

## **Advisory Opinion 2021-09**

**Issued on June 3, 2021, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **City Chief of Police** asks whether the City's Police Officers or its Police Department may accept gift cards, valued over \$25, from a citizen who solicited the gift cards from local businesses as an appreciation gift.

### **Facts Relied Upon by the Commission**

A citizen manages an apartment complex located within City limits. To show her appreciation for the City's Police Department, the citizen solicited gift cards from various restaurants and gave the gift cards to each Police Officer along with a thank you card. Neither the Police Department nor its Officers asked the citizen to request, solicit, or give the gift cards.

The individual gift cards from the restaurants were less than \$25 each but collectively totaled approximately \$50. The citizen also included with each thank you card a \$25 pre-paid Visa Card from the business which owns the apartment complex where she works. The total value of the gifts to each Police Officer was approximately \$75.

As part of her efforts to thank the Police Department, the citizen also gave various gift cards to the Chief of Police and told him that the gift cards were to be used for the Police Department. The gift cards were from a donut shop, pizzeria, and a Mexican restaurant.

The Chief of Police has directed that none of the gift cards are to be used until and unless the Ethics Commission finds that it is permissible for them to keep the gift cards.

### **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-1-3(h) states:

“Person” means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.

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

(c) *Gifts.* - (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose . . . . 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) 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:

- (A) Meals and beverages;
- (B) Ceremonial gifts or awards which have insignificant monetary value;
- (C) Unsolicited gifts of nominal value or trivial items of informational value;

W. Va. Code R. § 158-7-4.1 states:

4.1. 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.

W. Va. Code R. § 158-7-3.2 states:

3.2. An interested third party is 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

W. Va. Code R. 7-7-7.1 states, in relevant part:

7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:

a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

The W. Va. Ethics Commission Gift Guidelines, re-issued June 4, 2020, state, in relevant part:

**Acceptance of certain gifts is permitted.**

Notwithstanding the general prohibitions set forth in the prior section against public officials and employees accepting gifts, the Ethics Act provides that the following types of gifts **may** be accepted by public employees or public officials from lobbyists or others:

(A) Meals and beverages of any dollar value may be accepted if the person purchasing the meal is present;

...

(B) Unsolicited gifts of nominal value or trivial items of informational value are permissible if the value of any one item, or a combination of items from the same source, given to a public official or employee does not total more than \$25 in one calendar year. This exception and the \$25 limit apply to meals and beverages if the person purchasing them is not present;

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**Gift Rules**

The Ethics Act and related Legislative Rule restrict the types of gifts that public officials and employees may accept. W. Va. Code § 6B-2-5(c)(1) and W. Va. Code R. §§ 158-7-1 through 158-7-9. The restrictions apply only if the gift giver is a lobbyist or any person whom the official or employee knows or has reason to know:

1. Is doing or seeking to do business of any kind with his or her agency,
2. Is engaged in activities which are regulated or controlled by his or her agency, or
3. 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.

*Id.* Gift givers who fall within these categories are commonly referred to as “interested persons” or “interested parties” because they have interests which may be uniquely affected by the action or inaction of a public official or employee.<sup>1</sup>

The Ethics Commission must determine whether the citizen who gave the gift cards is an interested person in relation to the Police Department or its Officers. Categories one and two do not apply to this citizen as she is not doing business with the City and she is not currently being investigated or facing criminal charges in the City. Further, the citizen is not a lobbyist so that category of restricted gift givers is inapplicable as well. Hence, the Ethics Commission must determine whether the citizen falls within the third category of restricted gift givers which are persons who have “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.”

In Advisory Opinion 2003-05 the Ethics Commission held that state troopers must comply with the gift rules when accepting gifts from any citizen in the state of West Virginia due to the state-wide law enforcement power exercised by the officers. In this case, the ruling in Advisory Opinion 2003-05 is instructive but not controlling as the City Police Officers do not have unlimited jurisdiction outside of City limits.<sup>2</sup> The Ethics Commission must therefore determine whether the citizen is an interested party in relation to the powers and jurisdiction of the City’s Police Officers.

The citizen manages an apartment complex within City limits. When the citizen is physically present in City limits to perform her job duties at the apartment complex, she is subject to the arrest powers of the City’s Police Officers. Further, the citizen manages a business located within the Police Department’s jurisdiction and the business owners and the business’s tenants fall within the jurisdiction of the Police Department.<sup>3</sup> **The Ethics Commission finds that there is a sufficient nexus between the citizen and the Police Department to make her a person whose financial interests may be substantially and materially affected by the performance or nonperformance of the Police Officer’s law enforcement duties. The citizen is therefore an interested party for purposes of the gift restrictions in the Ethics Act and related Legislative Rule, and the Police Officers and the Police Department may only accept gifts from her within the prescribed limits. The fact that the citizen bundled gifts from local businesses does not change the analysis or conclusion because the citizen is an interested party and the source of the gift does not change this conclusion.**

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<sup>1</sup> In Advisory Opinion 2003-05 the Ethics Commission used the designation “interested persons” to describe persons who fall within the categories of restricted gift givers.

<sup>2</sup> The Ethics Commission analyzed what constitutes the regulatory authority of law enforcement officers in Advisory Opinion 2019-28 for purposes of applying another part of the Ethics Act that imposes limitations on public officials and employees, including police officers, from doing business with certain persons. Advisory Opinion 2019-08 is not controlling to the specific legal issue being presented in this Opinion: While law enforcement officers may not *regulate* [emphasis added] all persons within their jurisdiction, it requires a separate legal analysis to decide which persons are those who have “financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of” the duties of the law enforcement officers.

<sup>3</sup> W. Va. Code § 8-14-3 sets forth some of the powers of municipal police officers.

### *Police Officers*

The citizen has given each Police Officer gift cards valued at more than \$25, an amount which exceeds the gift limit established by the Ethics Commission's Legislative Rule<sup>4</sup> and Gift Guidelines. Each Police Officer must do one of the following to comply with the gift restriction:

- Return the gift cards.
- Keep one gift card valued at \$25 or less and return the rest.
- Donate all the gift cards to charity.
- Keep one gift card valued at \$25 or less and donate the rest to charity.

This ruling is consistent with the Ethics Commission's ruling in Advisory Opinion 2003-05 in which the Ethics Commission ruled that law enforcement officers in an association may only use donations exceeding \$25 from interested persons for charitable purposes. The "buy-down" rule was discussed in Advisory Opinion 2008-05 in which the Ethics Commission ruled that a public official or employee may comply with the gift restrictions when accepting a \$55 ticket to a sporting event from a vendor by reimbursing the vendor \$30, the difference between a sporting event ticket value, \$55, and the \$25 gift limit.

### *Police Department*

The Chief of Police also asks about the gift cards donated to the Police Department. In Advisory Opinion 1990-176, the Ethics Commission ruled that a gift to a government agency is permissible as it is considered a gift to the government if it is used for the benefit of the government agency and not for personal purposes. The gift cards from the citizen may only be kept and used by the Police Department if used for a public purpose.<sup>5</sup> For example, the Police Department may give the gift cards to citizens as part of Police Department programs aimed at improving community relationships. The Police Department should document the receipt of the gift cards and their disposition.

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11 and does not purport to interpret other laws or rules, including whether there is express or implied authority for the expenditure.*

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<sup>4</sup> W. Va. Code R. § 158-7-4.1

<sup>5</sup> The Police Department may not give the gift cards to the individual police officers, even if the value of the individually distributed gift is less than \$25, because the Police Officers already received a gift valued in excess of \$25 from the same citizen.

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission