ADVISORY OPINION NO. 2012-06

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the Board of Public** works asks whether a business which has a financial relationship with the State may pay his travel expenses for him to serve as a speaker on a panel at an international government forum.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Member of the Board of Public Works. His office has a contract with a financial institution to provide various financial services to the State of West Virginia. The financial institution contracts with a vendor to provide some or all of the services. The vendor is a financial service provider and is hereinafter referred to as the State subcontractor.

The Australian Government has a Department of Finance and Deregulation. This Department holds a Chief Finance Officer Forum approximately ten (10) times a year. Based upon information and belief, the Australian Government seeks a sponsor/underwriter for these forums. The forum in question is being held in Perth, Australia. While the host of the conference is Australia, it is sponsored by the State subcontractor. The State subcontractor states that the Western Australian Government is one of its clients.

The forum is entitled, "Risk Management and Program Benefits in Government Payments." The Requester has been invited by the State subcontractor to attend the forum to speak on the subject matter of public sector risk mitigation. The invitation also states that this opportunity will provide the Requester with a first-hand opportunity to observe Australia's approach to financial management and procurement. The State subcontractor will pay the travel expenses of the Requester, including international business class air travel.

The State subcontractor has also invited the Requester to meet with senior level executives at the Victorian Government in Melbourne and the Queensland Government in Brisbane. According to the invitation, "These engagements will adopt a board room meeting format and include approximately 5-10 finance and procurement managers from the respective states." The State subcontractor will also pay the Requester's travel expenses related to these proposed additional meetings, including business class air travel and lodging.

The Requester states that he believes his attendance at the forum will provide an overriding benefit to the State of West Virginia through the sharing of information between governments concerning fraud trends and internal control issues which arise due to the global nature of the economy and use of credit cards by public agencies. He states that the State's program has been nationally recognized. While the State of West Virginia uses the State subcontractor's

product, the Requester states that he will not be mentioning any specific product which is used by the State of West Virginia.

The State subcontractor states that one of the intended purposes of the trip is to strengthen its partnership with the Requester, and "the development of marketing programs and marketing strategies". Additionally, another intended purpose is for the State subcontractor to promote its brand and branded program. If the Requester accepts the State subcontractor's invitation, the Requester must sign an agreement relating to the expense reimbursement for travel. In relevant part, the State subcontractor is requiring the Requester to certify that his office is not engaged in any material contract or business negotiations at the time of the trip. Moreover, the agreement requires the Requester to warrant and represent that it is in full compliance with all applicable laws, including but not limited to the Foreign Corrupt Practices Act and the West Virginia Ethics Act.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> 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.

W. Va. Code§ 6B-2-5(c) reads in relevant part:

> 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 or her official duties.
>
> (2) ... The provisions of subdivision (1) of this subsection do not apply to:
>
> (D) Reasonable expenses for food, travel and lodging of the official or employee for a meeting at which the official or employee participates in a panel or has a speaking engagement. ...

§158-7-5. Reasonable Expenses for Panelist or Speaker.

5.1. A public official or public employee may accept payment or reimbursement for reasonable expenses for him or herself and for one

guest for food, travel and lodging incurred in attending a meeting at which he or she participates as a panel member or speaker, but may not accept payment or reimbursement for other expenses such as golf fees, carriage rides or health club fees unless these amenities are normally part of the standard hotel room charge and incidental to the use of the room.

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The Ethics Act expressly allows public officials to accept from interested parties "Reasonable expenses for food, travel and lodging of the official or employee for a meeting at which the official or employee participates in a panel or has a speaking engagement." W.Va. Code§ 6B-2-5(c)(2)(D). In regard to the Chief Finance Officer Forum, this speaking engagement falls within the exception to the gift rule. W.V.C.S.R. §158-7-5.1.

While it falls within the cited exception, the analysis does not end here. The Ethics Act prohibits public officials from endorsing products. *See generally* A.O.s 2000-21, 2005-10 and 2007-02. Here, the question presented is interesting as the Requester has no intent to discuss a specific financial service product. Instead, the focus of his discussion is public sector risk mitigation. Still, his presentation will undoubtedly include a discussion of the use of various financial service products which are available, including the use of credit card controls in furtherance of his agency's efforts to track spending and to control fraud. From a practical standpoint, the attendees will know that the State of West Virginia uses the product offered by the State subcontractor. Moreover, the State subcontractor sets forth in its proposed travel reimbursement agreement that one of the intended purposes of the trip is the development of its marketing strategies.

In Advisory Opinions 95-05, 95-28, and 2005-04, the Commission authorized a public servant or agency to enter into arrangements that provided certain benefits to private businesses. In each case, the Commission concluded that the agreements involved an overriding public benefit sufficient to legitimize any resulting private gain. Thus, even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain. In each of these Advisory Opinions, the overriding public benefit arose in the context of an economic development initiative. [This approach is consistent with another provision of the gift rule related to receipt of expenses to attend a seminar or conference. W.V.C.S.R. §158-7-3 provides a useful checklist to determine whether the receipt of such expenses provides a significantly greater benefit to the State agency than to the traveler.]

Thus, the Commission must determine whether the overriding benefit of the proposed trip is to the State. Based on the foregoing facts and analysis, the Commission concludes that the Requester's appearance at the forum provides a benefit to West Virginia by allowing our State to be recognized for its achievements in fraud control, and allowing the Requester to observe first-hand how Australian state governments approach financial management and procurement. Further, the event will provide an opportunity for the Requester to network with other government officials who also implement and manage electronic payments.

Hence, the Commission finds that the Requester may attend the forum at the State subcontractor's expense; however, limitations apply. The Requester must provide a copy of this opinion to the State subcontractor and formally notify the State subcontractor that he is prohibited from endorsing its product. Moreover, at or before the forum, the Requester must notify the forum participants that the West Virginia Ethics Act prohibits him from endorsing a particular product and that his presentation relating to fraud control should not be construed as an endorsement of the State subcontractor's product.

In regard to the proposed meetings with senior level executives at the Victorian Government in Melbourne and the Queensland Government in Brisbane, the Commission finds that these meetings do not fall within the speaking engagement exception. Further, the Commission finds that these meetings do not provide an overriding benefit to the State of West Virginia. Hence, the Commission finds that the Requester must decline these invitations.

This advisory opinion is limited to the facts presented any may not be relied upon by other public servants. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this advice invalid. This opinion is limited to the analysis of whether the Ethic Act would be violated by the proposed conduct. The Commission is without authority to determine whether other laws or rules prohibit or otherwise restrict the proposed conduct.

/s/ R. Kemp Morton, Chairman
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