

## **ADVISORY OPINION 2016-14**

**Issued on November 3, 2016, by**

### **THE WEST VIRGINIA ETHICS COMMISSION**

#### **OPINION SOUGHT**

A **Municipal Fire Department** asks whether it may use public funds to purchase coffee for the lobby of its main office.

#### **FACTS RELIED UPON BY THE COMMISSION**

The Requester states that the Fire Department provides coffee in the lobby of its main office primarily for members of the general public who visit the office to use the services provided by the fire department, e.g., file materials needed to get licenses, issue complaints and request fire reports. The Requester states that approximately 25-35 members of the public visit the lobby each week and collectively drink one to two pots of coffee each day.

The Requester further states that six employees who work in the main office also drink this coffee. The public employees consume approximately 40 percent of the coffee; the general public consumes approximately 60 percent.

The Fire Department spends approximately \$8 each month on coffee. The Requester asks whether purchasing this coffee for the public and employees is an authorized expenditure and if it is permissible under the Ethics Act.

#### **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W.Va. Code § 6B-2-5(b)(1) provides:

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* 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.

### **ADVISORY OPINION**

The Ethics Act prohibits public officials from knowingly and intentionally making unauthorized expenditures of public funds for their own or another person's private benefit. "Without exception, money in the public coffers may only be expended by a government entity for an authorized purpose." Advisory Opinion 2012-50.

The Ethics Commission previously has stated that: "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." Advisory Opinion 2016-09. Therefore, the Requester is advised to review applicable laws, rules and opinions by the above authorities to ensure that there is express or implied authority to purchase coffee for the lobby.<sup>1</sup>

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<sup>1</sup> The West Virginia Supreme Court provided guidance on what constitutes lawful expenditures in State ex rel. Foster v. Gainer, 272 S.E.2d 666, 166 W.Va. 88 (1980). The Court relied upon a West Virginia Attorney General's Opinion for the proposition that:

It is the duty of the Auditor to refuse payment of a requisition for expenditure of public funds,

- a. If there is no appropriation for the proposed expenditure;
- b. if there is no statute, State or Federal, authorizing the proposed expenditure;
- c. if the statute authorizing the proposed expenditure is unconstitutional;
- d. if the appropriation for the proposed expenditure is not for a public purpose;
- e. if the requisition for the proposed expenditure shows on its face that it is for a public or other lawful purpose, but the Auditor has reasonable proof available that, in fact, the money has been spent, or is proposed to be spent, for personal or private gain.

272 S.E.2d at 667, 166 W.Va. at 90-91, *citing* 45 Op.Atty.Gen. 583, 601 (W.Va. 1954)

Further, as for purchasing food for employees, an opinion on the State Auditor's website under Local Government section (under "View Correspondence"), written by the State Department of Tax and Revenue on October 17, 1996, to Brenda Lemon, Interim City Auditor, City of Charleston, states: "There is no [municipal] statutory authorization for the purchase of food for city employees except as follows: 1. Code § 8-12-5 (51) authorizes a city to expend funds for the advertisement of the city and the entertainment of visitors; 2. Code § 8-12-5 (52) authorizes a city to conduct programs to improve community relations and public relations generally and to expend funds for such purposes. Under both of these situations, food and any other expenses of a Christmas lunch would have to be available to the general public so that not only city employees are the recipients of the benefits."

## Ethics Act

Pursuant to the private gain provision of the Act, at W.Va. Code § 6B-2-5(b)(1), the Commission has held that the Ethics Act permits the expenditure of public funds only if there is a legitimate governmental purpose for the expenditure. Advisory Opinion 2015-12, *citing* Advisory Opinion 2012-27. Stated another way, the Commission has allowed the expenditure of public funds if the individual private gain was counterbalanced by an overriding public benefit. Advisory Opinion 2013-38.

The Commission has addressed what constitutes permissible use of public funds under the Ethics Act regarding kitchen appliances and employee meals. The Commission, in Advisory Opinion 2016-09, held that state agencies may use public funds, within reason, to purchase kitchen appliances such as water coolers, including water for the coolers, coffee makers, microwave ovens, toaster ovens and refrigerators for use by state employees at work because the individual private gain to employees is counterbalanced by an overriding public benefit to state agencies.

The Commission was most persuaded by the decisions of the Comptroller General of the United States. In B-302993 (2004), the Comptroller General allowed public funds to be used to purchase kitchen equipment like refrigerators, microwaves and coffee makers. Such equipment “increased employee productivity, health, and morale, that when viewed together, justify the use of appropriated funds to acquire the equipment.” *Id.*

The Comptroller General went on to state, “It should also be clear that appropriated funds will not be used to furnish goods, such as the coffee itself or microwavable frozen foods, to be used in the kitchen area. These remain costs each employee is expected to bear.” *Id.*

The Ethics Commission has also held that meals for public employees and officials are generally not permissible under the Ethics Act. Advisory Opinion 2012-50. For example, in Advisory Opinions 2015-07 and 2011-05, the Commission held that meals for public officials at chamber of commerce and rotary meetings are not permissible. (There are exceptions to the prohibition on providing meals to employees that are not relevant here, e.g., when employees are attending certain seminars, traveling overnight or working unscheduled emergency overtime. Advisory Opinions 2001-01, 2001-18, 2012-27 and 2012-50.)

In Advisory Opinion 2013-38, the Commission observed that “the West Virginia Auditor’s Office instructs governing bodies that they may not use public funds for meals or hospitality-related expenses when the general public is not invited.” The Commission concluded that “the Requester may not use public funds for a meal during a building dedication ceremony when the general public is not invited.”

In Advisory Opinion 2014-01, the Commission held that public funds could be used to provide boxed lunches to the public as well as to public officials during “County Day at the Legislature,” an event sponsored by a county Economic Development Authority.

Finally, W.Va. Code § 8-12-5 provides that municipalities “have plenary power and authority therein by ordinance or resolution, as the case may require, and by appropriate action based thereon: ...

(52) To appropriate and expend not exceeding twenty-five cents per capita per annum for advertising the municipality and the entertainment of visitors;

(53) To conduct programs to improve community relations and public relations generally and to expend municipal revenue for such purposes...”

## **CONCLUSION**

**The Fire Department’s purchase of coffee appears justified by the plenary power given to municipalities in W.Va. Code § 8-12-5 to expend municipal funds to improve community and public relations. Therefore, the Commission finds that as long as purchasing coffee is an authorized expenditure under the relevant laws, rules and opinions, there is a legitimate governmental purpose for purchasing coffee with public funds for its guests in its main lobby.**

**Further, in this situation, the amount of coffee consumed by the Fire Department’s employees is *de minimis*. Therefore, the Commission need not determine whether purchasing coffee for public employees is generally permissible.**

This Opinion does not confer any benefit or establish that public employees are entitled to the purchases in question herein. The governing body instead must determine whether the expenditure is consistent with fiscal responsibility and whether appropriated funds may be used for this purpose. Advisory Opinions 2012-27 and 2014-01

*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, at W.Va. Code § 6B-1-1 through W.Va. Code § 6B-2-10, 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.*



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Robert J. Wolfe, Chairperson  
WV Ethics Commission