

**ADVISORY OPINION NO. 90-118**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON JULY 12, 1990**

**GOVERNMENTAL BODY SEEKING OPINION**

A State Delegate

**OPINION SOUGHT**

1. Whether it is a violation of the Act for all State Legislators, while conducting State business to receive a **cheaper hotel rate** than that afforded other customers?
2. Whether it is a violation of the Act for State Legislators, while at a hotel conducting State business to make **free local telephone** calls, which normally cost a guest .75 per call?
3. Whether it is a violation of the Act for State Legislators, while conducting State business to receive **free parking** in the adjacent parking garage when this courtesy is offered to every registered guest?
4. Whether it is a violation of the Act for State Legislators, while conducting State business to receive complementary copies of a daily **newspaper** provided by the hotel, when this service is offered to all guests at this hotel?
5. Whether it is a violation of the Act for a State Legislator, while conducting State business to accept a free two month **subscription** to a local publication from a lobbyist group?
6. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive a **coupon** which entitles him to 30% off the purchase price of items in the hotel gift shop and other promotional prizes which are offered to every guest who stays at the hotel?
7. Whether it is a violation of the Act for a State Legislator, while conducting State business to utilize a discount coupon for various **prizes** when all guests registered at the hotel are afforded the same opportunity?
8. Whether it is a violation of the Act for a State Legislator, while conducting State business, to receive a 10 to 15 percent **discount on meals** purchased at the hotel restaurant?

### Hotel Bonus Points

- 9a. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for meals purchased at a Hotel when such expense is reimbursed by the State?
- b. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points from the hotel for credit card or room charges made in the cocktail lounge, when such expenses are not reimbursed by State funds?
- c. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for hotel gift shop purchases when such expenses are not reimbursed by State funds?
- d. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for monies spent on hotel rooms that are in excess of the charges reimbursed by State funds?
- e. Whether it is a violation of the Act for a State Legislator to receive bonus points afforded to all other guests for staying at the hotel at his own expense when he is not conducting State business?
- f. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for charging the purchase of a meal to a credit card when the Legislator is reimbursed by the State for the cost of the meal?
- g. Whether it is a violation of the Act for a State Legislator, while conducting State business to receive Guest points for charges made on the Hotel's "Honored Guest" credit card, when these expenses are not reimbursed with State funds?
10. Whether it is a violation of the Act for a State Legislator, while conducting State business, to receive bonus points for the purchase of gasoline when he receives partial reimbursement (.20 per mile) from the State?
11. When does a **promotional activity** such as bonus points and discount coupons offered by a commercial enterprise become a "gift", as that term is used in the Ethics Act?
12. To what extent does the West Virginia Ethics Act limit a member of the State Legislature from participating in **promotional activities** that are available to every other member of the public?

**OTHER FACTS RELIED UPON BY THE COMMISSION**

The State Delegate has requested that the Commission clarify issues raised with the issuance of advisory opinion number 90-64 and respond to several specific inquiries as set forth above.

The Hotel "Honored Guest Program" awards bonus points for several activities, in addition to staying at the Hotel. The participants in the program receive points for each night spent at the Hotel, points for each dollar spent for the Hotel room, gift shop purchases, restaurant or bar purchases, and any purchase made anywhere which is charged to a Hotel "Honored Guest" Visa card.

**PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a public official 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...

West Virginia Code Section 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;...

(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.

West Virginia Code Section 6B-2-5(c)(2) states in pertinent part that...Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. The provisions of subdivision (1) of this subsection do not apply to:

(A) Meals and beverages;...

(C) Unsolicited gifts of nominal value or trivial items of informational value;...

West Virginia Code Section 6B-2-5(k) states in pertinent part that...No public official shall knowingly request or accept from any governmental entity compensation or reimbursement for any expense actually paid by...any other person.

West Virginia Code Section 6B-2-5(m) states in pertinent part that...The Commission by legislative rule promulgated in accordance with chapter twenty-nine-a of this code may define further exemptions from this section as necessary or appropriate.

## ADVISORY OPINION

### **Cheaper Hotel Room Rate**

1. The first issue to be addressed is, if a State Delegate stays at a Hotel at a rate of \$43.00 per night in a room which normally rents for \$105 per night, has the requestor received a "gift" of the difference between the normal price of the room and the price charged him because he is a member of the Legislature.

The Commission finds that this would not be a "gift" as meant by subsection 6B-2-5(c) of the Act since the benefit of such reduced hotel charge inures to the benefit of the State who is paying the cost, and not the public official. One factor in determining whether something constitutes a gift that is prohibited by the Act is whether the individual or the State receives the most benefit from it.

Comparable reductions are available to all State officials and employees when performing governmental duties. It should be noted that the Legislator's use of rooms for the duration of the normal 60 day session accounts for some of the reduction.

It is not a violation of subsection 6B-2-5(b)(1) for the Delegate to accept reduced room rates while on official State business. These discounts are extended to him as a member of a class of business and government customers automatically entitled to lower rates. This does not constitute a prohibited use of public office for private gain.

### **Free Local Telephone Calls**

2. The second issue is whether it would be a violation of the Ethics Act for the Delegate to receive free local telephone calls for official business, which normally cost a guest in that hotel .75 cents per call.

As the Commission noted above in paragraph one this would not be a "gift" under the meaning of the Act since the benefit of such free calls inures to the benefit of the State who is paying the cost, and not the public official. Therefore, it would not be a violation of subsection 6B-2-5(c) of the Act for the Delegate to be provided with free local telephone calls for official business by the Hotel.

Also, although some benefit is received because of the official's position it would not be a violation of subsection 6B-2-5(b)(1) since the gain that would result would not be private, but would in effect be received by the State.

### **Free Hotel Parking**

3. The third issue is whether it would be a violation of the Ethics Act for the Delegate to accept free use of parking facilities in the parking garage adjacent to the Hotel when every guest who chooses to do so is provided the same opportunity.

This is a benefit which is ordinarily and logically considered **part and parcel** of the room package sold by the hotel to patrons without regard to their position. Since this benefit is generally available to all hotel guests, it is not considered a "gift" pursuant to subsection 6B-2-5(c) of the Act, but purchased with and incidental to the use of the room.

It is the Commission's opinion that, since the general public is afforded the same treatment as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits a public official from using his public office for private gain. It is the Commission's intent only to prohibit a public official from receiving a private benefit "because" of or as "a result of" his public position. However, as long as the official is being treated in the same manner as individuals who do not have public employment or positions it would not be a violation of the Ethics Act.

### **Free Daily Newspaper**

4. The fourth issue is whether it is a violation of the Act for the Legislator to accept complementary copies of the daily newspaper provided to the Delegate and other guests by the Hotel.

This is a benefit which is ordinarily and logically considered **part and parcel** of the room package sold by the hotel to patrons without regard to their position. Since this benefit is generally available to all hotel guests, it is not considered a "gift" pursuant to subsection 6B-2-5(c) of the Act, but purchased with and incidental to the use of the room.

It is the Commission's opinion that, since the general public is afforded the same treatment as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits a public official from using his public office for private gain. It is the Commission's intent only to prohibit a public official from receiving a private benefit "because" of or as "a result of" his public position. However, as long as they are being treated in the same manner as individuals who do not have public employment or positions it would not be a violation of the Ethics Act.

### **Free Two Month Subscription**

5. The fifth issue is whether it is a violation of the Act for a Delegate to accept a complementary two month subscription of a national newspaper published by lobbyist group.

The Commission finds that although the acceptance of gifts from a lobbyist is generally prohibited, public officials may receive certain gifts. One such exemption includes gifts of nominal value and trivial gifts of informational use. The Commission considers such publication (valued at under \$20 total) to fall within such categories and would be permitted.

### **Discount Coupon**

6. The sixth issue is whether it is a violation of the Act for the Delegate to receive a coupon which entitles him to a 30% discount on purchases made in the Hotel gift shop when he uses his personal Visa Card.

The Commission assumes that these purchases would be made with personal funds and would not be reimbursed with State funds.

It is the Commission's opinion that, since the general public is afforded the same opportunity to receive a discount coupon by using a Visa credit card as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits a public official from using his public office for private gain.

It is the Commission's intent only to prohibit a public official from receiving a private benefit "because" of or as "a result of" his public position. However, as long as he is being treated in the same manner as individuals who do not have public positions it would not be a violation of the Ethics Act. Therefore, the Commission finds that it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Delegate to receive and use such a discount coupon since it is offered to all guests and since items purchased by the Delegate from the hotel gift shop would be personal and not reimbursed with State funds.

### **Prizes**

7. The Seventh issue is whether it is a violation of the Act for a State Legislator, while conducting State business to utilize a discount coupon for various prizes when all guests registered at the hotel are afforded the same opportunity.

It is the Commission's opinion that, since the general public is afforded the same opportunity as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits the use of public office for private gain as previously noted it is the Commission's

intention only to prohibit a public official from receiving a private benefit "because" of or as "a result of" his public position. As long as he is being treated the same as individuals who do not have public employment or official positions it would not be a violation of the Ethics Act.

### **Discount on Meals**

8. The eighth issue is whether it is a violation of the Act for a State Legislator, while conducting State business, to receive a 10 to 15 percent discount on meals purchased at the hotel restaurant.

The Commission finds that the discount on meals given to the Legislator would not be a "gift" pursuant to subsection 6B-2-5(c) of the Act since the benefit of such reduced charges inures to the benefit of the State who is paying the cost of the Legislator's meals, and not the public official. As previously noted one factor the Commission uses in determining whether something is a gift is whether the individual or the State receives the most benefit. This discount it is primarily to the State's benefit.

Furthermore, it would not be a violation of subsection 6B-2-5(b)(1) of the Act since as noted in the previous paragraph the State receives the benefit of the reduced charges while the Legislator is on official business and not the Legislator as a private benefit.

### **Hotel Bonus Points**

9. The Hotel "Honored Guest Program" awards bonus points for several activities, in addition to staying at the Hotel. The participants in the program receive points for each night spent at the Hotel, points for each dollar spent for the Hotel room, gift shop purchases, restaurant or bar purchases, and any purchases made anywhere which are charged to a Hotel "Honored Guest" Visa card.

The next series of questions brought before the Commission by the requestor encompasses the use or accumulation of hotel bonus points and will be addressed individually.

a. The first issue from this series is whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for his private use based on meals purchased on a credit card or room charge at the Hotel when such expenses are reimbursed by the State.

The Commission finds that it would be a violation of subsection 6B-2-5(b)(1) of the Act for a State Legislator to receive bonus points for his private use based on purchases (i.e. meals) made which are paid by the State or are reimbursed with State taxpayer's money.

b. The next issue is whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for his private use from the hotel for credit card charges made in the cocktail lounge, when such expenses are not reimbursed by State funds.

The Commission finds that it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Delegate to receive bonus points for expenditures made at the hotel lounge since these are private expenses and would not be reimbursed with State funds. When charges are not paid or reimbursed by the State the value of the points belongs to the individual who paid for the expenditures.

c. Another question concerning bonus points is whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for his private use based on hotel gift shop purchases made on a credit card when such expenses are not reimbursed with State funds.

The Commission finds that it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Delegate to receive bonus points since items purchased by the Delegate from the gift shop are private expenses and would not be reimbursed with State funds. When charges are not paid by the State the value of the points belongs to the individual who paid for the expenditures.

d. The next issue in this series is whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for his private gain based on monies spent on hotel rooms that are in excess of the amount reimbursed by State funds. The hotel room costs approximately \$43 and the State reimburses the Legislator \$40 for lodging.

The Commission finds that it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Delegate to receive bonus points for monies spent on hotel rooms that are in excess of the amount reimbursed with State funds. The additional charge for the room would be a private expense and would not be reimbursed with State funds. Therefore, the Legislator may accumulate such bonus points for his private use.

However, the responsibility would be with the public official to maintain a separate account of bonus points accumulated by private funds.

e. The requestor questions whether it is a violation of the Act for a State Legislator to receive bonus points for staying at the hotel at his own expense when he is not on State business.

It would not be a violation of the Ethics Act for the Delegate to receive bonus points for staying at the hotel at his own expense when he is not conducting State business and therefore is not reimbursed with money collected from State taxpayers. When the official is staying at the hotel and paying as a private citizen he is free to accumulate and use bonus points for his benefit. It is only when the public official receives payments by State funds or uses his position to receive some private gain not equally available to others that there is a violation of subsection 6B-2-5(b)(1) of the Act.

f. Another issue is whether it is a violation of the Act for a State Legislator, while conducting State business to receive bonus points for his subsequent private gain by charging the cost of a meal to a credit card when the Legislator is reimbursed by State funds for the meal.

The Commission finds that it would be a violation of subsection 6B-2-5(b)(1) of the Act for a State Legislator to receive and use bonus points for his subsequent private gain for activities or purchases (i.e. meals) made which are paid by the State or are reimbursed with State funds accumulated from the taxes paid by the citizens of the State.

g. The last issue in this series is whether it is a violation of the Act for a State Legislator, while conducting State business to receive Guest points for charges made to the Hotel honored Visa card, when these expenses are not reimbursed with State funds.

The Commission finds that it would not be a violation of the Ethics Act for the Delegate to receive bonus points offered to all guests since these are private expenses which would not be reimbursed with State funds. When charges are not paid by the State the value of the points belong to the individual who paid for the expenditures.

### **Gasoline Reimbursement**

10. The tenth issue is whether it is a violation of the Act for a State Legislator, while conducting State business, to receive bonus points by using a credit card for the purchase of gasoline when he receives partial reimbursement (.20 per mile) from the State.

The Commission finds that it would be a violation of the Ethics Act for the Delegate to receive bonus points for the portions of the purchase of gasoline which would be reimbursed with State funds (.20 per mile). The Legislator may receive bonus points for private expenses which are not reimbursed with State funds. The value of any points accumulated and not paid for by the State belong to the individual.

However, the burden is on the public official to maintain such separate account of bonus points accumulated by using his private funds.

**Note:** The Commission would note that questions eleven and twelve are general in nature and without reference to specific factual circumstances identified by the requestor. These questions were addressed by the Commission as a matter of clarification and serve to reinforce the responses previously provided in this opinion.

However, pursuant to subsection 6B-2-3 of the Act which provides immunity from prosecution to those relying in good faith on these opinions, immunity from prosecution may be guaranteed only after the Commission considers the specific facts and circumstances as they relate to each individual request.

### **Promotional Activity**

11. The eleventh issue is when does a promotional activity offered by a commercial enterprise become a "gift", as that term is used and receipt is prohibited by the Ethics Act.

As previously noted one factor in determining whether something is a gift prohibited by the Act is whether the individual or the State receives the most benefit. This question will be more fully addressed in paragraph 12 below.

### **Limitations On State Legislators**

12. The final issue to be addressed is to what extent does the Ethics Act limit a member of the State Legislature from participating in promotional activities that are available to every other member of the public.

Subsection 6B-2-5(c)(1) provides that a public official may not accept any gift, directly or indirectly, from a lobbyist or from any person who is doing or seeking to do business of any kind with his or her agency, or any person who may have a financial interest which may be substantially and materially affected by the performance or nonperformance of his official duties. It is clear that hotels, restaurants, airlines and credit card companies are seeking to do business with the public official and have financial interests that are affected by the manner in which the official performs his or her duties.

However, subsection 6B-2-5(c)(2) allows a person who is a public official to accept certain gifts which are afforded a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. A few of the specifically named gifts which may be accepted include meals and beverages, unsolicited gifts of nominal value or trivial items of informational value and gifts that are purely private and personal in nature.

However, the Commission would remind the Legislator that pursuant to subsection 6B-2-5(b)(1) of the Ethics Act he may not accumulate bonus points for his personal use when the charges for the purchases which earn such points are reimbursed with funds collected from State tax payers.

Also, it is the Commission's opinion that, if the general public is afforded the same treatment as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits the use of public office for private gain.

The Commission's intent as previously stated in this opinion is to prohibit a public official from receiving a private benefit "because" of or as "a result of" his or her public position. As long as he is being treated in the same manner as individuals who do not have public employment or positions it would not be a violation of the Ethics Act.

On the date the Commission renders this opinion, the Commission has also reviewed proposed travel regulations submitted by a State Administrator and has issued Advisory Opinion #90-100 on this matter. The regulations provide that any value derived from bonus point programs such as, credit card and cash back programs for all charges made while on State business travel and reimbursed from State funds must be returned for the State's benefit and used for the public official's future State business travel.

  
Chairman

Also, it is the Commission's opinion that, if the general public is afforded the same treatment as that given to the Delegate it would not be a violation of subsection 6B-2-5(b)(1) of the Act which prohibits the use of public office for private gain.

The Commission's intent as previously stated in this opinion is to prohibit a public official from receiving a private benefit "because" of or as "a result of" his or her public position. As long as he is being treated in the same manner as individuals who do not have public employment or positions it would not be a violation of the Ethics Act.

On the date the Commission renders this opinion, the Commission has also reviewed proposed travel regulations submitted by a State Administrator and has issued Advisory Opinion #90-100 on this matter. The regulations provide that any value derived from bonus point programs such as, credit card and cash back programs for all charges made while on State business travel and reimbursed from State funds must be returned for the State's benefit and used for the public official's future State business travel.

  
Chairman