

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2002-EC-006 **Issued June 21, 2002**

The Arkansas Ethics Commission is issuing this advisory opinion on its own initiative in response to a number of inquiries concerning travel by public servants. Those inquiries have centered around trips paid for by nongovernmental sources.

Two frequently asked questions are (i) whether a public servant who is appearing in his or her official capacity at an event which bears a relationship to the duties and responsibilities of his or her office or position may stay over before or after the event, and (ii) whether entertainment expenses may be paid on behalf of the public servant in connection with such an event.

The answers to these questions require analysis of Ark. Code Ann. § 21-8-801(a)(1), which provides as follows:

No public servant shall receive a gift or compensation as defined in § 21-8-402 *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 office or position.

The term "gift" is defined in Ark. Code Ann. § 21-8-402(5) to mean "any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor." The definition goes on, however, to exclude certain items from that meaning.

One of the items excluded is "[t]he 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." Ark. Code Ann. § 21-8-402(5)(B)(ii). Another is "[a]nything with a value of one hundred dollars (\$100) or less." Ark. Code Ann. § 21-8-402(5)(B)(vii)(a).

Expenditures for food, lodging, or travel which do not exceed \$100 are exempt from the definition of gift pursuant to Ark. Code Ann. § 21-8-402(5)(B)(vii)(a). Accordingly, there is

never a need to analyze such expenditures under the exception set forth in Ark. Code Ann. § 21-8-402(5)(B)(ii).

The exception to the definition of gift for food, lodging, or travel is addressed in § 301 of the Commission's Rules on Gifts, which provides as follows:

- (a) The giving or receiving of food, lodging, or travel shall not be considered a gift in situations where a public servant is appearing in his or her official capacity and the appearance bears a relationship to the public servant's office or position.
- (b) For purposes of this rule, a public servant appears in an official capacity when the appearance arises solely because of the position held by the public servant, would be subject to expense reimbursement by the agency with which the public servant is associated, and involves matters which fall within the official responsibility of the public servant.
- (c) For purposes of this rule, an appearance at an event bears a relationship to the public servant's office or position when such appearance furthers a purpose of the governmental body served by the public servant and the interest of such governmental body outweighs the likelihood that attending the event will improperly influence the public servant in the performance of his or her official duties and responsibilities. Factors to be considered in making a determination as to whether or not an appearance bears a relationship to a public servant's office or position shall include, but not be limited to: the nature of any pending matter affecting the interest of the person paying for the food, lodging, or travel; the importance of the event to the governmental entity; the significance of the public servant's role in the event; the timing of the event; the identity of the other expected participants; and, the cost of the public servant attending the event. If a public servant is invited to attend a purely social event with no or a de minimis nexus to the programs or operations of the governmental entity which he or she serves, then the public servant's attendance would not bear a sufficient relationship to his or her office or position to meet the exception contained in subsection (a) of this rule.

In summary, there are two conditions which must be met in order for the giving or receiving of food, lodging, or travel worth more than \$100 to be excluded from the definition of gift. The public servant must be appearing in his or her official capacity and the appearance must bear a relationship to the public servant's office or position.

A. May a public servant stay over before or after an event?

As discussed above, the exception to the definition of gift for food, lodging, or travel applies in situations where a public servant is appearing in his or her official capacity at an event which bears a relationship to the public servant's office or position. The Commission has concluded, however, that this exception is not so broad as to encompass food, lodging, or travel provided to a public servant who is staying over before or after such an event for purely personal reasons.

According to information received by the Department of Finance and Administration, state paid travel expenses incurred before or after a particular event may be approved by the fiscal officer of the agency involved. Such approval may be granted in the following circumstances: when the cost of airfare is reduced significantly by staying over a Saturday night, when the travel distance is so great as to cause a need for recovery of jet lag, or when air travel is only available at certain times and going early or staying late would provide a more feasible option for the public servant. This list is not complete and discretion is left with the individual agency.

The Commission is not aware of any reason that a different standard should be applied to travel paid for by nongovernmental sources. Accordingly, it is the Commission's opinion that a public servant's expenses for food, lodging, or travel may be paid for by a nongovernmental source when a prudent reason exists for staying over before or after an event. In the absence of such a reason, however, the payment of expenses costing more than \$100 would be considered a gift and prohibited by Ark. Code Ann. § 21-8-801(a)(1) if intended to reward the public servant for doing his or her job or as a reward for past or future action.¹

B. May entertainment expenses be paid on behalf of a public servant?

Pursuant to Ark. Code Ann. § 21-8-801(a)(1), a public servant is prohibited from receiving a gift "for the performance of the duties and responsibilities of his or her office or position." This statutory provision is the subject of § 303(b) of the Commission's Rules on Gifts. Said section provides in pertinent part as follows:

[A] gift shall be prohibited if it is intended to reward a public servant for doing his or her job or it is intended as a reward for past or future action. In contrast to bribery which requires a showing that a gift and some official action motivated each other, a gift is prohibited by this rule if the gift is for or because of the action. In order for a gift to be prohibited, it need not be shown that the official action was for or because of the gift.

A review of Ark. Code Ann. § 21-8-402(5) shows that entertainment is specifically included in the definition of the term "gift." On its face, the exception to the definition of gift for food, lodging, or travel does not extend to entertainment. Accordingly, it is the Commission's opinion

¹ This opinion does not prohibit a public servant from extending a trip at his or her own expense.

that Ark. Code Ann. § 21-8-801(a)(1) prohibits the giving or receiving of entertainment worth more than \$100 if such entertainment is intended to reward a public servant for doing his or her job or as a reward for past or future action. It makes no difference that the entertainment is being given to a public servant who is appearing in his or her official capacity at an event which bears a relationship to the public servant's office or position.

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

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