

ADVISORY OPINION NO. 2009-12

Issued On February 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the Board of Public Works** charged with responsibility for overseeing payroll deductions for State employees asks whether he may authorize deductions for the purpose of allowing State employees to purchase various consumer products through a company via a retail installment sales agreement.

FACTS RELIED UPON BY THE COMMISSION

The Requester is charged with the responsibility of overseeing voluntary payroll deductions for State employees. The West Virginia State Code provides that State employees or officers may authorize voluntary deductions from their paychecks for such items as payment for membership dues and supplemental life insurance. W. Va. Code § 12-3-13b. The statute also allows for other voluntary deductions, provided that they are approved by the Requester in accordance with legislative rules. The related Legislative Rule creates standards for voluntary payroll deductions. Title 155, Series 3. In general, the Legislative Rule establishes standards for allowing deductions for employee associations, charitable organizations and commercial organizations.

A company seeks to offer State employees the opportunity to purchase products such as computers and appliances through payroll deductions via the use of a retail installment sales agreement. The company would not charge interest for the products. State employees who elect to purchase products would have an agreed-to amount deducted from their paychecks until the item is paid in full.

The Requester's agency states that it believes that the enabling legislation and related Legislative Rule authorize deductions for this purpose. The Requester states that any business or entity requesting a voluntary payroll deduction for this purpose would be eligible if the entity receives a commitment to enroll from at least fifty State employees as required by the Legislative Rule. The Requester further states that it will provide a disclaimer that it does not warrant or endorse any particular product.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

A public official or 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.

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The Ethics Act generally prohibits public employees from using their public office for their own private financial gain or that of another. W. Va. Code § 6B-2-5(b). The Ethics Commission has previously ruled that conferring a fringe benefit upon a public employee would only be prohibited if there is no rational basis for the decision. See A.O.s 2008-07 and 2008-09.

In this case, the Legislature has authorized payroll deductions. The Requester states that his agency interprets the enabling legislation and related legislative rule as authorizing payroll deductions for this purpose, *i.e.* purchase of consumer products through a retail sales agreement with no interest charged. The Requester further states that, pursuant to his agency's interpretation of the law and related rule, the company which has made the request and other similarly situated companies which offer products for sale in the same manner are eligible to use the payroll deduction program for this purpose; provided that they satisfy the other requirements imposed by the Legislative Rule. The Ethics Commission is not authorized to interpret another agency's Legislative Rule. As such, consistent with rules of statutory interpretation, it defers to the agency's interpretation thereof.

Since the Legislature has approved this program through the enabling legislation and related legislative rule, there is nothing in the Ethics Act which prohibits the Requester from allowing a payroll deduction for this purpose. It is a form of an employee benefit.¹

The purpose of the Ethics Act, and in particular the private gain provision, is intended in relevant part, to ensure that a person or business is not unlawfully favored to the detriment of another. As the Requester states that his office is authorized to permit said deductions, and that all entities or business will be provided an equal opportunity to offer this service so long as they comply with the Legislative Rule, this payroll deduction opportunity does not constitute a matter prohibited by the Ethics Act.

The Ethics Act also prohibits a public agency from endorsing a particular product. See A.O. 2005-10. The Requester states that his office will add a disclaimer that his office does not endorse or warrant any particular product offered by the company.² As such, by permitting this payroll deduction, and allowing equal access to businesses which seek to implement similar programs, the Requester does not violate any provisions in the Ethics Act which prohibit the endorsement of a particular product.

¹ The Commission notes that there is nothing to suggest that the Requester solicited this company to offer this service or solicited retailers to offer this program. There are limitations in the Ethics Act upon solicitations for non-charitable purposes. W. Va. Code § 68-2-S(c).

² There is a limited exception to this rule which states that a commercial endorsement is only permissible when there is an overriding public benefit. That exception is not relevant to the present case as the Requester does not seek to endorse the products. If he did, further analysis would be required.

Before the Requester implements the program, he should seek to have the contract reviewed by the Office of the Attorney General to ensure that it complies with other applicable State laws, including consumer protection laws.

This advisory opinion is limited to the facts and circumstances presented regarding the responsibilities of an Elected Member of the Board of Public Works charged with authorizing payroll deductions for State employees. It may not be relied upon as precedent by other public bodies.

/s/ R. Kemp Morton, Chairman
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