

ADVISORY OPINION NO. 90-172

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 3, 1991

GOVERNMENTAL BODY SEEKING OPINION

President of a non-profit Association formed on behalf of public employee members

OPINION SOUGHT

SOLICITATION

a. Whether it is a violation of the Ethics Act for a public employee to solicit gifts or donations for a charitable purpose?

ACCEPTANCE

b. Whether it is a violation of the Ethics Act for a public employee to accept an award from a non-profit Association of which he is a member?

c. Whether it is a violation of the Ethics Act for public employees, as members of a non-profit Association to accept gifts such as door prizes that are given to the members by the Association?

d. Whether it is a violation of the Ethics Act for a public employee to receive a nominal gift from an incentive program sponsored by the non-profit Association of which he is a member?

e. Whether it is a violation for a public employee to accept a gift from a Federal Law Enforcement Agency?

f. Whether price reductions, discounts or free goods given by businesses to public employees are considered "gifts" within the meaning of the Act?

FACTS RELIED UPON BY THE COMMISSION

The Association is a non-stock, non-profit organization which was incorporated in 1983. The territory of operation of the Association is the continental United States, with the principal place of business being West Virginia.

The membership of the Association is comprised of any West Virginia State Trooper currently serving in the state. Retired members of the West Virginia State Police may be members of the Association on a non-voting basis. Public employees who want to join the Association must complete an application and pay annual dues.

Membership Benefits

The Association is involved in many activities that affect the membership, a few of which are:

- 1) Association Day, a day at the State Capitol where all Association members can meet their legislators, and make their concerns known.
- 2) Association's Annual Conference for members with workshops, seminars and other beneficial activities for the members and their families. Also, awards are presented during the conference.

During the Association's annual conference which provides members with workshops, seminars and other activities, door prizes may be given to the attending members. Certain businesses or companies may volunteer to provide gifts for the conference. These gifts are unsolicited by the Association and are not earmarked for a specific individual. The initial donor of the gift does not have any authority or control over the distribution of the gift.

- 3) Association awards program, where an award is given to one member of the Association who meets certain qualifications. It is primarily funded and sponsored by the Association through dues and magazine royalties, with a few additional donations from certain businesses. Award winners receive the following items: a) Trip to Disneyworld for the member and family or \$1500 cash, b) \$500 cash from the Association, c) Walnut wall plaque, d) Class ring with year inscription, e) various clothing items with the Association's logo, f) desk set, and g) a selection of Smoky Mountain Secrets products.

There are also four runner-up awards. These winners will receive the following items: a) a weekend trip to a State park for the member and his family, b) \$50 cash from the Association, c) Walnut wall plaque, d) various clothing items with the Association's logo, e) desk set, and f) a selection of Smoky Mountain Secrets products.

Also, a Federal Law Enforcement Agency has discussed the possibility of presenting the Association with a monetary contribution to enhance the award given by the Association to the outstanding public employee of the year, or to create a separate award based on superior individual job performance.

5) The requestor states that one of the most important aspects of the organization is that it now offers a vehicle to West Virginia State Troopers which they can use to express their concerns and problems to the Legislature.

Public Benefits

The Association is also involved in a number of community activities throughout the State. Some of the activities and programs that affect the community are as follows:

- 1) A program developed to take the message of substance abuse to the children in elementary schools called the Bears against Drugs Program. Since its conception the program has been expanded to include many other programs geared for children.
- 2) A program identified as Bears Against Drunk Driving aimed at young adults in high school is designed to inform them of the consequences and problems they will face if they drink and drive.
- 3) A program which is in the developmental stage regarding a summer camp for underprivileged children.
- 4) The Association is also a leading supporter of the National Drug Free America Week. The Association members go to shopping malls across the State and distribute red ribbons that read "The Choice For Me Is Drug Free". The purpose of this program is to raise the level of public awareness to the current drug problem throughout the State.
- 5) The Troopers Teddy Bear Program places teddy bears in the patrol cars of every State Trooper on the road. The bears are used when a child is the victim of a crime and is traumatized to the point that it is difficult to communicate with the child.

The programs described are all performed by Association members during their OFF DUTY time. The members that participate in these programs do not receive any pay for their services. The time is donated by the Association members. The Association does sponsor an incentive program which awards gifts of nominal value to any member who volunteers to give a certain number of program presentations during his or her off duty time. Such nominal gifts may include sun glasses, key chains, t-shirts and jackets.

The administration of the Association is funded entirely by the collection of dues and royalties received from a magazine the Association publishes. On occasion various persons or businesses have volunteered financial or other support for activities promoted by the Association. All support, financial or otherwise, goes directly to the Association and never to a specific member of the Association.

There is no promise, implied or otherwise, given to anyone who donates money or anything else to the Association as to who the recipient of the gift will be. That decision is left to the sole discretion and determination of the Board of Directors.

On an additional matter, some public employees who are members of the Association have been offered significant price reductions (such as 50%) or complete nonpayment for certain items from persons or businesses located in the State. These public employees question whether this price discount or free item constitutes an impermissible gift. Specifically, the employees ask for clarification as to who in the State their agency regulates.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(a) states in pertinent part that...the provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments...

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

West Virginia Code Section 6B-2-5(c)(1) states in pertinent part that...a 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: Provided, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position as such is subordinate to the soliciting official or employee...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; or

(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.

West Virginia Code Section 6B-2-5(c)(2) states in pertinent part that...a person who is a public official or public employee may accept a gift described in this subdivision...:

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

ADVISORY OPINION

SOLICITATION

a. Pursuant to subsection 6B-2-5(c)(1) a public employee may only solicit a gift for a charitable purpose. The type of solicitation named in the request pertains to the support of community programs and activities on behalf of the Association throughout the State. Some examples are: the program developed to take the message of substance abuse to children, a program aimed at informing young adults of the consequences they will face if they drink and drive, a program which entails developing a camp for underprivileged children and the Teddy Bear program. The Commission considers these projects to be of a charitable purpose and for the aid and benefit of the general public.

Therefore, it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for public employees to solicit contributions to support charitable community projects which primarily benefit the public.

ACCEPTANCE

b. The Association gives an annual award to a public employee whose conduct best exemplifies law enforcement. The award serves to recognize and reward the employee for outstanding public service. This award carries with it monetary and other gifts.

Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act a public employee may not accept any gift from persons seeking to conduct business with his or her agency or any person who has a financial interest in the performance of the public employee's duties. The Association does not fall within such a category since the Association is not seeking to conduct business with the public employee, is not regulated by him or her nor does it have a direct financial interest which may be affected by the performance or nonperformance of the public employee's official duties.

However, this subsection also prevents public employees from accepting gifts indirectly from persons in the prohibited categories listed above.

For example, the Commission considers the Association's accepting a gift from a State vendor and then giving it to a member to be an "indirect" gift to the public employee from the vendor.

However, subsection 6B-2-5(c)(2) establishes categories of gifts which may be accepted by public employees from persons who are regulated by the public employees' governmental agency. Some of the acceptable gifts include meals and beverages, gifts of nominal value, ceremonial gifts or awards, gifts from relatives or those which are purely private and personal in nature. There is a presumption that these type of gifts would not impair the impartiality and independent judgment of the public employee.

Therefore, the gifts awarded by the Association to its members which do not fall within the categories established in subsection 6B-2-5(c)(2) must be funded by membership dues, magazine royalties or other profits and not from gifts given to the Association by persons falling into the prohibited categories outlined above.

In summary, it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for a public employee to accept the award accompanied by certain gifts from the Association if the award and prizes are funded by membership dues, magazine royalties or other profits, gifts donated by persons who are not regulated by the public employees' State agency and conduct do not business with the State agency.

c. Subsection 6B-2-5(c)(1) of the Ethics Act prohibits a public employee from accepting a gift either directly or indirectly from persons who are regulated by his or her agency.

Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act a public employee who won the door prize given by the Association could accept it if it was not given to the Association by persons who are regulated by the public employee's agency or who does not conduct business with the State agency as established in the prohibited categories outlined in answer (b).

However, prizes which fall into one of the exception categories established in 6B-2-5(c)(2), such as meals and beverages, gifts of nominal value or informational use, or ceremonial gifts would be permitted.

d. Subsection 6B-2-5(c)(1) of the Ethics Act specifically prohibits a public employee from accepting any gift from persons conducting business with his or her agency or from any person who is regulated by the public employee's governmental agency.

Also, this subsection clearly prevents public employees from accepting gifts indirectly from persons in the prohibited categories. It is unclear from the facts presented if the gifts awarded by the Association to its members for participation in the incentive program is funded by membership dues, magazine royalties and other profits or from gifts given to the Association by any person falling into the prohibited categories listed above.

However, subsection 6B-2-5(c)(2) of the Ethics Act provides that the acceptance of certain gifts given by persons in the prohibited categories is permissible by public employees. Gifts of nominal monetary value are included in the acceptable gifts.

The Commission would note that the gifts awarded to the members for participating in the Association's incentive program are of nominal monetary value. These gifts include sun glasses, T-shirts, key chains, jackets or ball caps with the Association's logo.

Therefore, it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for a public employee to participate in an incentive program sponsored by the Association where they receive nominal gifts for participating.

e. As noted above, a public employee may not accept any gift from persons seeking to conduct business with his or her agency, any person who has a financial interest in the performance of the public official's duties or from any person who is regulated by or does business with the public employee's governmental agency. A Federal law enforcement agency or organization would not fall within such a category.

Therefore, it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for a public employee to accept an award accompanied with certain gifts from a Federal law enforcement agency for outstanding public service.

DISCOUNTS

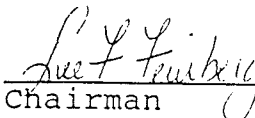
f. The Commission has determined that price reductions or discounts given directly or indirectly to public employees by businesses or persons would be considered gifts within the meaning of the Ethics Act. This does not include discounts or "specials" that are available to every other citizen of the State, but only those received by the public employee because of his or her position. Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act a public employee may not accept a gift from any person who is regulated by the public employee's agency.

It is the Commission's opinion that these particular public employees regulate every citizen and business in the State, since they enforce Statewide laws which apply to all individuals and business entities.

The Commission has previously noted in this opinion the Ethics Act provides for the acceptance of certain gifts. Some of the acceptable gift categories include meals and beverages, gifts of nominal value, ceremonial gifts or awards and gifts from relatives or those which are purely private and personal in nature.

There is a presumption that these type of gifts would not impair the impartiality and independent judgment of the public employee. Although the Commission recognizes that meals and beverages are generally considered permissible gifts there could be situations where they would not be. For example, if a public law enforcement officer were to eat three meals a day at a local restaurant the Commission might consider this to be excessive and to rebut the presumption of independence and impartiality in the employee's carrying out of his official duties. Also, the Commission would note that this continuous pattern of providing meals and beverages might be in violation of subsection 6B-2-5(b)(1) which prohibits a public employee from intentionally and knowingly using his prestige for private gain.

Further, the Commission recognizes that under certain circumstances, price reductions or discounts would not be considered a gift under the meaning of the Ethics Act. If the benefit of such reduced rates inures to the benefit of the State and not the public employees it would not be considered a gift. For example, in situations where the State is paying the cost or reimbursing the public employee's expenses. One factor used by the Commission in determining whether something constitutes a prohibited gift is whether the individual or the State receives the most benefit from it.



Chairman