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ADVISORY OPINION 2020-EC-002

Issued November 20, 2020

The Arkansas Ethics Commission (the "Commission") received a written advisory opinion request dated October 12, 2020, from Mr. Robert Coon of Impact Management Group of Little Rock. Therein, Mr. Coon requested an advisory opinion on behalf of Impact Management Group ("IMG") concerning payment of a quarterly bonus to a former employee who now works for the State of Arkansas.

Background:

As background, he provided the following information:

- a) *As a normal business practice, IMG provides a quarterly bonus to all members of its staff. This practice is memorialized in a printed policy document that lays out expectations of the staff. The amount of the bonus varies based on quarterly performance measures and is calculated at the beginning of the month following the end of the quarter - i.e. the third quarter bonus covering the work period of July through September would be calculated the first week of October.*
- b) *IMG is a registered lobbying firm. Many of its principals and staff are registered lobbyists.*
- c) *One of IMG's staff members left the company at the end of September and took a position with the State of Arkansas. Because the quarterly bonus payment for the period that the employee was employed by IMG was not calculated until the beginning of October, IMG was unable to make this payment to its employee prior to their departure from the firm.*
- d) *According to the Commission's Rules, "§ 300 Definitions (b) Gift - As used in these rules, the term "gift" means any payment, entertainment, advance, services or anything of value, unless consideration of equal or greater value has been given therefor."*
- e) *Because this bonus payment was based on prior performance while employed by IMG, in IMG's view consideration of equal or greater value has been given.*

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- f) Accordingly, IMG's intent would be to provide its normal quarterly bonus payment to this now former employee, as in its interpretation the payment would not be deemed a gift under the Commission's Rules. As reference, the amount of this payment would exceed \$100.00.*

Questions Presented:

In his request, he asks the following questions:

1. Whether or not a payment for work that predates an individual's employment with the state is considered a gift.
2. Whether or not there are any explicit prohibitions on IMG making this payment to its former employee.
3. If there are not any explicit prohibitions, whether or not and what, if any, disclosure or reporting would be required of IMG if this payment is made.
4. Whether or not and what, if any, disclosure or reporting would be required of the former employee/current state employee if this payment is made.

Answers:

Question 1: Whether or not a payment for work that predates an individual's employment with the state is considered a gift?

Answer:

In short, probably not. Ark. Code Ann. § 21-8-402(5) defines "Gift" as any "payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor", then gives many exceptions to the definition of gift. Likewise, Ark. Code Ann. § 21-8-801ⁱ provides, in pertinent part, that no public servant shall, "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. Pursuant to the Rules on Gifts, Section 303 (d), a public servant may accept a gift conferred on account of a bona fide personal, professional, or business relationship independent of his or her official status."ⁱⁱ Payment for work that predates an individual's employment with the state would not be considered a gift as long as the contract for services/employment and the work performed both predated the employment with the state and the value of the payment was a fair market value for the services rendered. In that situation, the payment would not be for the performance of the duties and responsibilities of his or her government office or position, and as suggested in the advisory opinion request, consideration of equal or greater value would have been given therefor, i.e., the completed quarter of services rendered as an employee of IMG.

Question 2: Whether or not there are any explicit prohibitions on IMG making this payment to its former employee?

Answer:

Based on the facts provided, the short answer is no. Pursuant to Ark. Code Ann. §21-8-801, no public servant shall, "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." Public servants are not prohibited from receiving all gifts. Pursuant to the Rules on Gifts, Section 303 (d), a public servant may accept a gift conferred on account of a bona fide personal, professional, or business relationship independent of his or her official status.ⁱⁱⁱ Whether they had a bona fide professional or business relationship would be determined on a case-by-case basis. Whether or not there was an independent professional relationship would be a question of fact for the Commission. Facts they might consider could include whether other IMG employees received the same bonus for that period (even though they did not get a job with the state), whether the former employee received bonuses pursuant to the agreement in the quarters preceding their departure from IMG, and when the job with the State of Arkansas was arranged and agreed upon.

Question 3: If there are not any explicit prohibitions, whether or not and what, if any, disclosure or reporting would be required of IMG if this payment is made?

Answer:

No, the lobbyist reporting requirements are set out in Ark. Code Ann. § 21-8-604, and salaries of lobbyists are not listed as a specific item that must be reported. While the facts provided do not say that this former employee was a lobbyist, payments for salaries generally do not have to be reported. If this bonus payment is in fact part of an agreed upon income for services already rendered to IMG, then the Commission is not aware of any reporting requirements under its jurisdiction with respect to the payment of this bonus.

It is worth noting Ark. Code Ann. §21-8-607(b), which provides, in pertinent part, that no person engaged in lobbying shall:

- (1) Influence or attempt to influence, by coercion, bribery, or threat of economic sanction, any public servant in the discharge of the duties of his or her office;

- (4) Contract to receive or accept compensation that is dependent in any manner upon:

A) The success or failure of a legislative or administrative action;

B) The outcome of any executive, legislative, or administrative action relating to the solicitation or securing of a procurement contract[.]

Question 4: Whether or not and what, if any, disclosure or reporting would be required of the former employee/current state employee if this payment is made?

Answer:

It depends, but probably not. The facts provided note that the former IMG employee now works for the state, and it is possible that this new state employee will have a Statement of Financial Interest ("SFI") due if they are an agency head, department director, or division director of state government or a chief of staff or chief deputy of a constitutional officer, the Senate, or the House of Representatives, pursuant to Ark. Code Ann. §21-8-701. If so, then IMG would be listed as a source of income for the previous calendar year. However, if the bonus is considered part of their wage agreement for services rendered, then it would not be a "gift" and would not have to be reported in Section 9-GIFTS, but instead could be lumped with their regular income from IMG in Section 3-SOURCE OF INCOME.

Conclusion:

This advisory opinion is limited to the specific set of facts or activity set forth in the request. The Commission 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 requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law.

In conclusion, it should also be noted that 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 Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

By: 
Jill Rogers Barham

ⁱ Ark. Code Ann. § 21-8-801 provides 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; or

(2) Purposely use or disclose to any other person or entity confidential government information acquired by him or her in the course of and by reason of the public servant's official duties, to secure anything of material value or benefit for himself or herself or his or her family.

(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.

(2)(A) The first violation of this subsection by any person other than a registered lobbyist shall result in a written warning.

(B) Upon a second violation and subsequent violations by persons other than registered lobbyists and upon a first violation by registered lobbyists, the penalties provided for in § 7-6-218 shall apply.

ⁱⁱ Arkansas Ethics Commission's Rules on Gifts:

§ 303 Receipt of Gifts by Public Servants

(a) No public servant shall receive a gift for the performance of the duties and responsibilities of his or her office or position.

(b) For purposes of this rule, 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.

(c) A public servant is not prohibited from receiving an item conferred to show appreciation for the public servant's job performance (i.e., to reward the public servant for doing his or her job) so long as the value of the item does not exceed \$100. Items costing more than \$100 which are given to public servants to show appreciation for their efforts (i.e., to reward them for doing their job) or to reward them for past or future action are prohibited under this rule.

(d) A public servant is not prohibited from receiving all gifts. For example, a public servant may accept a gift conferred on account of a bona fide personal, professional, or business relationship independent of his or her official status. In determining whether a gift was conferred on account of an independent relationship, the Commission will 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.

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