceed the rate established by the West Virginia Travel Rules for the fiscal year in which he or she seeks reimbursement, this satisfies the requirements of the Ethics Act.**

**The Requester also asks whether it is permissible to provide more expensive meals to elected officials and senior staff. This practice does not *per se* violate the Ethics Act if the cost of the meal is within the limits prescribed herein.<sup>6</sup> The question of whether this practice is good public policy is beyond the jurisdiction of the Ethics Commission.**

**Nothing in this Opinion is granting express or implied authority to spend public funds for meals under the Ethics Act.**

**Before purchasing meals for its officials, employees or other persons, a public agency should review applicable laws to determine if there is express or implied authority for the expenditure.<sup>7</sup> Further, a public agency may consider requesting an opinion from the Office of the Attorney General as to whether it has express or implied authority or a legitimate public purpose to expend public funds for meals.<sup>8</sup>**

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<sup>6</sup> Whether a public official or employee violates the Ethics Act requires a fact specific inquiry through the formal complaint process. There could be occasions where an expenditure of this type violates the Act. For example, 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. Fosterv. Gainer*, 166 W. Va. 88, 90-91, 272 S.E.2d 666,667 (1980), citing 45 W. Va. Op. Atty. Gen. 583, 601 (1954).

<sup>7</sup> The Internal Revenue Service (IRS) states in its Quick Reference Guide for Public Employers that meal expenses are excludable income if: "[T]hey are furnished on your business premises and they are furnished for your convenience." I.R.S. Publication 5138 (2-2014) at p. 13. While the IRS recognizes that some meals in the public or private sector are furnished for the convenience of the employer, before providing any meals to public officials or employees, a state agency or local government body should ensure that it has authority to expend public money for that purpose.

<sup>8</sup> For example, the Office of the Attorney General issued an opinion in which it held: "[W]e are of the opinion that there is no statutory authority for the reimbursement of members of the Commission's citizen task forces for their meals and mileage when attending task force meetings. Without specific statutory

**An agency should also review Advisory Opinions issued by the Ethics Commission.**

*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.*

*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.*

  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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authorization, it must be concluded that the Commission lacks the authority to make such reimbursements." 64 W. Va. Op. Att'y Gen. No. 19 (Feb. 24, 1992)