Advisory Opinion 2017-07

Issued on March 2, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A Manager of a Legislative Office asks whether his office's employees are permitted to purchase a temporary license for their personal use of Microsoft Office through Microsoft's Home Use Program.

Facts Relied Upon By the Commission

The Requester's office purchased several hundred licenses for Microsoft Office which is used by the office's employees for daily operations. The State of West Virginia Office of Technology executed a contract, entitled State of West Virginia Master Agreement ("Agreement",) with SHI International Corp. to provide Microsoft software products at a discounted rate. The Agreement became effective in November 2016. The discounted rate for each license was $201.58, and the retail rate was $248.40.

The Agreement included the "Software Assurance" benefit, which was included so that the office would receive free upgrades and patches. Although the agency was not aware of it at the time of purchase, Microsoft's "Home Use Program" was included in the Software Assurance benefit at no additional cost. This benefit is available to all commercial and government customers that purchase volume licenses. Microsoft states on its website[1] that:

> Software Assurance helps you with the following:
>
> •Reduce software and services costs with rights to new software releases and cost-efficient upgrades.
> •Use consulting services to plan new, on-premises and cloud-based deployments.
> •Improve operational efficiency through access to unique technologies and licensing rights.
> •Increase overall user productivity with instructor-led technical training and online end-user training.
> •Maintain an available and responsive IT infrastructure with around-the-clock support.

The Home Use Program allows employees to purchase discounted, temporary licenses to use the applications on their personal devices. Microsoft's website states:

[1]https://www.microsoft.com/en-us/licensing/licensing-programs/software-assurance-default.aspx

> The Home Use Program is a Software Assurance benefit available to Microsoft volume licensing customers with active Software Assurance coverage on their Office applications. Employees who use the covered licenses at work are eligible to purchase these Office applications for use on a personal device during the term of their employment. This temporary license expires with the employer's Software Assurance coverage, or upon termination of employment with the covered organization.[2]

The retail price for a one-year software license for home use is $99, but through the Home Use Program, the employees may purchase a temporary license for this software for $10. The license would be paid for by the employees with no additional cost to the Requester's office.

The Requester states that neither he nor his employees solicited the Home Use Program from Microsoft. He further states that his office did not select the Microsoft Office volume license package based on its Home Use Program and only later learned that this program was included. The Requester purchased the Microsoft Office volume license package based solely upon computer functionality and for compatibility with other agencies and with the public.

Provisions Relied Upon By the Commission

W.Va. Code§ 6B-2-S(b) 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.

W.Va. Code§ 6B-2-5(c)(1) provides in relevant part:

> A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family...

[2] http://www.microsofthup.com/hupus/hup.aspx?culture=en-US

> No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:
>
> (A) Is doing or seeking to do business of any kind with his or her agency;
> (B) Is engaged in activities which are regulated or controlled by his or her agency; or
> (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

Advisory Opinion

To determine whether the Requester's employees are permitted to purchase a temporary license for their personal use of Microsoft Office through Microsoft's Home Use Program, the Commission must assess whether the employee's purchase of the software would amount to the use of public office for private gain under W.Va. Code § 6B-2-5(b) or the acceptance of a gift prohibited under W.Va. Code§ 6B-2-5(c).

In Advisory Opinion 1996-47, the Commission held that it would not violate W.Va. Code § 6B-2-5(b) or (c) for public employees to receive discounts on products when the discount is offered by a retailer that is not doing business with or seeking to do business with the agency; the employees have not used their position to obtain the discount and the discount is offered to all the employees of the public body. The Requester purchased the Microsoft Office volume license package based solely upon computer functionality and for compatibility with other agencies and with the public. Therefore, the Requester did not knowingly and intentionally use his office for private gain and therefore did not violate (b).

In the present case, however, Microsoft is doing business with the Requester's office. Therefore, the Commission must now determine whether the employees' purchase of Microsoft Office to use on personal devices for $10 is a prohibited gift under W.Va. Code§ 6B-2-5(c)(A) when the retail price for a full license is $99. This subsection of the Code prohibits public employees from accepting gifts from a public agency's vendors or companies that are seeking to do business with the agency.

In Advisory Opinion 1991-58, the Commission held that it would violate W.Va. Code§ 6B-2-5(c)(1)(A) for city employees to accept personal tires at a 75% discount from a local tire company since the company was seeking to do business with the city. The facts did not suggest that this discount was offered to employees of the company's other customers.

In Advisory Opinion 2010-02, however, the Commission held that W.Va. Code§ 6B-2-

5(c)(1)(A) did not prohibit city employees from accepting personal cellular phone service at a discount from the city's cellular phone service provider under certain conditions. The Commission held:

> ... [T]his advisory opinion authorizes governing bodies to offer, and public employees to accept, discounts which meet the criteria established herein. Specifically, the proposed discount must: be available to all employees; not be solicited; not be offered as an inducement for the award and/or renewal by a governing body of a contract with a particular vendor; and, be a commercial business incentive offered by a company to its business account customers (private and public alike), at no additional cost to the governing body...

Although not explicitly stated in the Opinion, the criteria articulated therein established that the cellular service provider's discount offered under the circumstances was not a prohibited "gift" under the Act. This conclusion is consistent with Advisory Opinion 1992-04 in which the Commission stated that since "gift" is not defined in the Ethics Act, its ordinary meaning or definition must be used. "A gift is generally defined as something that is bestowed voluntarily and gratuitously without compensation in return." *Id.*

The Commission finds that Microsoft's Home Use Program is not "gratuitous," but rather, the lower price represents the value Microsoft places on a temporary license for home use as evidenced by Microsoft's offer of the Home Use Program to all its commercial and government customers that purchase volume licenses.

The Commission holds that Microsoft's Home Use Program is not a "gift" under W.Va. Code § 6B-2-S(c) due to the following circumstances: the Program is offered to all of the Requester's eligible employees; the Program is not offered to impair the impartiality and independent judgment of employees with the authority to determine whether to do business with Microsoft; the Program represents a business product available to all its commercial and government customers that purchase volume licenses; and, the Program is included in the assurance benefit at no additional cost to the Legislative Office. Accordingly, the Legislative Office's employees may purchase a temporary license for their personal use of Microsoft Office through Microsoft's Home Use Program.

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.

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, Chairperson
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