ADVISORY OPINION 2015-18

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State employee** asks whether he may accept a $2,000 award, a plaque, reimbursement of various travel expenses and a per diem for meals and incidentals associated with the award from a public health association in recognition of his outstanding creative and innovative work in public health.

FACTS RELIED UPON BY THE COMMISSION

The Requester became a full-time State public health employee in 2015. Prior to working for the State, he worked as a full-time county health administrator and local health officer. The public health association ("Association") selected the Requester for the award because of his response to a chemical emergency in 2014 while he was employed by the county health agency.

The Association is a national, non-profit, I.R.S. 501(c)(3) organization which is dedicated to improving the health of all United States citizens. It advocates for the adoption by government of the most current scientific advances relevant to public health and public education about improving community health.

The Association invited the Requester to the Association's awards ceremony to be held at its next annual meeting and exposition. The Association also wished to present the Requester with a $2,000 award, a plaque, free conference registration, airfare to the ceremony, baggage fees, ground transportation to and from the airport, hotel accommodations for two nights and a per diem of $71 per day for two days for meals and other incidentals.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

(1). .. 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.

(2) Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. This presumption may be rebutted only by direct objective evidence that the gift did impair the impartiality and independent judgment of the person or that the person knew or had reason to know that the gift was offered with the intent to impair his or her impartiality and independent judgment. The provisions of subdivision (1) of this subsection do not apply to:

(A) Meals and beverages;
(B) Ceremonial gifts or awards which have insignificant monetary value;
(C) Unsolicited gifts of nominal value or trivial items of informational value;
(D) Reasonable expenses for food, travel and lodging of the official or employee for a meeting at which the official or employee participates in a panel or has a speaking engagement;
(E) Gifts of tickets or free admission extended to a public official or public employee to attend charitable, cultural or political events, if the purpose of such gift or admission is a courtesy or ceremony customarily extended to the office;
(F) Gifts that are purely private and personal in nature; or
(G) Gifts from relatives by blood or marriage, or a member of the same household.

W. Va. Code§ 6B-2-5(h)(6) provides:

Employment by regulated persons and vendors.
A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

ADVISORY OPINION

In evaluating whether the Requester may accept the $2,000 award, the plaque, reimbursement of various travel expenses and a per diem for meals and incidentals, two provisions of the Ethics Act may apply. First, the Act prohibits public employees from accepting gifts from certain persons, including those who are "doing or seeking to do business of any kind with his or her agency." In addition, the Act prohibits public employees from receiving "private compensation" for providing services that they are required to provide as part of their public job responsibilities.

The gift prohibition in W.Va. Code§ 6B-2-5(c)(1) applies only if the potential gifter is doing or seeking to do business of any kind with the employee's agency; is engaged in activities which are regulated or controlled by his or her agency, or 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.[1] W.Va. Code§ 6B-2-5(c)(1). The only one of these categories which potentially applies to the Requester's situation is that the Association which is making the award may be doing business or seeking to do business with the Requester's agency.

The Requester indicates that the Association's website contains a link for individuals or agencies to become a member. Membership fees for individuals vary but are approximately $200 per year. Neither the Requester nor his agency is currently a member of the Association, although in previous years, the agency had been either a dues-paying member or an affiliate member. The Commission finds that this national, non-profit organization whose membership is limited to professional peers is not "seeking to do business" with the Requester's agency by merely having a website that offers memberships in all 50 states which is accessible to the general public.

The Ethics Commission finds that the Association is not "doing or seeking to do business of any kind with the Requester's agency" as set forth in W.Va. Code§ 6B-2-5(c)(1). The prohibition in that provision against accepting gifts accordingly does not apply to the instant situation. Moreover, the $2,000 award, the plaque,

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[1] In Advisory Opinion 95-03, the Commission found that it would be a violation of the Ethics Act for a County Sheriff to accept a $450 gift from the County Deputy Sheriffs' Association. The purpose of the County Deputy Sheriff's Association was to establish a forum to assist Deputy Sheriffs in addressing the problems and concerns which they may have with the Sheriff's administration. Given the Association's purpose, the Commission found that "[c]learly the Association has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of the sheriff's official duties." To the extent Advisory Opinion 95-03 conflicts with this opinion, it is hereby overruled.

the per diem and the reimbursements are all considered to be allowable gifts under the Ethics Act.[2]

The other provision of the Ethics Act which must be analyzed is the prohibition in W.Va. Code§ 6B-2-5(h)(6) against public employees receiving private compensation for providing services which they are required to provide as part of their public job responsibilities.

"Compensation" is broadly defined in the Ethics Act's definitional section as "money, thing of value or financial benefit." W.Va. Code§ 6B-1-3(c). The Commission finds that the term "private compensation" in W.Va. Code§ 6B-2-5(h)(6) connotes a private employment or contractual relationship and not gifts for two reasons. First, the title of W. Va. Code§ 6B-2-5(h)(6), *Employment by regulated persons and vendors,* is an indication that the section is only concerned with those instances in which a public official is employed.[3]

Second, limiting this restriction to compensation from private employment prevents inconsistent applications of provisions within the Ethics Act that the Legislature did not intend. If the term "private compensation" did not require an employment relationship, then an award could be permissible under W.Va. Code§ 6B-2-5(c)(2)'s exceptions to the gift prohibition, but prohibited underW. Va. Code§ 6B-2-5(h)(6). If W. Va. Code§ 6B-2-5(h)(6) did not require an employment relationship, awards such as meals and beverages and ceremonial gifts recognizing public service would be prohibited by W. Va. Code§ 6B-2-5(h)(6) because they would fall within the Act's broad definition of compensation. However, these same items are permissible under W.Va. Code§ 6B-2-5(c)(2). Thus, one provision would allow a gift, and another would prohibit it. The Commission finds that this was not the intent of the Legislature.

Therefore, requiring an employment relationship in order for W.Va. Code§ 6B-2-5(h)(6) to apply is in line with the purpose of the Ethics Act and results in the consistent application of the Act's provisions.

The Commission concludes that the prohibition against receiving private compensation for providing services required as part of the Requester's public job responsibilities does not prohibit him from accepting the $2,000 award, the

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[2] Today's holding is consistent with Advisory Opinion 99-14, where the Commission found that a coach at a state institution of higher education could accept a $5,000 bonus in recognition of his five years of service to the athletic program without violating the Act's gift prohibition. That Advisory Opinion found that the nonprofit boosters club or association did not have the type of private financial interests with which the rule is concerned and that gifts to coaches offer no potential for private financial benefit to the association or its members.

[3] The Act defines "employment" for purposes of (h) as "professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor." W. Va. Code§ 6B-2-5(h)(2) The Requester is not an employee or contractor of the Association.

plaque, reimbursement of various travel expenses and a per diem for meals and incidentals.

The Ethics Commission accordingly concludes that the Requester's acceptance of the award from the public health association in recognition of his outstanding creative and innovative work in public health does not violate the Ethics Act.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

/s/ Robert J. Wolfe, Chairperson
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