ADVISORY OPINION NO. 2012-27

Issued On June 28, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Licensing Board** asks under what circumstances the Ethics Act allows it to purchase meals for its members and staff and, if permissible, what monetary limits apply.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Licensing Board established under Chapter 30 of the West Virginia Code. Such Boards are commonly referred to as Chapter 30 Boards. Their members are appointed by the Governor and approved by the Senate.

Chapter 30 Boards are comprised of representative members of their regulated professions and members of the general public. These members reside in different parts of the State.

When Chapter 30 Boards meet, at times, the meetings are long. For instance, the Requester has several committees whose meetings often last from five to six hours. To accomplish its work, the Board has working meals. The Requester states that they normally order from an inexpensive restaurant such as Bob Evans and work during the meals. Agency staff members who are present to assist the Board Members also get lunch. The Board uses public funds to purchase the lunches.

CODE PROVISIONS 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.

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. *See* A.O. 2010-19 wherein the Commission ruled there was no authority for the expenditure of public funds to purchase funeral flowers.

In the present situation, the State Licensing Board states that it has a working lunch to ensure that it accomplishes the work of the board and that its decision to use public

funds for this purpose is based, in large part, upon the fact that its meetings are long and its Board Members travel from various parts of the state. In light of these facts, the Commission must determine whether the expenditure of public funds for this purpose constitutes unlawful private gain to the Board Members and staff, or whether, for purposes of the Ethics Act, it is permissible.

Generally, the expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure. The Internal Revenue Service (IRS) guidelines permit meals for public employees when: (1) they are furnished on the agency's premise and (2) they are furnished for the convenience of the employer.[1] The Commission is not authorized to interpret IRS regulations; however, it finds them useful in analyzing whether the expenditure constitutes a taxable fringe benefit, or whether it is a legitimate business/governmental expenditure. If it is the latter, then this supports the conclusion that the overriding benefit is to the public and the public agency since the expenditure is made to enable the agency to perform its statutory duties. Hence, even if there is an incidental benefit to public officials or employees; still, it is a legitimate governmental business expense, not a taxable fringe benefit. Indeed, if it qualifies as a taxable fringe benefit or compensation, then it would constitute an emolument of office. Public officials are prohibited from increasing their own compensation. [2]

Based upon the facts presented, the Commission finds that it does not violate the Ethics Act for the Requester to provide a working meal to its members and any staff who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e. to accomplish its work. Here, the Commission finds that the meals are not being furnished with the intent of lavishing an unlawful benefit/compensation upon the Board Members, or any staff who are required to be present. Instead, they are being furnished for the convenience of the Board so that it may accomplish its mission more effectively and thereby serve the public.

Nevertheless, the Commission cautions that this opinion may not be construed as giving State Boards or Commissions unfettered authority under the Ethics Act to expend money for meals. In that regard, the Commission hereby establishes the following guidelines for such expenditures:

- State Boards or Commissions may spend a reasonable amount of public funds for meals at meetings when the meeting takes place at a time or is of such length that it makes the same reasonable.

- The Ethics Act does not authorize any governing body to recess or adjourn a meeting and go to a restaurant (or other off-site location) to consume a meal paid for with public funds. Indeed, governing bodies should take care not to schedule public meetings at private locations unless those meetings take

[1] IRS Quick Reference Guide for Public Employers

[2] For this reason, in A.O. 2009-02 the Commission found that a County Funded Employee Wellness Program may not be extended to elected county officials whose compensation is set by statue.

place in a public area fully accessible to the public at no cost to members of the public.

- The agency may not order lavish meals; instead, it must exercise fiscal responsibility in expending public funds on meals for its members and staff.

- The decision to purchase the meal must be based upon a legitimate government reason, i.e. that the agency is having a working lunch or dinner in order that agency business may be conducted most efficiently and effectively.

- The agency must determine whether it has funds to cover this expenditure.

- The ruling in this opinion does **not** extend to local governmental officials and agencies, e.g. City Council Members, County Commissioners or other local agencies. In A.O. 2001-18 the Commission found that the Ethics Act prohibits local government bodies from spending public funds for this purpose.

- A State Board or Commission seeking to expend money for meals at its meetings should check with the Auditor's Office to ensure that it does not run afoul of laws or regulations governing authorized expenditures.

In closing, the guidance offered herein recognizes that the expenditure of public funds for this purpose under the facts presented is acceptable under the general limitations in the Ethics Act against use of office for private gain. This guidance does not confer any benefit or establish that appointed State Board Members are entitled to a working lunch or dinner at the public's expense at each meeting. Instead, the governing body must determine whether the expenditure is consistent with fiscal responsibility and whether appropriated funds may be used for this purpose.

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