

Advisory Opinion 2019-25

Issued on October 3, 2019, by The

West Virginia Ethics Commission

Opinion Sought

A **City Treasurer** asks whether the City may provide meals to employees who are required to work beyond their normal work schedule due to an unscheduled emergency.

Facts Relied Upon by the Commission

The Requester states that it has departments that may require their employees to work beyond their normal working hours due to an emergency that cannot wait until the following work day, such as a water line break. The Requester asks whether it may provide meals to those employees who are working beyond their regularly scheduled shifts and, if so, whether this constitutes a taxable fringe benefit.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-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.

Advisory Opinion

The Ethics Commission's authority regarding whether an expenditure is permissible, including expenditures for meals, is limited to interpreting and enforcing the Ethics Act. The Commission does not have exclusive authority to decide if state or common law authorizes an expenditure by a local government agency or by the state of West Virginia. Instead, the Ethics Commission only has authority to determine whether a proposed expenditure violates the private gain provision of the Act. Advisory Opinion 2018-02.

If state law gives a public official or employee express or implied authority to expend public funds for a specific purpose, then normally it does not violate the Ethics Act if he or she expends money for that purpose. If a public official or public employee makes an

unauthorized expenditure, however, it may constitute the unlawful use of office for private gain if the benefit to the public official or employee, or another person, is not counterbalanced by an overriding public benefit. Advisory Opinion 2018-02; Advisory Opinion 2013-38.

For example, in Advisory Opinion 2001-18, the Commission considered, *inter alia*, whether a County Ambulance Authority could use public funds to provide meals and refreshments as an inducement to encourage employees to voluntarily attend training sessions on their own time and without pay. Authority employees were required to maintain certification in emergency services. The Commission noted:

Public servants do not ordinarily receive meals while working at their regular duty locations. Specific Legislative authority must exist to warrant giving such benefits at public expense. The members of an Authority's board who gave unauthorized benefits to themselves, or other Authority personnel, benefits which were "beyond the lawful emoluments of their position", could be found to have committed a material violation of the Ethics Act.

Nevertheless, the Commission ruled in Advisory Opinion 2001-18 that such expenditures on meals and refreshments for training sessions for employees who attend on their own time, without pay, are justified by the counterbalancing public benefit from the training. The Commission concluded that such "expenditures would not be a prohibited use of office for the private gain of Authority employees."

The Ethics Commission similarly holds here that any individual private gain associated with providing meals to employees who are required to work unscheduled emergency overtime is justified by the counterbalancing public benefit from permitting city employees to respond to an emergency, such as a water line break, and remain on-site as needed. Expenditures for this purpose therefore do not constitute a prohibited use of office for the private gain of city employees.¹

While the Ethics Commission has determined that the proposed action does not violate the private gain provision of the Ethics Act, the Commission is without authority to determine whether any other laws or rules govern or otherwise prohibit the Requester's proposed conduct. The Requester should consult with its attorney as to whether providing meals to its employees under these circumstances constitutes a taxable fringe benefit.

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

¹ See Advisory Opinion 2001-01 ("It would not be a violation of the Ethics Act for [a state health care agency], in accordance with appropriate legislative authority, to provide or pay for employee meals when those employees are required to work unscheduled emergency overtime").

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