

ADVISORY OPINION NO. 2004-28

Issued On January 6, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** asks if it is a violation for a potential vendor to pay the expenses of certain agency personnel to travel to and attend a vendor's product related open house.

FACTS RELIED UPON BY THE COMMISSION

The County Board of Education is building a new high school. The new high school will contain a state-of-the-art printing facility. The facility will be used for instruction of the printing trade and will also provide printing services to schools throughout the state. The facility is being funded in part via grant from the West Virginia Economic Development Authority. It is believed that the teaching of the printing trade will help bolster economic growth in West Virginia by establishing a trained labor force for this growing industry.

In evaluating which operating system to acquire, the board of education has made the preliminary determination that technology developed by a German company would best serve the needs of the school. The German company holds a patent for the process which it has developed. At present, no other company in the United States has this technology, nor is this system operating in the states. Thus if the school system purchases the system, it will be the first facility in the United States to employ the technology. The contract must be placed out for bid.

The German Company is holding an open house in Germany. It has offered to pay the cost of attending the open house for the School Superintendent, the President of the Board, the County Supervisor of Vocational Education, and the Director of Operations.

The open house is more comparable to a trade show. At the event, the company will unveil new products. During the course of the trip, the company will provide on site demonstrations of the equipment for the county school board representatives. It will also take them to a local company that uses the system and provide training. As there is no similar system in the United States, it is not possible to inspect the equipment without traveling.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain or that of another person. 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.

West Virginia Code §6B-2-5(c)(1) states in pertinent part that...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 official duties.

### ADVISORY OPINION

In previous Advisory Opinions the Ethics Commission has approved the practice of government agencies permitting vendors to pay the expenses of agency personnel when they attend events designed to enhance their job related skills or knowledge. For instance, in A.O. 98-18 the Commission found that it was permissible for a Public Service District (PSD) to be reimbursed by a potential vendor for the expense of key personnel attending a one day seminar on wastewater treatment equipment.

In certain instances, this practice does not violate the Ethics Act's prohibition against the acceptance of gifts because the employing agency and the public benefit significantly from the increase in the traveler's job related skills or knowledge. Although the individual traveler benefits, it is not the type of benefit which violates the Ethics Act.

There is no improper use of office for private gain where there is an overriding public benefit to such travel and the true recipient is the governmental agency, not the individual agency traveler. The incidental benefit to the individual is legitimized by the overriding public benefit.

To assist public officials and public employees in determining whether accepting financing for a trip from someone outside the agency is acceptable, the Commission established the following guidelines:

**1. The trip must be necessary to fulfill an existing agency need.**

The first consideration must be whether the trip will significantly enhance the traveler's occupational skill or knowledge or provide important information needed by the agency to meet its official mandate. Public employees and officials who have been offered trips should consult with their supervisor or agency head for guidance in making this judgment.

If the trip was conceived and scheduled by the agency prior to and independent of the offer of payment from a third party, then it is likely that the trip is necessary to the agency's official activities.

The skill, knowledge or information to be gained from the trip should meet a clear **immediate** need of the agency. The information should be of immediate value to current or planned activities of the

agency rather than theoretically valuable to activities that are neither current nor planned for the foreseeable future.

**2. The trip must be appropriate for the proposed traveler.**

A trip is appropriate for the traveler who needs and will use the information or job skill enhancement or who is the agency employee most suitable to acquire and transfer the information or skills to other appropriate agency personnel.

**3. The site of the proposed trip must be appropriate.**

Central to this inquiry is a consideration of whether the trip is a reasonable means of meeting the agency's needs. For example, it would not be reasonable for the agency to send its personnel to an out of state resort to obtain information that is readily available locally. Similarly, it would not be reasonable to permit an interested person to provide agency personnel such a trip.

**4. The trip must offer a reasonable return on the time spent.**

The trip should represent a reasonable investment of the traveler's time when weighed against the information acquired or the degree of improvement in job skills. A five day trip comprised of two travel days and three days of light class work would not be a reasonable way to acquire information or skills which could be adequately presented in a one day seminar.

This consideration also applies to part-time officials and employees who might travel outside official work hours. If they accept inappropriate free trips offered because of their public positions they may violate the Ethics Act's prohibition against using the prestige of office for private gain.

**5. The benefit to the agency must be significantly greater than the incidental benefit to the traveler.**

If the incidental personal benefit to the traveler outweighs the benefit to the agency, then the trip is in reality a gift to the traveler and not the agency. In such a case the trip should not be accepted because it is a gift to the individual of more than nominal value.

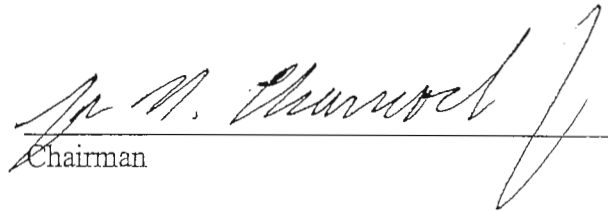
A safe rule would be to limit acceptance to only expenses that the agency itself would accept for reimbursement, i.e. reasonable food, travel, lodging, and attendance fees. First class airfares, deluxe accommodations, and other perks not associated with the basic travel, meals, and lodging required by the trip would increase the incidental benefit to the traveler.

The foregoing guidelines provide the requestor and other public servants a means of judging whether a specific offer of a trip is acceptable under the Ethics Act. Care should always be taken that no gift is tendered or accepted under facts or circumstances which could impair the impartiality and independent judgment of public servants in a particular governmental agency or give the appearance of impropriety or the creation of a quid pro quo.

The cost of leasing or purchasing the printing system technology will involve a significant expenditure of money. In order to ensure that the operating systems will serve the needs of the school and the state, it is important that the potential purchase be carefully evaluated and scrutinized.

Based on the information provided, and as the technology cannot be inspected and evaluated in the United States, the Ethics Commission finds that the proposed trip is acceptable. The criteria for determining who should attend is that the traveler must be an individual "who needs and will use the information or job skill enhancement or who is the agency employee most suitable to acquire and transfer the information or skills to other appropriate agency personnel." The Board has stated that the offer to reimburse expenses has been extended to four persons. The Board of Education must apply the applicable guidelines provided in order to determine whether each individual is an appropriate traveler, and meets all of the five criteria.

The Commission notes that this opinion is limited to the specific facts and circumstances of this particular case, and the decision may not be relied upon by others without having first consulted with and received written confirmation from the Ethics Commission

  
Chairman