ADVISORY OPINION NO. 2012-20

Issued On June 28, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An employee of a **Public University** asks whether public funds may be used to purchase prizes or incentives, including gift cards, for wellness related competitions or promotions when prize recipients may be employed by the university; and, if so, whether there is a limit on the amount of public funds which may be spent on each item purchased.

FACTS RELIED UPON BY THE COMMISSION

A Public University has a membership only recreation center. Its members consist of students, university staff, and the family members of staff. Members, including students, pay a membership fee.[1] University staff may purchase an individual or family membership. Membership is not open to the general public.

The recreation center sponsors various wellness related competitions such as triathlons, basketball tournaments and walking programs. These events are open to all recreation center members. Prizes are given to winners of the events. Participants may also be eligible to win a prize via random drawings conducted in conjunction with the events.

Historically, the program manager has used public funds to purchase the prizes. Oftentimes the prizes are gift cards. In this regard, the following question has arisen: Is it permissible to use public funds to purchase these prizes, including gift cards, when the recipients of such prizes may be university employees or their family members? The Requester seeks guidance on using public funds for this purpose, and further seeks clarification on the monetary limit, if any, on the value of these prizes. In particular, the Requester asks if the twenty-five ($25.00) gift limitation established by the Ethics Commission's Legislative Rule, Title 158, Series 7, and its related Gift Guideline, applies.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) 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)(1) states in relevant part:

[1] All undergraduate students are members via their student fee package.

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 heragency;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.

W.Va. C.S.R. § 158-7-4 reads in relevant part:

For purposes of the Ethics Act, W.Va. Code § 6B-2-5(c)(2)(c) a nominal gift is any gift with a monetary value of twenty-five dollars ($25.00) or less.

ADVISORY OPINION

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. A.O. 2010-19. The Commission has previously ruled that the use of public funds to underwrite a wellness program which provides financial incentives to public servants who participate in the program does not violate the Ethics Act. A.O. 98-28. *See contra* A.O. 2009-02 wherein the commission ruled that a county commission may **not** extend the benefits of a wellness program to its elected officials (emphasis supplied) unless statutorily authorized.

Here, the Commission reaffirms its prior holdings, i.e. that public funds may be used to fund public wellness programs and to purchase incentives for participants in the program or wellness related events. As such, public funds may be used to purchase prizes for these events, even if the winners of the prizes may be University employees or their family members.

Next, the Commission turns to the Requester's question regarding whether the Ethics Act imposes limitations on the value of a gift which may be given for wellness related events. The Ethics Act, related Legislative Rule, and the Commission's Gift Guideline set forth that a public employee or official may not receive a gift/s valued in excess of $25.00 in a calendar year from a lobbyist or interested party. W.Va. Code§ 6B-2-5(c), and, Title 158, Series 7. An interested party is defined in relevant part as "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." The Commission finds that the question presented is not governed by the gift limitations in the Ethics Act and related legislative rule as the University administrators who oversee the wellness program are **not** interested parties in relation to participants in university sponsored wellness programs. Hence, the $25.00 gift limit is not applicable.[2]

In regard to the amount of money a public agency may expend for incentives for public employees who participate in agency sponsored wellness program or related events, the Commission finds that it does not violate the Ethics Act to use a reasonable amount of public funds so long as there is a rational basis for the decision. The Commission declines to establish a dollar amount/limitation as it finds that this question is a policy question which goes beyond the authority of the Commission to establish. Instead, the institution may want to consider adopting its own policy to ensure that the University's administration may formally evaluate what constitutes a reasonable amount of funds to use for this purpose.

In regard to purchasing gift cards as prizes for wellness events or incentives, the same analysis and conclusion applies. Still, the University should review applicable Internal Revenue Service laws and regulations to ensure that providing gift cards does not constitute income to the recipient. Moreover, the Requester should consult with the State Auditor's Office to ensure that the use of public funds for this purpose constitutes an authorized expenditure.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/Jonathan E. Turak
Jonathan E. Turak, Acting Chairperson

[2] Similarly, the Commission finds that the Commission's Public Employee Recognition Events Guideline, which provides that it does not violate the Ethics Act to expend up to $25.00 of public funds per employee per fiscal year to recognize public employees, does not govern the question presented; instead, that guideline governs employee recognition events, **not** wellness events or programs.