

## **ADVISORY OPINION NO. 2009-09**

**Issued On October 1, 2009 By The**

### **WEST VIRGINIA ETHICS COMMISSION**

#### **OPINION SOUGHT**

A **State Agency** asks whether it would violate the Ethics Act to accept a lower lodging rate for certain Agency employees from a resort which the State Agency regulates.

#### **FACTS RELIED UPON BY THE COMMISSION**

The Requester is a public agency that provides oversight and administration of a regulated industry which operates licensed activities at various locations in the state. As part of its administration and regulation, employees of the State Agency are stationed on-site at each of the licensed locations and/or make in-person visits in order to oversee the activities of each regulated entity.

One of the entities which the State Agency will regulate is located in a resort.<sup>1</sup> As part of its regulatory powers, employees of the State Agency will be sent to the facility to oversee the activities being operated at the resort. According to the Requester, much of the regulatory and oversight work performed by the Agency employees will be performed in the evening and overnight hours. Thus, the Requester desires to have the employees obtain lodging at the resort. The State Agency expresses concern that long hours and fatigue of its employees warrants lodging in close proximity to the regulated entity.

Currently, the resort does not offer a discounted rate for public employees, nor an established "government rate." Instead, based upon information and belief, all patrons and guests pay the prevailing commercial rate, which typically averages around \$400.00 a night. According to the Requester, the proposed special rate for the State Agency officials and employees to stay at the resort is \$100.00 a night. Per the Requester, this is the same nightly rate paid by employees of the resort.

As the State Agency noted in its request for an opinion, this special rate is "a substantial savings from the [resort's] regular nightly rate and compares favorably with other [local] hotel rates." There are multiple hotels and inns located within a ten (10) mile radius of the resort, including one that is one (1) mile away. A review of some of these local hotel rates reflects nightly rates equal to or less than the proposed \$100.00 rate.

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<sup>1</sup> The regulated entity is not yet operational. In addition to its oversight duties, the State Agency is also charged with reviewing, certifying, and monitoring so that the entity will

be able to begin its regulated activities.

Notwithstanding the availability of other hotels with comparable or lower rates, the Requester seeks an opinion about accepting a reduced rate for the State Agency employees at the resort it regulates.

## **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code§ 6B-2-5(b) reads in relevant 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.

Further, W. Va. Code§ 6B-2-5(c)(1) states 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[.]

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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**

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code§ 6B-1-2(a).

The Requester seeks the authority to accept a lower than commercial rate from an entity that it regulates and oversees. While the Requester appropriately asserts that a lower rate inures to the financial benefit of the State Agency, the Commission must additionally consider the request based upon the plain language of the Ethics Act, existing precedent, and the spirit and intent of its legislative mandate.

The West Virginia Ethics Acts forbids public officials or employees from accepting any gift, directly or indirectly, from any person engaged in activities which are regulated or controlled by his or her agency. W. Va. Code § 68-2-5(c)(1)(8). In this matter, the resort is regulated by the State Agency. Therefore, the officials and employees of the State Agency are precluded from accepting "gifts" from the entity.

Accordingly, the issue to be decided by the Commission is whether the offer and acceptance of a special, Agency-only reduced lodging rate from a regulated entity constitutes a prohibited "gift" under the West Virginia Ethics Act.

After weighing the potential benefit to the State Agency and the Commission's necessity to uphold our legislative mandates, the Commission hereby finds that a special, Agency-only lodging rate provided by a regulated entity would constitute a gift for purposes of the Ethics Act, and thus be prohibited by West Virginia Code § 68-2-5(c).

In making this determination, the Commission would note that the regulatory relationship between the State Agency and the licensee demands the utmost protection of the public confidence in the impartiality of its oversight. An appearance of impropriety is rife when a licensee establishes a special rate for the Agency which regulates it.

More importantly, the State Agency's concern about having its employees in close proximity to the regulated entity is tempered by the availability of other hotels near the location. The Commission would note there are multiple hotels and inns within a ten (10) mile radius of the regulated resort, including one that is one (1) mile away, which offer rates at least equal to or less than the proposed special rate. Use of these other non-regulated hotels would avoid the appearance of impropriety and still allow the State Agency to save money on lodging expenses without compromising the safety of its employees.

In denying the Requester's acceptance of the proposed special rate in this matter, the Commission wishes to make clear that it is **not** limiting the use and acceptance of reduced lodging rates offered to **all** public employees by a non-regulated entity.<sup>2</sup> As the

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<sup>2</sup> The Commission recognizes that there may be times when the employees of certain regulatory agencies, for example health departments, must stay overnight at entities they generally regulate, e.g. hotels. In such a situation, the public employees may accept reduced lodging rates when such rates are offered to **all** public employees, not just the agency that regulates them because **all** hotels are subject to the agency's regulation. The Commission cautions, however, that before accepting such a reduced rate from a regulated entity, regulatory agencies should consider the potential appearance of impropriety, undue influence and conflicts of interest that may arise therefrom.

Commission held in Advisory Opinion 90-118, these reduced rates are extended to all public employees as a class of business and government customers, and do not constitute a gift or use of public office for private gain.<sup>3</sup>

In contrast, the issue presented in this matter relates to a specific discount for a limited group of public officials and employees by the regulated entity the Agency oversees. In reviewing discounted commercial rates for public employees, the Commission weighs and considers whether the benefit to the State is significantly greater than the incidental benefit to the traveler.

In the present situation, the Commission is unable to find that staying at a resort, when other hotels which offer nightly rates comparable to the proposed rate are in close proximity, creates a significant overriding benefit for the State which outweighs the benefits to the traveler who would receive luxury accommodations at a facility that he or she is overseeing. Further, weighing the potential benefit to the State with the potential public perception of inappropriate intermingling between the regulator and licensee warrants denial of the special rate in order to uphold the public confidence in the impartiality of the State Agency.

Accordingly, based upon the foregoing, the Commission finds that the State Agency's acceptance of a special, Agency-only rate by a regulated Agency is prohibited by the West Virginia Ethics Act.

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-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Drema Radford, Vice Chair  
Drema Radford, Vice Chair

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<sup>3</sup> In Advisory Opinion 90-118, the Commission answered twelve specific questions. Question #1 addressed the acceptance of a reduced hotel rate, and our Opinion today does not change our answer therein. In our answer to Question #9, however, we stated that the Ethics Act prohibited the acceptance of bonus points for hotel stays and related expenditures which were paid by public funds. This portion of Advisory Opinion 90-118 has since been overruled by a subsequent amendment to the Ethics Act. See W. Va. Code § 6B-2-5(b)(2).