ADVISORY OPINION 2016-09

Issued on June 2, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency Manager** asks whether state agencies may use public funds to purchase kitchen appliances and water for water coolers for use by state employees at work.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by the state and is responsible for reviewing the spending of state agencies and approving the spending in his state office. The Requester asks whether state agencies may use public funds to purchase water coolers, including water for the coolers, coffee makers, microwave ovens, toaster ovens and refrigerators for use by state employees while they are working.

The Requester also asks the Commission to draw a line between the unethical use of public funds and a *de minimis* use of public funds that does not rise to a material violation of the Ethics Act. The Requester states that his office provides filtered water and water coolers in several locations to 110 full-time employees and 30 seasonal employees.

Finally, the Requester asks the Ethics Commission to establish a bright-line rule regarding these types of office conveniences and to provide a set of factors his office should consider in reviewing the purchasing of and contracts for various agencies.[1]

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[1] This question has been answered by the West Virginia Supreme Court which provided guidance on what constitutes lawful expenditures in *State ex rel. Foster v. Gainer,* 272 S.E.2d 666, 166 W.Va. 88 (W.Va. 1980). It cited an Attorney General Opinion for the proposition that:

> It is the duty of the Auditor to refuse payment of a requisition for expenditure of public funds,
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> a. If there is no appropriation for the proposed expenditure;
> b. if there is no statute, State or Federal, authorizing the proposed expenditure;
> c. if the statute authorizing the proposed expenditure is unconstitutional;
> d. if the appropriation for the proposed expenditure is not for a public purpose;
> e. if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but the Auditor has reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain.

Id. at 90-91, 667, *citing* 45 Op.Atty.Gen. 583 (W.Va. 1954)

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) provides:

> 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.

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The Ethics Act prohibits public officials from knowingly and intentionally making unauthorized expenditures of public funds for their own or another person's private benefit.

The Ethics Commission's authority is limited to determining whether a proposed expenditure violates the private gain provision of the Act, at W.Va. Code§ 6B-2-5(b)(1). In making these determinations, the Commission considers, among other factors, whether the proposed expenditure is authorized elsewhere. In Advisory Opinion 2009-02, the Commission recognized that "although the Ethics Commission is only empowered to interpret the Ethics Act, we may not do so in a vacuum. Thus, we must take into consideration provisions of the Code and Constitution that directly bear on this request."

In Advisory Opinion 2012-50, the Ethics Commission stated, "In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure."[2]

In accordance with the above methodology and upon review of the above authorities, the Commission finds no regulation, opinion or law expressly authorizing the use of public funds to make the purchases requested herein. The Commission, however, makes clear

[2] The Commission, in Advisory Opinion 2012-50, provided a summary of its past holdings on what constitutes a permissible use of public funds under the Ethics Act. Some of these Advisory Opinions and others offer insight into the questions presented here. For examples, see Advisory Opinion 2011-05 (meals for public officials at chamber of commerce meetings are not permissible), 2010-19 (funeral flowers are not authorized) and Advisory Opinion 2011-05 (meals at Rotary meetings are not authorized.)

that although it relies upon the rules promulgated by these authorities, it does not have the authority to interpret the rules or make decisions on behalf of other governmental bodies charged with making decisions on whether purchases are authorized. Therefore, the Requester is advised to review applicable rules, laws and opinions by the above authorities to ensure that there is express or implied authority to make such purchases. "Without exception, money in the public coffers may only be expended by a government entity for an authorized purpose." Advisory Opinion 2012-50

Pursuant to the private gain provision, the Commission has held that, generally, the Ethics Act permits the expenditure of public funds if there is a legitimate government purpose for the expenditure. Advisory Opinion 2015-12, *citing* 2012-27. Stated another way, the Commission has allowed the expenditure of public funds if the individual private gain was counterbalanced by an overriding public benefit. Advisory Opinion 2013-38

The specific questions here are issues of first impression for the Ethics Commission. Therefore, the Commission will begin with a review of its prior relevant Advisory Opinions for guidance.

Prior Advisory Opinions by the Ethics Commission

In Advisory Opinion 2012-50, the Commission found that, in general, a public body may not spend public funds on meals and beverages for its employees while they are at work. (There are exceptions, e.g., when employees are attending certain seminars or traveling, which are not relevant here.) The purchases of office furniture, however, for a sheriff's office constituted authorized expenditures.

In Advisory Opinion 2013-38, the Commission stated that "the West Virginia Auditor's Office instructs governing bodies that they may not use public funds for meals or hospitality-related expenses when the general public is not invited. Therefore, the Commission hereby finds that the Requester may not use public funds for a meal during a building dedication ceremony when the general public is not invited."[3] The Commission went on to state, in Advisory Opinion 2013-38, that the "Requester may still hold a closed, invitation-only tour of the facility based on its security concerns, so long as no additional public funds are spent."

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[3] This is somewhat consistent with an opinion letter posted on the State Auditor's website under Local Government section (under "View Correspondence"), written by the State Department of Tax and Revenue on October 17, 1996, to Brenda Lemon, Interim City Auditor, City of Charleston, "There is no [municipal) statutory authorization for the purchase of food for city employees except as follows: 1. Code § 8-12-5 (51) authorizes a city to expend funds for the advertisement of the city and the entertainment of visitors; 2. Code § 8-12-5 (52) authorizes a city to conduct programs to improve community relations and public relations generally and to expend funds for such purposes. Under both of these situations, food and any other expenses of a Christmas lunch would have to be available to the general public so that not only city employees are the recipients of the benefits." (Subsequently, in 2008 the Ethics Commission issued a Guideline for Public Employee Recognition Events which provides guidelines for the expenditure of public funds for events held to recognize public employees, e.g., $25 per employee per year.)

In Advisory Opinion 2014-01, the Commission held that public funds could be used to provide boxed lunches to the public as well as to public officials during "County Day at the Legislature," an event sponsored by a county Economic Development Authority.

In Advisory Opinion 2014-11, the Commission found that the purchase of fitness supplies and equipment "within reason" for a sheriff's department was permissible under the Ethics Act. The Commission reasoned that "there is a direct benefit to the public in having strong and healthy officers since they are more capable of performing their duties. Any benefit that may inure to the officers is more than offset by the benefit to the public ... Indeed, the Requester's proposed purchase of fitness supplies and equipment falls within the Ethics Act's definition of "usual and customary ... duties [and] the advancement of public policy goals or constituent services." I.Q. While the basis of the decision was likely in regard to exercise equipment and the like, the proposed purchase also included bottled water and a water cooler.

In Advisory Opinion 2015-12, the Commission held that a sheriff's office may use public funds for cruisers, Tasers and fixed radar units for cruisers under the Ethics Act. 'Those items are directly related to general law enforcement, including patrolling highways and making arrests. Moreover, the public will benefit from Sheriff's Office employees being properly equipped to carry out their duties to maintain public safety."

Other States

The Commission also researched whether other jurisdictions permit public funds to be used to purchase kitchen appliances and/or water.

The Commission did not find any advisory opinions issued by other states' ethics commissions on whether public funds may be used to purchase kitchen appliances and/or water.

The Commission, however, found opinions from other state attorneys general to consider.

First, in Ohio Op. Att'y Gen. No. 82-006 (1982), the Ohio Attorney General stated, "Since the decision to expend public funds to purchase coffee, meals, refreshments or other amenities is a legislative decision, it must be memorialized by a duly enacted ordinance or resolution and may have prospective effect only."

Second, in Texas Op. Att'y Gen. No. C-557 (1965), the Texas Attorney General stated:

> A State agency or department may purchase consumable supplies or materials to be used in the care and maintenance of such items as refrigerators, ranges, sinks, percolators and cups. However, a State agency or department is prohibited by Section 51 of Article III of the Constitution of Texas and Section 6 of Article XVI of the

> Constitution of Texas from purchasing with State funds such items as food, coffee, cream, and sugar which would ultimately be consumed by employees of or visitors to the State agency or department.

Comptroller General of the United States

The Commission is most persuaded by the decisions of the Comptroller General of the United States. In B-302993 (2004), the Comptroller General stated, "The U.S. Pacific Command (USPACOM) may use appropriated funds to purchase refrigerators, microwaves and commercial coffee makers for central kitchen areas in its new headquarters building." The Comptroller General adopted the following reasoning:

> [T]here is a real and immediate benefit to employees who are provided the use of kitchen equipment like refrigerators, microwaves, and coffee makers... [F]or example, providing such equipment for employee use also inures to the benefit of the agency in a number of ways, including increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment. With kitchen facilities available, employees, facing deadlines and emergencies, often find that they can more easily accommodate these deadlines. Indeed, in a sense, it is the employee's use of the equipment itself, rather than use of alternatives, that accrues to the agency's benefit.

The Comptroller General went on to state, "It should also be clear that appropriated funds will not be used to furnish goods, such as the coffee itself or microwavable frozen foods, to be used in the kitchen area. These remain costs each employee is expected to bear."

In B-341539 (2008), the Comptroller General stated, "We have no objection to the Corps using appropriated funds to provide bottled water, so long as the Corps administratively determines that providing bottled water is the best way to provide its employees at a particular remote area with access to potable water."

In B-324781 (2013) the Comptroller General stated, "[W]e conclude that APG may use appropriated funds to purchase bottled water, water coolers, and cups for use at the specified locations [(agency had determined that the locations failed to comply with potable water standards)], and to purchase bottled water for use in response to legitimately anticipated dangers and exigencies."

CONCLUSION

The Commission holds that, based upon the reasons asserted above by the Comptroller General of the United States, state agencies may use public funds, within reason, to purchase kitchen appliances such as water coolers, including water for the coolers, coffee makers, microwave ovens, toaster ovens and refrigerators for use by state employees at work because the individual private gain to employees is counterbalanced by an overriding public benefit to state agencies.

This Opinion does not confer any benefit or establish that state employees are entitled to the purchases in question herein. Instead, the governing body must determine whether the expenditure is consistent with fiscal responsibility and whether appropriated funds may be used for this purpose. Advisory Opinions 2012-27 and 2014-01

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 § 6B-1-1 through W Va. Code§ 6B-2-10, 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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