

ADVISORY OPINION NO. 92-35

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 3, 1992

GOVERNMENTAL BODY SEEKING OPINION

A State Legislator

OPINION SOUGHT

Is it a violation of the Ethics Act for a member of the West Virginia Legislature to allow a private party to pay for a trip related to Legislative business which would have been reimbursed by the Legislature?

FACTS RELIED UPON BY THE COMMISSION

The requestor is a Legislator who was required, because of this position, to attend a meeting in Charleston. His schedule also required him to return home later that same day so he chartered the smallest plane available for the trip. The cost for that trip would be reimbursed by the Legislature.

The morning of the flight the requestor discovered that a larger plane would be used because another individual, a private business person, also needed to fly to Charleston and return that day. The requestor and the other passenger had never met before that morning. During their conversation the requestor learned that the business person was employed in an industry that was impacted by recently enacted legislation sponsored by the requestor. Their conversation included only general discussion of the industry and the legislation.

When they returned home the requestor gave the pilot a check for his share of the cost based upon his original agreement. The next day, however, the pilot returned the check with a note explaining that the other passenger had paid the full cost of the flight.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

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Solicitation

Although payment of the cost of a plane trip associated with legislative business would not be considered a charitable purpose, it is clear from the facts presented that the requestor did not solicit such payment. Consequently there is no violation of the Act's restriction on the solicitation of gifts for non-charitable purposes.

Acceptance

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. The approval is limited to reasonable expenditures for travel, lodging, and meals incidental to attending the event.

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.

This principle of overriding public benefit is applicable to gifts of trips from any one of the "interested persons" enumerated in W.V. Code §6B-2-5(c)(1) - lobbyists, regulated persons, and persons with a financial interest that is substantially affected by the traveler's official duties.

To assist public officials and public employees in determining whether accepting financing for a trip from someone outside the agency is acceptable, the Commission establishes 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 skill 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.

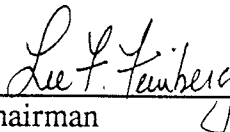
A safe rule would be to limit acceptance to only expenses that the agency itself would accept for reimbursement, i.e. reasonable food, travel, lodging, and attendance fees. First class airfares, deluxe accommodations, and other perks not associated with the basic travel, meals, and lodging required by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

It is important to note that these guidelines do not apply to public servants who receive offers of trips due to their private business activities. In such cases there is a presumption that the offer of the trip is not due to the individual's public office or employment. Rather, the trip is offered because he or she is a member of a wider business group whose members all have similar access to such a trip.

Applying the above guidelines to the facts provided, it is clear that the gift is to the agency and not to the traveler. First, the trip was approved for reimbursement by the Legislature before third party payment was offered. This is a clear indication that the trip was necessary to fulfill the Legislature's existing needs. Second, the site and duration of the trip were also appropriate. Legislative business typically takes place in Charleston and a trip of less than a day offered little or no opportunity for incidental personal benefits. In reality, the requestor received no incidental personal benefit from the trip. Therefore it would not be a violation of the Ethics Act for the requestor to accept, on behalf of the Legislature, the payment of the trip from a third party.

Under certain facts and circumstances, not present in this case, gifts to a governmental entity may be considered an attempt to influence public policy or impair the impartiality and independent judgment of individual public servants. Such gifts could also constitute a lobbying activity which would require registration of the donor as a lobbyist and reporting of the expenditures associated with the gifts.

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.



Chairman