

# ARKANSAS ETHICS COMMISSION

910 West Second Street, Suite 100  
Post Office Box 1917  
Little Rock, Arkansas 72203-1917  
(501) 324-9600 Fax (501) 324-9606  
Toll Free (800) 422-7773

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## **ADVISORY OPINION NO. 99-EC-007** **Issued July 30, 1999**

The Arkansas Ethics Commission is issuing this advisory opinion on its own initiative to set forth its interpretation of Ark. Code Ann. §§ 21-8-402(5)(B)(ii) and 21-8-801(1). The former excludes certain food, lodging, and travel from the definition of "gift" and the latter contains a prohibition on the receipt of gifts and compensation by public servants. The Commission has discussed these statutory provisions in previous opinions<sup>1</sup> but this opinion marks the first time the meaning of these provisions has been squarely addressed.

Determining the actual meaning of these provisions has proven a difficult task for the Commission because Initiated Act One of 1988 appears to contain some inconsistent provisions.<sup>2</sup> Neither the Arkansas Supreme Court nor the Arkansas Court of Appeals has specifically addressed the meaning of the provisions in question. Moreover, there is no legislative history to consult regarding the meaning of these provisions because these statutes came into existence as part of an initiated act.

Accordingly, interpretation was based upon the language of the Act itself.<sup>3</sup> In this opinion, the Commission has attempted to give effect to each part of Initiated Act One of 1988 in order make the provisions consistent, harmonious and sensible. The Commission has given due consideration to the objects and purposes of the people's enactment of Initiated Act One of 1988.

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<sup>1</sup> See, e.g., Advisory Opinion Nos. 91-EC-003, 97-EC-004, 97-EC-010, 97-EC-011, and 97-EC-013.

<sup>2</sup> There are two (2) separate disclosure requirements contained in Initiated Act One of 1988 that appear to be in conflict with the "[p]rohibited gifts generally" language contained in Ark. Code Ann. § 21-8-801(1). The first disclosure provision is the duty of public servants to report gifts worth more than \$100 on their statement of financial interest contained in Ark. Code Ann. § 21-8-701(d)(8). The second disclosure provision is the duty of registered lobbyists to report gifts given to public servants on their lobbyists activity reports contained in Ark. Code Ann. § 21-8-604(b)(2)(A)(i).

<sup>3</sup> During the 82<sup>nd</sup> General Assembly, the Ethics Commission worked with Senator Morrill Harriman on SB 943 which would have rewritten Ark. Code Ann. § 21-8-801(1). The session ended without the opportunity for the bill to be presented for consideration.

### I. Exclusion for Food, Lodging, and Travel

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. Among 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).

It is the view of the Commission that there are two conditions which must be met in order for the giving or receiving of food, lodging, or travel to meet the foregoing exclusion. 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.

The Commission came close to addressing the first such condition in Advisory Opinion No. 97-EC-010 which dealt with the question of whether a public official could accept compensation for speaking engagements. In that advisory opinion, the Commission stated that it was permissible for an officeholder to accept honoraria or other fees when speaking in an unofficial capacity but not when speaking in an official capacity.<sup>4</sup>

In seeking to distinguish between speaking in an official capacity and an unofficial capacity, the Commission stated the following:

[a] public official is acting in his official capacity when he is asked to participate because of his official status. Thus the test for determining whether a public appearance for a private concern is an outgrowth of the person’s official capacity is whether the person would not have been asked to appear or speak on a private matter but for his official...status or position.

The Commission notes that Advisory Opinion No. 97-EC-010 addressed the topic of a public official speaking in his or her official capacity. It did not address the broader topic of a public servant appearing in his or her official capacity.

The term “official capacity” is not defined in Initiated Act One of 1988. As used in Ark. Code Ann. § 21-8-402(5)(B)(ii), it is the Commission’s considered opinion that “when appearing in an official capacity” means an appearance which arises because of the office or position of a public servant. Clearly, if an appearance is one for which a public servant would be subject to expense

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<sup>4</sup> Although not mentioned in Advisory Opinion No. 97-EC-010, Ark. Code Ann. § 5-52-108 prohibits a member of the General Assembly from soliciting or accepting compensation for speeches or other appearances, unless the appearance is made in the normal course of business in his or her private occupation.

Reimbursement from the governmental entity which he or she serves, then the public servant is appearing in an official capacity.

The fact that a public servant is appearing in his or her official capacity does not mean that food, lodging or travel furnished to the public servant in connection with the appearance is excluded from the definition of "gift." In order for such food, lodging or travel to meet the exclusion set forth in Ark. Code Ann. § 21-8-402(5)(b)(2), the appearance must also bear a relationship to the public servant's office or position.

In order to find such a relationship, a public servant's appearance at an event must further a purpose of the governmental entity which he or she serves. Moreover, it is the Commission's opinion that the interest of the governmental entity which employs the public servant must outweigh the likelihood that attending the event will improperly influence the public servant in the performance of his or her official duties and responsibilities.

In that regard, there are a number of factors to be considered. Those factors include: 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 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 attendance would not bear a sufficient relationship to the public servant's office or position.

## II. Reporting of Food, Lodging, or Travel

Pursuant to Ark. Code Ann. § 21-8-604(b)(2)(A)(ii), a lobbyist is required to report each payment for food, lodging or travel in excess of forty dollars (\$40.00) on behalf of a public servant. If the expenditure exceeded one hundred and fifty dollars (\$150.00) and met the requirements of Ark. Code Ann. § 21-8-402(5)(B)(ii) (i.e., the public servant was appearing in his or her official capacity and the appearance bears a relationship to the public servant's office or position), then a public servant filing a Statement of Financial Interest ("SFI") would be required to report the payment under Ark. Code Ann. § 21-8-701(d)(9).<sup>5</sup>

If, on the other hand, an expenditure for food, lodging, or travel exceeded one hundred dollars (\$100.00) and did not meet the requirements of § 21-8-402(5)(B)(ii), then it would constitute a

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<sup>5</sup> Pursuant to this subsection, a public servant filing a SFI is required to report each nongovernmental source of payment of his or her expenses for food, lodging, or travel which bears a relationship to the public servant's office when the public servant is appearing in his or her official capacity when the expenses incurred exceed one hundred and fifty dollars (\$150.00).

gift. In such event, a public servant filing a SFI would be required to report same under Ark. Code Ann. § 21-8-701(d)(8).<sup>6</sup>

### III. Prohibition Concerning Gifts and Compensation

Focus will now shift to the meaning of Ark. Code Ann. § 21-8-801(1) as it pertains to the receipt of gifts and compensation by public servants. Said statute is entitled “[p]rohibited acts generally” and provides, in pertinent part, as follows:

[n]o public servant shall...[r]eceive a gift or compensation as defined in subchapter 4 of this chapter, 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.

Analysis of the meaning of Ark. Code Ann. § 21-8-801(1), requires an understanding of the definitions of “gift” and “compensation.” As previously mentioned, 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.” However, subsection (5)(B)(ii) of said statute specifically excludes “[a]nything with a value of one hundred dollars (\$100.00) or less” from the definition.

The term “compensation” is defined in Ark. Code Ann. § 21-8-402(7) to mean the following:

any money or anything of value received, or to be received as a claim for future services, whether in the form of a retainer, fee, salary, expense, allowance, forbearance, forgiveness, interest, dividend, royalty, rent, or any other form of recompense or any combination thereof.<sup>7</sup>

A big difference in the two definitions is that “gift” is defined to exclude anything with a value of one hundred dollars (\$100.00) or less while “compensation” includes anything of value received. This difference raises a potential conflict in the language of Ark. Code Ann.

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<sup>6</sup> Pursuant to this subsection, a public servant filing a SFI is required to report the source, date, reasonable fair market value, and description of each gift of more than one hundred dollars (\$100.00) received by the public servant or his or her spouse or more than two hundred and fifty dollars (\$250.00) received by his or her dependent children.

<sup>7</sup> In Advisory Opinion No. 91-EC-003, the Commission noted that the definition of “compensation” was not clearly defined and went on to state that “the commonly accepted definition is that of a payment made under obligation for services or other value received.”



§ 21-8-801(1) insofar as an item not prohibited as a gift could nevertheless be prohibited as compensation.<sup>8</sup>

In order to give meaning to both the prohibition concerning the receipt of gifts by public servants and the prohibition concerning the receipt of compensation by public servants, the prohibitions will be analyzed separately. Discussion will begin with the meaning of Ark. Code Ann. § 21-8-801(1) as it pertains to the receipt of “gifts.”

A. Prohibited Gifts

With respect to gifts, the operative language of the statute is that “[n]o public servant shall... receive a gift... for the performance of the duties and responsibilities of his or her office or position.” Initially, it was the Commission’s view that there were two possible interpretations of that language.

The first such interpretation was that it prohibited gifts conferred on account of the official status of the recipient. The second was that it prohibited quid pro quo gifts, i.e., those given in exchange for the performance of official action.

The Commission was quick to reject the second interpretation because reading Ark. Code Ann. § 21-8-801(1) as merely a prohibition on gifts given in exchange for a specific act would render it superfluous. At the time Initiated Act One of 1988 was passed, such conduct was already prohibited by the Arkansas Constitution and the Arkansas Criminal Code. See, e.g., Article 5, § 35 of the Arkansas Constitution and Ark. Code Ann. § 5-52-103.<sup>9</sup>

Upon considering the matter further, the Commission has determined that there is a level of intent which falls short of that required for bribery but still requires showing something more than the mere fact that a gift was conferred on account of the official status of the recipient. This intermediate level of intent is to “reward” a public servant.<sup>10</sup> In contrast to bribery which requires a showing that the gift and the official action motivated each other, the Commission has

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<sup>8</sup> For example, an item worth \$75.00 would not be a “gift” because the value is less than one hundred dollars (\$100.00). Clearly, however, the item would meet the “anything of value” part of the definition of “compensation”.

<sup>9</sup> Ark. Code Ann. § 5-52-103 makes public servant bribery a Class D felony punishable by a jail term of no more than six (6) years and/or a fine of no more than \$10,000.00.

<sup>10</sup> See U.S. v. Sun-Diamond Growers of California, \_\_\_\_ U.S. \_\_\_\_, 119 S.Ct. 1402 (1999). An illegal gratuity ... may constitute merely a reward for some future act that the public official will take (and may have already have determined to take), or for a past act that he has already taken.

concluded that a gift is prohibited by Ark. Code Ann. § 21-8-801(1) if there is a unidirectional relationship between the gift and the action – the gift is for or because of the action.

The Commission notes further that the statute does not speak in terms of a public servant performing a specific act or duty. Instead, it uses the language “for the performance of the duties and responsibilities of his or her office or position.” The Commission interprets that language to mean “for doing his or her job.” Thus, Ark. Code Ann. § 21-8-801(1) prohibits the receipt of a gift intended to reward a public servant for doing his or her job.

The line between such a gift and an official capacity gift, i.e., one conferred solely on account of the official status of the recipient, is very thin. The giving of a gift by a foreign head of state would be a good example of an official capacity gift, provided such gift was not motivated by anything more than the official status of the recipient.

It must be remembered, however, that the definition of “gift” specifically excludes anything with a value of one hundred dollars (\$100.00) or less. Accordingly, a public servant could receive an item conferred to show appreciation for the public servant’s job performance so long as the item was not worth more than one hundred dollars (\$100.00).

Moreover, a public servant would not be prohibited from receiving a gift conferred on account of bona fide personal, professional, or business relationship independent of his or her official status. In determining whether a gift was conferred on account of such a relationship, the Commission would consider such factors as when the relationship began (i.e., before or after the public servant obtained his or her office or position), the prior history of gift giving between the individuals, whether the gift was given in connection with a holiday or other special occasion, and whether the same gift was given to other public servants.

#### B. Reporting of Gifts

While a public servant is permitted to accept gifts conferred on account of a relationship which is independent of his or her official status, a public servant filing a Statement of Financial Interest (“SFI”) must report such gifts in accordance with Ark. Code Ann. § 21-8-701(d)(8). Pursuant thereto, the following information must be reported:

[t]he source, date, reasonable fair market value, and description of each gift of more than one hundred dollars (\$100.00) received by the public servant or his or her spouse or more than two hundred and fifty dollars (\$250.00) received by his or her dependent children.

The Commission is aware that Ark. Code Ann. § 21-8-604(b)(2)(A)(i) expressly requires a lobbyist to report each “[g]ift given to a public servant.” Having concluded that a public servant

is prohibited from receiving a gift conferred as a reward for doing his or her job, the Commission will address the giving of gifts by lobbyists to public servants.

A lobbyist is free to give a gift to a public servant if it is conferred on account of a bona fide personal, professional or business relationship independent of the public servant's official status. The Commission cautions, however, that relationships arising after a public servant obtained his or her position will be examined with heightened scrutiny.

A lobbyist could also give a gift to a public servant in his or her official capacity. With respect to such gifts, the Commission would pay particular attention to whether or not the same gift was offered to all public servants holding a similar office or position. If not, the Commission questions whether a gift from a lobbyist to a public servant would be viewed as an official capacity gift.

A gift given for the purpose of influencing legislative action or administrative action would not be an official capacity gift. Such a gift would be viewed as a reward for future action and be prohibited by Ark. Code Ann. § 21-8-801(1).

The Commission is aware that Ark. Code Ann. § 21-8-604(b)(2)(A)(i) has been interpreted by a number of people to mean that a lobbyist can spend an unlimited amount on a public servant as long as it is reported. The Commission has acquiesced in that interpretation but notes this advisory opinion constitutes a significant departure from that interpretation.

The Commission wishes to make it clear that a public servant cannot accept a gift from a lobbyist as a reward for doing his or her job. Items costing more than \$100.00 which are given to public servants to show appreciation for their efforts or to influence legislative action or administrative action run afoul of Ark. Code Ann. § 21-8-801(1).

### C. Prohibited Compensation

With respect to the receipt of compensation by public servants, the operative language of Ark. Code Ann. § 21-8-801(1) is as follows:

[n]o public servant shall...[r]eceive...compensation..., 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.

In Attorney General Opinion No. 98-024, Ark. Code Ann. § 21-8-801(1) was discussed in the context of a public servant receiving compensation. The question presented was whether or not a person employed by the State as a public defender could receive additional salary from the county where he or she practices as a public defender.

The underlying facts were that a number of public defenders who were employed by a county became state employees through the passage of legislation. In some instances, the state salary appropriation for the position was less than the salary the individual had received from the county.

The Attorney General opined that Ark. Code Ann. § 21-8-801(1) prohibited the county from supplementing the salary of a public defender whose position was created and funded by the General Assembly. The rationale was that if the county supplemented the salary of a public defender paid by the State, then the public defender would be in receipt of compensation, other than from the governmental body he or she is duly entitled, for the performance of the duties and responsibilities of his or her position.

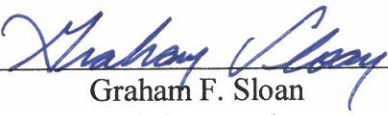
The Commission is of the opinion that the reasoning contained in Attorney General Opinion No. 98-024 is correct. As it pertains to the receipt of compensation by public servants, the Commission interprets Ark. Code Ann. § 21-8-801(1) to mean that, except as expressly provided by statute,<sup>11</sup> a public servant can only be compensated for doing his or her job by the governmental body which he or she serves. In other words, a public servant cannot receive outside compensation for doing his or her job.

If a public servant were allowed to accept compensation from outside sources for performing the duties and responsibilities of his or her position, such practice could lead to divided loyalties. Even if corruption were not intended, the recipient might have a tendency to provide preferential treatment, albeit subconsciously, to those persons supplementing his or her salary.

The Commission recognizes that it is breaking new ground with this advisory opinion. It is aware that public servants and lobbyists have been operating on interpretations of Ark. Code Ann. §§ 21-8-402(5) and 21-8-801(1) which differ greatly from those set forth herein. Accordingly, the interpretations set forth herein will be given prospective application only.

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

**ARKANSAS ETHICS COMMISSION**

by:   
Graham F. Sloan  
Chief Counsel

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<sup>11</sup> Ark. Code Ann. § 6-62-103 is an example of such a statute. It allows private contributors to endow academic chairs at state-supported colleges and universities for attracting personnel with exceptional qualifications.