

Advisory Opinion 2021-17

Issued on August 5, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **City** asks whether employees at its new sports complex may accept tips from the public.

Facts Relied Upon by the Commission

A City recently hired multiple employees to work at its new sports complex, which is operated by the City's Parks and Recreation Department. The workers were hired to operate a customer service desk, run the concession stand, direct youth sports, provide clerical work, and serve as lifeguards and fitness attendants.

The employees are paid at least the West Virginia minimum wage, \$8.75 per hour, and work either part-time or full-time. Some of the positions are seasonal, but even the seasonal workers were hired as (Form W-2) employees and not independent contractors. The City did not contemplate that tips would be part of the employees' compensation. The City is not treating the employees as "tipped service employees" for Internal Revenue Service tax purposes. For example, the City is not taking a tax credit for tips against the minimum wages required to be paid in West Virginia.¹

Code Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(j) provides, in relevant part:

"Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

W. Va. Code § 6B-2-5(b)(1) provides, 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis*

¹ In West Virginia, employers may pay tipped service employees 70% of the minimum wage, \$8.75 per hour. Therefore, employers are only required to pay tipped employees \$6.13 an hour, and may take a tip credit of \$2.62, if the employee makes at least \$8.75 with tips. <https://www.nolo.com/legal-encyclopedia/west-virginia-laws-tipped-employees.html>

private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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

(1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: *Provided*, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position is subordinate to the soliciting official or employee: *Provided, however*, That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution. 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.

...

The provisions of subdivision (1) of this subsection do not apply to:

...

(C) Unsolicited gifts of nominal value [\$25] or trivial items of informational value.

...

W. Va. Code R. § 158-7-4 provides, in relevant part:

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. Some examples of nominal gifts include a T-shirt, hat, key chain, pen, pencil or any memento of that caliber. A public official or employee may accept from an interested party a nominal gift or gifts not exceeding twenty-five (\$25.00); *Provided*, That, the total dollar value of any nominal gift or gifts accepted from any one source may not exceed twenty-five (\$25.00) in one calendar year.

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

(6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

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

No public official or public employee shall knowingly request or accept from any governmental entity compensation or reimbursement for any expenses actually paid by a lobbyist and required by the provisions of this chapter to be reported, or actually paid by any other person.

Advisory Opinion

The Ethics Act applies to public officials and employees, including part-time employees. W. Va. Code § 6B-1-3(j). An independent contractor, however, is not a public employee, and therefore not subject to the Ethics Act. Advisory Opinion 2011-04. **The Ethics Commission finds that the definition of public employee includes seasonal employees who receive a W-2 from their government agency employer.**

Prohibited Extra Compensation

Two Ethics Act provisions, at W. Va. Code §§ 6B-2-5(h)(6) and (m), provide restrictions on public employees and officials accepting extra compensation from either a private person or a governmental entity.

The Requester states that the employees at the sports complex are paid at least minimum wage. Further compensation, including tips, was not contemplated as a part of the employees' compensation, and the City is not taking a tax credit for tipped employees. Further, the Commission finds that the employment positions at the new sports complex are not jobs for which tips are customarily given in either the private or public sectors. The Commission finds rather that job positions, such as restaurant servers, bag carriers, and room cleaners, customarily receive tips as part of their compensation.

First, the Commission will consider W. Va. Code § 6B-2-5(h)(6), which states, "A full-time public official or *full-time* [emphasis added] public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities." This provision was applied in Advisory Opinion 2001-35 (holding that a state forester could not provide private forestry services because he was already being paid by the state to provide the same services) and in Advisory Opinion 2008-05 (holding that a county golf professional could not teach lessons to private customers at the public golf course while on the clock because he was already being paid to do so by the county. He could give lessons on his own time.) While the facts in these opinions do not deal with tips, the same principle applies.

Therefore, the full-time City employees are prohibited from accepting tips from members of the public under W. Va. Code § 6B-2-5(h)(6) because the employees are being fully compensated by the City. To accept additional compensation, including tips, would result in prohibited extra compensation.

Second, W. Va. Code § 6B-2-5(m) provides, “No... public employee shall knowingly request or accept from any governmental entity compensation... actually paid by any other person.” This provision contains the same or similar restrictions as (h)(6) and applies to both full-time and part-time employees.

Therefore, the City employees, including part-time employees, are prohibited from accepting tips from members of the public under W. Va. Code § 6B-2-5(m) because the employees are being fully compensated by the City. To accept additional compensation, including tips, would result in prohibited extra compensation.

Prohibited Gifts

The Ethics Act prohibits public servants from accepting gifts more than \$25 per calendar year from four defined categories of people: lobbyists, persons doing or seeking to do business of any kind with their governmental agency, persons regulated by their agency, and persons who have a unique financial interest in the employee’s performance of his/her job duties. W. Va. Code § 6B-2-5(c)(1)(A)-(C).

The relevant subsection to consider in this case is W. Va. Code § 6B-2-5(c)(1)(A), which prohibits gifts to the employees from persons “doing or seeking to do business of any kind” with the City at the sports complex.² The Ethics Commission, in Advisory Opinion 1995-49, analyzed the applicability of this section of the prohibited gift provision when a state park customer gave a photograph to an employee of the state park. The photograph was believed to be valued at more than \$25. The Commission held:

In this instance the individual giving the gift to the public employee is merely a customer of the State Park. Although technically he may be seeking to “conduct business” with that governmental agency, the Commission has determined that this is not the type of relationship covered by W. Va. Code § 6B-2-5(c)(1)(A). Social guests at State Park lodges would not be considered vendors seeking to “conduct business” as that term is used in the Ethics Act.

Therefore, since the guest at the State Park facility would not fall within one of the categories of prohibited gift givers, it would not be a violation of W. Va. Code § 6B-2-5(c)(1) to accept his gift of a photograph....

² Another subsection may also apply: W. Va. Code § 6B-2-5(c)(1)(C) prohibits gifts from a person who “[h]as 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.” Given the holding today, however, the Commission will not analyze this section of the prohibition.

[P]ublic employees may not use their public position for their own private gain or for the private gain of another.... [Therefore], the requester is cautioned that she may not use her position at the State Park facility to obtain, increase or promote her personal interests. She may not offer preferential treatment, exclusive services or other extraordinary assistance to those individuals who offer her special gratuities as a quid pro quo.

The Commission will now reconsider its holding in Advisory Opinion 1995-49. The Commission notes that W. Va. Code § 6B-2-5(c)(1)(A) broadly prohibits gifts from persons who are “doing or seeking to do business of any kind with his or her agency.” This broad language encompasses all types of business transactions by an agency. The limitation also applies to every employee of an agency regardless of whether his or her position gives him or her control or influence over the agency’s business transactions.

Therefore, based on the plain language of the provision, the Commission overrules its holding in Advisory Opinion 1995-49 to the extent it held that “the Commission has determined that this is not the type of relationship covered by W. Va. Code § 6B-2-5(c)(1)(A)” and that “Social guests at State Park lodges would not be considered vendors seeking to ‘conduct business’ as that term is used in the Ethics Act. W. Va. Code § 6B-2-5(c)(1)(A).” Today’s finding is supported by the stated purpose of the prohibited gift provision as expressed in Advisory Opinion 1999-14:

This [gift] rule is a recognition that gifts from interested persons to public servants may give the appearance of an effort to buy, or to reward, preferential treatment. The rule is intended to regulate the nature and magnitude of gifts to those public servants whose official influence may benefit the financial interests of those who give the gifts. It is an effort not only to prevent misconduct, but to guide public servants away from situations which may suggest or give the appearance of impropriety.

The Commission holds that customers at a city-owned sports complex fall under a category of persons from whom city employees may not accept gifts. W. Va. Code § 6B-2-5(c)(1)(A). Therefore, the prohibited gift provision of the Ethics Act prohibits the employees assigned to the sports complex from accepting gifts valued at more than \$25 per calendar year from any one source or person.

Nothing in the Ethics Act prohibits the City from prohibiting employees from accepting gifts valued at less than \$25 per calendar year from a customer.

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 W. Va. Code § 61-10-15, 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 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
WV Ethics Commission