

# ARKANSAS ETHICS COMMISSION

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## Advisory Opinion No. 2019-EC-002 Issued April 19, 2019

The Arkansas Ethics Commission (“AEC”) received a written advisory opinion request from Mr. Clay Ford, Saline County Civil Attorney, of Benton, Arkansas. In his request, Mr. Ford asks whether certain employment benefits provided to Saline County Library (“Library”) employees by the Saline County Library Board (“Library Board”), given with Library Board approval, that have not been “legislated” by the Saline County Quorum Court, and that are benefits not provided to other County employees, are considered a “gift”, and thus prohibited under Ark. Code Ann. § 21-8-801, *et seq.*, or whether these benefits are considered as “income and benefits from the governmental body to which...[an employee] is entitled . . .”, and thus permitted under the law. <sup>i</sup>

The referenced statute, Ark. Code Ann. § 21-8-801, provides, in pertinent part, as follows:

(a) No public servant shall:

(1) Receive a gift or compensation as defined in § 21-8-401 *et seq.*, other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position[.] <sup>ii</sup>

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(b) (1) No person shall confer a gift or compensation as defined in § 21-8-401 *et seq.* to any public servant, the receipt of which is prohibited by subdivision (a)(1) of this section[.]

Ark. Code Ann. § 21-8-402 (5) (A) defines “Gift” to mean any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor. While not specifically addressed in the request, the instant opinion has been written assuming the benefits in question (including, but not limited to, a Child Care and Elder Care Stipend, Student Loan Reimbursement, Wellness Reimbursement, Career Service Recognition, and Quarterly Hour benefits) exceed \$100 in value and do not fit within one of the exceptions to the definition of “gift” set forth in Ark. Code Ann. § 21-8-402(5). The facts provided make it clear that these benefits are being provided from the governmental body served by the Library employees and that these benefits are given for the performance of the duties and responsibilities of the employee’s office or position.

Accordingly, the question boils down to whether or not the referenced benefits constitute income and benefits to which the library employees are “duly entitled”. The answer carries significant ramifications because if the employees are not “duly entitled” to those benefits, then the conferring of the benefits would be prohibited under Ark. Code Ann. § 21-8-801(b). It is noted that the term “duly entitled” is not defined by statute. However, in Advisory Opinion No. 2007-EC-007, the AEC interpreted “duly entitled” to mean “legally owed to the public servant.”

According to materials submitted by the requestor, the Library Board was established by the Saline County Quorum Court’s passage of Ordinance No. 78-1 on January 5, 1978. Pursuant to that ordinance, the Library Board was granted the power to “employ or remove all employees of the Saline County Public Library and to fix, regulate, and pay their *salaries*.” (Emphasis added) The meaning of “salaries” has been discussed in previous Attorney General opinions, notably Op. Ark. Atty. Gen. No. 2009-025, which stated that “compensation” is a broad category of remuneration which includes, but is not limited to, salary and that “[b]enefits, such as insurance, are one example of compensation that is not salary.” (See also Op. Ark. Atty. Gen. No. 95-061.)

That opinion cited Ark. Code Ann. § 14-14-1203, a statute found in the area of the Code governing County Government, which provides, “All compensation, including salary, hourly compensation, expense allowances, and other remunerations...shall be made only on specific appropriation[.]” Op. Ark. Atty. Gen. No. 2003-050 likewise looked at the meaning of “salary” and noted that the Courts in Arkansas have held that “salary” denotes payments at regular intervals or fixed compensation regularly paid, as by the year, quarter, month, or week, and observed that “salary” has been construed in other jurisdictions as being distinct from fringe benefits.

While the Library Board was vested with the power to fix, regulate, and pay the “salaries” of Library employees, Ordinance No. 78-1 did not go so far as to empower the Library Board to provide Library employees with additional benefits such as Child Care and Elder Care Stipend, Student Loan Reimbursement, Wellness Reimbursement, Career Service Recognition, and Quarterly Hour benefits. In the absence of such power, it is the AEC’s opinion that the Library Board’s decision to provide additional employment benefits to Library employees was *ultra vires* and, therefore, that library employees are not “duly entitled” to those benefits within the meaning of Ark. Code Ann. § 21-8-801.

In the event the Saline County Library Board did have the power to fix, regulate, and pay not only salaries but also benefits, the Commission finds it questionable that the library employees would be “duly entitled” to the benefits in question by virtue of Ark. Code Ann. §14-14-805 (2) which provides, in pertinent part, as follows:

Each county quorum court in the State of Arkansas exercising local legislative authority is prohibited the exercise of the following:

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(2) Any legislative act that applies to or affects the provision of collective bargaining, retirement, workers' compensation, or unemployment compensation. However, subject to the limitations imposed by the Arkansas Constitution and state law regarding these subject areas, a quorum court may exercise any legislative authority with regard to employee policy and practices of a general nature, including, but not limited to, establishment of general vacation and sick leave policies, general office hour policies, general policies with reference to nepotism, or general policies to be applicable in the hiring of county employees. *Legislation promulgated by a quorum court* dealing with matters of employee policy and practices shall be applicable only to employees of the county and shall not apply to the elected county officers of the county. *Legislation applying to employee policy practices shall be only of a general nature and shall be uniform in application to all employees of the county.* The day-to-day administrative responsibility of each county office shall continue to rest within the discretion of the elected county officials[.] (*Emphasis added*)

In Advisory Opinion No. 2007-EC-007, the AEC found that if there is a state law that specifically limits the compensation of Quorum Court Members, and certain compensation exceeds that state proscribed limit, then the Quorum Court members would not be “duly entitled” to the excessive compensation.

Although Advisory Opinion 2007-EC-007<sup>iii</sup> involved a different statute which specifically regulated and limited Quorum Court member compensation, the AEC specifically found that if longevity bonuses voted on by a Quorum Court caused its members to exceed the compensation limit established by that statutory provision, then the members would not be “duly entitled” to the bonuses. In other words, if there is a statute that makes a benefit otherwise illegal, then the prospective recipient could not be “legally” owed that benefit and, therefore, not “duly entitled” to it.<sup>iv</sup>

As noted in Op. Ark. Atty. Gen. No. 2018-116, Ark. Code Ann. §14-14-805 (2) requires that Counties have uniform “employee and policy practices” and “shall be uniform in application to all employees of the county.” With that in mind, Op. Ark. Atty. Gen. No. 2018-116 found that the Library Board cannot adopt policies for Library employees that differ from those established by the Quorum Court for county employees as part of the county’s general “employee policies and practices” and would mean that the Library Board lacks statutory authority to provide different benefits from those that have been legislated by the Quorum Court. Similarly, the Attorney General stated in Op. Ark. Atty. Gen. No. 2013-070 that the “...County Library Board lacks authority to adopt a sick leave policy for county library employees that contravenes a policy established by the Quorum Court pursuant to Ark. Code Ann. §14-14-805 (2).”

Based upon the foregoing, it is the AEC’s opinion that the Library employees would not be “duly entitled” to the additional benefits, if such benefits were different from those legislated by the Quorum Court for other employees. In that situation, the benefits could be found have been conferred in contravention of Ark. Code Ann. § 21-8-801.

However, to the extent that the Library Board voted to provide these benefits to its employees, the Commission is of the opinion that “good cause” would exist for not imposing a sanction on the library employees in the event a violation of Ark. Code Ann. § 21-8-801(a)(1) was found. Furthermore, the AEC notes that employee benefits do not appear to be the basic type of illegal gratuities Ark. Code Ann. § 21-8-801(a)(1) was designed to prohibit.

Finally, the AEC notes that nothing in Ark. Code Ann. § 21-8-801(a)(1) would prohibit the Library Board from increasing the salaries of the Library employees as an alternative to providing such employees with benefits above and beyond those provided to other county employees. The Library Board could, for example, raise a Library employee’s salary by an amount necessary to help pay childcare expenses or student loan payments.

This opinion should not be interpreted to limit in any way traditional compensation and employees benefits received by other county employees and commonly afforded to public servants in Arkansas, such as, health insurance benefits, retirement benefits, payroll deduction options, or the payment of expenses related to the ability of the employee to carry out their job responsibilities (i.e., the county providing a mandatory uniform for a county employee or the county paying for the licensing fees or continuing education for an employee that must have said license or education to carry out their county employment).

This advisory opinion is limited to the specific set of facts or activity set forth in the request. The AEC emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the Commission’s answer might differ. Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law.

Finally, the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission cannot opine regarding the permissibility of a specific past event.

This advisory opinion is issued by the Arkansas Ethics Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By:   
**Jill Rogers Barham**

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<sup>i</sup> As background, Mr. Ford states that the Saline County Library Board was established by Saline County Ordinance No. 78-1 as a County Administrative Board. That Ordinance states that the Board has the right and power to regulate and pay the salaries of the Library employees. The Library is funded by a \$1.7 million tax on real and personal property within Saline County.

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While the salary of library employees is paid from proceeds of the \$1.7 million tax, the Library handles the payroll for Library employees “in-house”. Based on the opinions expressed in Ark. Op. Atty. Gen. No. 2013-070 and Ark. Op. Atty. Gen. No. 2016-125, it is believed that employees of the Library are considered “County employees.”

Mr. Ford further states that the Library, with Library Board approval, currently provides certain benefits to Library employees that are not made available to other county employees whose benefits are approved by the Saline County Quorum Court. The benefits that are made available to Library employees, but not county employees at large, include, but are not limited to, a Child Care and Elder Care Stipend, Student Loan Reimbursement, Wellness Reimbursement, Career Service Recognition, and Quarterly Hour benefits.

Based upon the opinion expressed in Ark. Op. Atty. Gen. No. 2018-116, Mr. Ford states it is believed that the Library Board cannot adopt policies for Library employees that differ from those established by the Quorum Court for County employees as part of the county’s general “employee policy and practices,” and that the Library Board lacks authority to provide different benefits from those that have been legislated by the Quorum Court. The referenced Attorney General opinion states that it does not necessarily mean that Library employees are limited to receiving benefits only if those same benefits are available to other County employees.

<sup>ii</sup> Ark. Code Ann. § 21-8-402 (5) (A) defines "Gift" to mean any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor. (B) The term "gift" does not include: (i) (a) Informational material such as books, reports, pamphlets, calendars, or periodicals informing a public servant regarding his or her official duties. (b) Payments for travel or reimbursement for any expenses are not informational material; (ii) The giving or receiving of food, lodging, or travel which bears a relationship to the public servant's office and when appearing in an official capacity; (iii) Gifts which are not used and which, within thirty (30) days after receipt, are returned to the donor; (iv) Gifts from an individual's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any of these persons, unless the person is acting as an agent or intermediary for any person not covered by this subdivision (5)(B)(iv); (v) Campaign contributions; (vi) Any devise or inheritance; (vii) (a) Anything with a value of one hundred dollars (\$100) or less. (b) The value of an item shall be considered to be less than one hundred dollars (\$100) if the public servant reimburses the person from whom the item was received any amount over one hundred dollars (\$100) and the reimbursement occurs within ten (10) days from the date the item was received; (viii) Wedding presents and engagement gifts; (ix) A monetary or other award presented to an employee of a public school district, the Arkansas School for the Blind, the Arkansas School for the Deaf, the Arkansas School for Mathematics, Sciences, and the Arts, a university, a college, a technical college, a technical institute, a comprehensive life-long learning center, or a community college in recognition of the employee's contribution to education; (x) Tickets to charitable fund-raising events held within this state by a nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code; (xi) A personalized award, plaque, or trophy with a value of one hundred and fifty dollars (\$150) or less; (xii) An item which appointed or elected members of a specific governmental body purchase with their own personal funds and present to a fellow member of that governmental body in recognition of public service; (xiii) Food or beverages provided at a conference-scheduled event that is part of the program of the conference; (xiv) Food or beverages provided in return for participation in a bona fide panel, seminar, or speaking engagement at which the audience is a civic, social, or cultural organization or group; (xv) (a) A monetary or other award publicly presented to an employee of state government in recognition of his or her contributions to the community and State of Arkansas when the presentation is made by the employee's supervisors or peers, individually or through a nonprofit organization which is exempt from taxation under section 501(c)(3) of the Internal Revenue Code, and the employee's receipt of the award would not result in or create the appearance of the employee using his or her position for private gain, giving preferential treatment to any person, or losing independence or impartiality. (b) The exception in subdivision (5)(B)(xv)(a) of this section shall not apply to an award presented to an employee of state government by a person having economic interests which may be affected by the performance or nonperformance of the employee's duties or responsibilities; and (xvi) Anything of value provided by a political party under § 7-1-101 or § 7-7-205 when serving as the host of the following events to all attendees as part of attendance at the event: (a) The official swearing-in, inaugural, and recognition events of constitutional officers and members of the General Assembly; and (b) An official event of a recognized political party so long as all members of either house of the General Assembly affiliated with the recognized political party are invited to the official event[.]

<sup>iii</sup> Ark. Code Ann. § 14-14-1205

<sup>iv</sup> That fact pattern can be distinguished from this fact pattern in that an anonymous donor was the source of the funding for those longevity bonuses and those Quorum Court members were voting themselves to receive the bonuses in question.