

Advisory Opinion 2018-03

Issued on March 1, 2018, by

The West Virginia Ethics Commission

Opinion Sought

A **State Agency Manager** asks when it is reasonable for a public employee to book and seek reimbursement for overnight lodging while on official business.

Facts Relied Upon by the Commission

The Requester states that he is seeking “guidance regarding standards or considerations for determining when it is reasonable for a public employee to book and seek reimbursement for overnight lodging while on official business.” The Requester asks what distance or amount of travel time would qualify for the overnight lodging to be appropriate for reimbursement and if there are other factors besides distance that may be relevant.

For example, the Requester asks if official business beginning early in the morning and the employee incurring overtime for travel outside of regular working hours would weigh in favor of reimbursement for an overnight stay. The Requester further states, “A manager responsible for approving the expenses of many employees who work in the field must have some basis on which they may authorize appropriate and ethical expenses without being arbitrary.”

Provision 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.

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The Ethics Act (“Act”) permits the expenditure of public funds if there is a legitimate government purpose for the expenditure. Advisory Opinion 2015-12, *citing* 2012-27. An unauthorized expenditure, however, may constitute the unlawful use of office for

private gain if the overriding benefit is to the public official or employee as opposed to the agency or public. W. Va. Code § 6B-2-5(b)(1); Advisory Opinion 2013-56 (finding that public funds may not be used to pay for a sheriff's flight lessons and airplane rental to acquire a pilot's license because the stated reasons for these expenditures resulted in more personal benefit to the sheriff than to the public).

In making these determinations, the Commission considers whether the proposed expenditure is authorized elsewhere. "[T]he 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." Advisory Opinion 2012-50. The Commission's authority regarding the expenditure of public funds is limited to determining whether a proposed expenditure violates the Act. The Commission does not have exclusive authority to opine if state or common law authorizes an expenditure by a local government agency or the state of West Virginia. See, e.g., Advisory Opinion 2015-12 (recommending that a Sheriff contact the County Commission and the State Auditor's Office to ensure that excess home incarceration funds may be used for the proposed purchases even though the purchases would not violate the Ethics Act).

The Ethics Commission has previously addressed the issue of reimbursement for travel expenses under the Act. In Advisory Opinion 2011-13 the Commission considered whether a state agency's officials and employees could accept payment or reimbursement for health club or gym fees if the hotel at which they are staying on agency business does not provide free exercise facilities to lodgers. The Commission considered whether the fees could be paid by a third party under the gift provisions of the Act as well as whether they could be reimbursed by the state agency under the Act's private gain provisions. *Id.* The Commission found that a specific Legislative Rule addresses when a public official or public employee may accept travel and lodging expenses from interested third parties under the Act's gift provisions. *Id.*; W. Va. Code R. §§ 158-7-3, 158-7-5. However, "[t]he Rule is silent as to whether a public entity is permitted to use public funds to pay or reimburse its public servants in travel status for health club fees if the hotel does not provide free exercise facilities to lodgers." Advisory Opinion 2011-13.

To determine whether public funds could be used to reimburse health club or gym fees, the Commission turned to the applicable State Travel Rules and the Auditor's Office.

All State public servants—including officials and employees of the Requester --are subject to the restrictions imposed by their applicable State Travel Rules; i.e. they are only entitled to expense reimbursement for authorized expenses. According to the Auditor's Office, when determining whether a request for reimbursement is authorized, the first question is whether the expense is reasonable. Indeed, the Requester's enabling legislation authorizes the payment of "reasonable and necessary" expenses actually incurred in discharging one's duties. According to the Auditor's Office, neither the Executive nor the Legislative State Travel

Rules deem the reimbursement of health club or gym fees a reasonable expense, and therefore any such request for reimbursement would be denied as unauthorized. Instead, it is considered a personal expense for which the public servant in travel status is personally responsible.

Id.

Here, the Requester asks when it is reasonable for a public employee to book and seek reimbursement from the employee's agency for overnight lodging while on official business including what distance or amount of travel time would qualify for the overnight lodging to be appropriate. **The Ethics Commission finds that following the restrictions imposed by an agency's applicable State Travel Rules satisfies the requirements of the Ethics Act.** See Advisory Opinion 2001-33 (“[A]ccepting reimbursement of travel expenses, *otherwise authorized by law*, does not give public servants the kind of personal financial interest prohibited by ... the Ethics Act”) (*emphasis added*). For example, Rule 6.1 of the State of West Virginia Travel Rules states, “Lodging for a Traveler is reimbursable where the distance is more than fifty (50) miles from his or her official work location or home, whichever is the shorter distance, and an overnight stay is required.” State Travel Management Office, State Travel Policy (2015), <http://www.state.wv.us/admin/purchase/travel/TravelRule.pdf>.

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.

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.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission