ADVISORY OPINION NO. 2011-13

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether its officials and employees in travel status may accept payment or reimbursement for health club or gym fees if the hotel does not provide free exercise facilities to lodgers.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a state agency whose board members and certain employees travel in the performance of their duties. At times, third parties offer free or reduced lodging, and/or free or reduced registration rates for attendance/participation as panelists or speakers at certain educational events. While use of a "gym" or "workout room" is often included in the standard hotel room charge as an incidental benefit, on infrequent occasions the lodging facility contracts with a third party for the provision of a gym or workout room for an additional fee.

The Ethics Commission's Legislative Rule on Gifts imposes certain restrictions on public servants in travel status accepting payment or reimbursement from a third party for health club fees when they are not normally part of the hotel room charge or included in the cost thereof. As a result, the agency's trustees and employees may only use an exercise room at no personal expense when the hotel provides access to a gym or exercise room at a charge of $25 or less; otherwise, they must pay for the "gym privilege" out of pocket.

In support of its position that gym/health club fees should be covered, the Requester states: "Regular exercise is as important to health as eating and sleeping. By not allowing for the reimbursement of health club fees, the Commission is imposing a financial burden on officials or employees who wish to maintain a regular exercise schedule while traveling."

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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

> A public official or 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.

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

> A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose ....

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

> (2) Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee 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:
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> (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. ...

Finally, the Commission's legislative rule governing solicitation and receipt of gifts provides, in relevant part:

§ 158-7-3. Receipt of Free Admission, Travel and Lodging Expenses to Attend an Educational Seminar or Conference

> 3.1. A public official or public employee may accept from an interested third party a reduced rate for or free admission to a privately sponsored conference or seminar, and reimbursement for reasonable meals, travel and lodging expenses, if his or her attendance will result in benefit to the governmental agency he or she serves by enhancing his or her job related skills and the performance of his or her public job responsibilities....
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> 3.5. A public official or public employee may not accept payment or reimbursement for other expenses such as golf fees, carriage rides or health club fees if the total value of the fees exceeds twenty-five dollars ($25.00) unless these amenities are normally part of the standard hotel room charge and incidental to the use of the hotel room.
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§ 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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158 C.S.R. § 7.

ADVISORY OPINION

The Ethics Act prohibits public servants from soliciting gifts unless the solicitation is for a charitable purpose. More important for purposes of the question presented here, however, the Ethics Act prohibits public servants from **accepting** gifts with a value of $25 from a single source per calendar year, with some exceptions.

In 2008, the Ethics Commission promulgated a Legislative Rule to provide specific guidance to public servants regarding solicitation and acceptance of gifts. For those circumstances when a public servant is staying at a lodging facility where health club use is normally part of the standard hotel room charge and incidental to the use of the hotel room, the relevant provisions of that Rule may be summarized as follows: When a public servant receives an expense-paid trip to participate in a conference, the public servant may accept health club fees up to a value of $25. On the other hand, if the public servant is attending a conference or event as a panelist or speaker, the public servant may not accept any payment or reimbursement of health club fee expenses. Further, the Rule is silent as to whether a public entity is permitted to use public funds to pay or reimburse its public servants in travel status for health club fees if the hotel does not provide free exercise facilities to lodgers.

The Requester asserts that the rule is unfair, and states, "In a state where obesity and health issues are clearly a problem, it seems that the State should be encouraging those traveling on its behalf to maintain a healthy lifestyle." Although the Commission has historically upheld the expenditure of public funds to promote wellness, the facts and circumstances in those instances differ from the facts presented here. In those opinions, the Commission generally authorized use of agency resources to provide agency-wide opportunities or incentives to promote wellness among employees.[1]

By contrast, in Advisory Opinion 2009-02, the Commission ruled that a County Funded Employee Wellness Program may not be extended to elected county officials whose compensation is set by statute, reasoning that to increase compensation through the extension of such benefits beyond their statutory maximum constitutes use of office for private gain. Here, although not all of the subject agency's public servants have their compensation set by statute, availing themselves of an additional benefit as proposed could be perceived as the prohibited use of office for private gain.

All State public servants-including officials and employees of the Requester --are subject to the restrictions imposed by their applicable State Travel Rules; i.e. they are only entitled to expense reimbursement for authorized expenses. According to the Auditor's Office, when determining whether a request for reimbursement is authorized, the first question is whether

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[1] In Advisory Opinion 98-28, the Commission wrote that the Ethics Act's prohibition against use of office for private gain "does not apply to [the) use of ... financial resources in a program intended to reduce the overall cost of agency operation, even if the program results in immediate financial gain to its members"; in Advisory Opinion 2001-19, the Commission authorized an agency to secure discounts for those who participate in the wellness program..."; and in Advisory Opinion 2004-09, the Commission authorized public employees to participate in a program offering discounted membership in the YMCA

the expense is reasonable. Indeed, the Requester's enabling legislation authorizes the payment of "reasonable and necessary" expenses actually incurred in discharging one's duties. According to the Auditor's Office, neither the Executive nor the Legislative State Travel Rules deem the reimbursement of health club or gym fees a reasonable expense, and therefore any such request for reimbursement would be denied as unauthorized. Instead, it is considered a personal expense for which the public servant in travel status is personally responsible.

While the Commission recognizes that inconvenience and disruption of daily routine are inherent to travel, it declines to find that the State should be expected to bear the cost of ameliorating any expenses created thereby. Thus, absent express statutory authority, the Commission hereby finds that public servants should not receive perquisites while in travel status. The Commission takes this opportunity to remind public servants that they are also prohibited from accepting payment or reimbursement for premium services such as access to a spa, or massage or other specialized treatments. Further, this ruling applies to public servants in travel status whose expenses are paid by a third party, as well as to public servants whose expenses are reimbursed by the agency.

The Commission concludes that the Ethics Act and its related Legislative Rule prohibit public servants who receive an expense-paid trip to participate in a conference from accepting payment or reimbursement for health club fees, when the total value of the fees exceeds $25.[2] Further, the Commission concludes that the Ethics Act and its related Legislative Rule prohibit a public servant who participates in a conference or event as a panelist or speaker, from accepting payment or reimbursement for health club or gym fees if the hotel does not provide free exercise facilities to lodgers.

While generally the Ethics Commission has held that wellness programs do not violate the Ethics Act, still the issue of expenditures of public funds therefor is a policy matter best resolved through legislation, travel regulations, and/or wellness policies.

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, Acting Chairperson
West Virginia Ethics Commission

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[2] The Commission cautions that although under this limited circumstance it is permissible to accept payment by a third party up to $25 for health club or gym fees, public servants may not solicit or otherwise request a third party to pay for such expenses. This action would constitute both the prohibited use of office for private gain and prohibited solicitation. Inquiries to a third party regarding what expenses are covered are permissible.