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Advisory Opinion 14-08

(Acceptance of Gifts)

SUMMARY: It would be a violation of Article XXIX for the employees of the Division of Motor Vehicles to accept a gift under the circumstances of this request.

I. BACKGROUND

Mike Dixon,¹ (“Requestor”), the Senior Enforcement Director for the Division of Motor Vehicles, has submitted a request to the Independent Ethics Commission (“IEC” or “Commission”) asking whether it would be permissible for Driver’s License Examiners (“employees”) in the Division of Motor Vehicles (“DMV”) to accept various items from Donor Alliance, a federally-designated, non-profit organ procurement organization. The DMV is under the Department of Revenue.

According to the request, Donor Alliance would like to offer gifts to DMV employees in appreciation for their efforts to help procure monetary donations from persons applying for driver’s licenses and/or designating those who would like to donate organs or tissue by putting a “Y” on their physical license. There are approximately 245 Driver’s License employees in approximately 36 offices. An office can consist of one or

¹ Mr. Dixon has waived confidentiality relating to this request.

two people or a maximum of around 20. Donor Alliance would like to give employees, either individually or to entire offices, t-shirts, polo shirts, lunches, and gift baskets (fruit, candies, nuts, etc.). The cost of these gifts per individual employee per year is estimated to be between \$35.00 to \$40.00. In addition, Donor Alliance is offering to provide free tickets to Elitch Gardens Theme and Water Park to employees and their family members (up to four free tickets). The cost of one Elitch ticket is advertised for \$39.99; four tickets would be \$159.96. Donor Alliance has expressed an interest in providing these gift items throughout the year on an on-going basis.

According to the Requestor, the Driver's License examiners are mandated by statute to partner with Donor Alliance. The purpose for the relationship is described in C.R.S. §42-2-107 (4)(b)(I): "state government should play a role in increasing the availability of human organs and tissue to procurement organizations . . . by acting as a conduit to make moneys available for promoting organ and tissue donation and that this role constitutes a public purpose." Specifically C.R.S. §42-2-107 (4)(b)(V) describes the DOR's and DMV's role: "the department shall inquire of each applicant at the time the completed application is presented whether the applicant is interested in making a donation of one dollar or more and shall specifically inform the applicant of the option for organ and tissue donations." Furthermore, employees must provide written information to applicants who choose to be organ donors. C.R.S. §42-2-107 (4)(b)(1)(B)(V). The statute names Donor Alliance, Inc., or its successors, as the procurement organization with which the DMV should work.

The Requestor emphasized that no issues of influence are present here because neither the DOR and nor the DMV have any power to make decisions regarding Donor

Alliance. The Requestor added that Donor Alliance, as a non-profit organization, has limited funds to conduct marketing and donor drives.

II. JURISDICTION

The IEC finds that the Driver's License examiners are "government employees" subject to the Commission's jurisdiction. CO Const. Art. XXIX, sec. 2(1)(3).

III. APPLICABLE LAW

Section 1 of Article XXIX (Purposes and Findings) provides that:

- (a) The conduct of public officers, members of the general assembly, local government officials and government employees must hold the respect and confidence of the people;
- (b) They shall carry out their duties for the benefit of the people of the state;
- (c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;
- (d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust

Section 3 of Article XXIX (Gift Ban) reads in relevant part:

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) [now \$53] in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who solicited, accepted or received the gift or other thing of value.

§ 24-18-104 (1)(b): A public officer, a member of the general assembly, a local government official, or an employee shall not “[a]ccept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

- (I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties or
- (II) Which he knows or a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

IV. DISCUSSION

A. Accepting the gifts from Donor Alliance in the manner described by the Requestor will result in most individual employees violating the gift ban.

Under the circumstances described, it is likely that the \$53 gift limit will be exceeded in most individual employee cases. Article XXIX specifically prohibits any covered local government official or government employee from accepting or receiving a gift over \$53 in value from any one person or entity on an annual basis. In Position Statement 09-01 (Gifts from Lobbyists and Organizations Represented by Lobbyists), the Commission analyzed gifts to government offices and decided that the value of a gift should not be allocated among the officials or employees, but to the office as a whole. “The gift as a whole cannot exceed a value of \$53,” page 7. When reviewed as a gift to the office, the proposed gift is clearly beyond the limits of the gift ban. See, Advisory Opinion 14-01.

Even if the gift limits are viewed individually, the dollar amounts to be given to DMV employees range between \$35-\$40 and any extras which are available in the gift offer will exceed the established limit of \$53 for that employee. An additional polo shirt

or an additional lunch would exceed the personal gift limit. An employee who receives any Elitch's tickets in addition to the other gifts will automatically be over the allowable limit. The gifting proposal appears undefined and unregulated. It offers no accountability to the gift ban limits, and therefore is rejected even if evaluated as a gift to individual employees.

B. Acceptance of gifts by individual employees or by entire offices would violate C.R.S. § 24-18-104 (1)(b)(II).

Accepting the gifts from Donor Alliance would violate C.R.S. § 24-18-104 (1)(b)(II) which states a government official or employee shall not accept a gift of substantial value "which he knows or a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken." A reasonable employee in a DMV Office would likely know that the gift from Donor Alliance is in return for official action taken by the Office, i.e., asking driver's license applicants for a monetary donation, or designating a donor by putting a Y on their driver's license, or educating applicants who choose to be a donor. Not only is this "official action" taken by the Driver's License examiners, it is mandated by statute by the use of the word "shall." Even if the gift amount should fall below the gift ban threshold of \$53, a government employee cannot ethically accept a gift for official action. See, Advisory Opinion 14-01 at page 6.

C. Acceptance of the gifts may result in an appearance of impropriety.

The Requestor contends that there is no breach of public trust because the employees have no opportunity to influence Donor Alliance. Article XXIX, Section 1(c) states that public officials and employees shall “avoid conduct that is in violation of the public trust or creates a justifiable impression among members of the public that such trust is being violated.” In Advisory Opinion 09-06 (Service on the Board of a Nonprofit Entity), the Commission found that “[a]ppearances of impropriety can weaken public confidence in government and create a perception of dishonesty, even among government officials who are in technical compliance with the law.” Page 8. Article XXIX emphasizes that public employees should avoid any conduct which may violate the public trust, or appear to violate the public trust. Advisory Opinion 09-06, page 3 and C.R.S. § 24-18-103.

The Requestor is confident that whether DMV employees receive gifts from Donor Alliance or not, the employees will continue to perform their duties to the program. The Commission agrees that this would be the better ethical approach, as recently stated in Advisory Opinion 14-01 at pages 9-10:

The Commission believes that all covered individuals in offices and agencies of the state should perform their jobs without expectations of rewards beyond compensation provided by law. See Article XXIX, Section 1(d). Such a policy instills confidence that the priority of public employees is to carry out their duties for the benefit of all of the people of Colorado, and avoids the appearance that employees are getting something special for performing their regular work duties. The gift . . . may create an appearance of impropriety and is thus impermissible under Article XXIX.

The Commission is aware that Donor Alliance has made the offer of gifts to the Colorado DMV employees upon terms which are similar to gifts being made to other

states. If the reward of the proposed gifts to employees is generated from contribution efforts of DMV employees, the Commission does believe that DMV could request that the value of the gifts offered to the Colorado DMV employees might be directed into the Colorado organ and tissue donor program.

IV. CONCLUSION

The Commission believes that acceptance of gifts from Donor Alliance under the circumstances of this request does constitute a violation of Article XXIX under the Commission's jurisdiction. The Commission further believes that the gift proposal would violate C.R.S. § 24-18-104 (1)(b)(II) and creates an appearance of impropriety. The Commission cautions public officials and employees that this opinion is based on the specific facts presented in this request, and that different facts could produce a different result. The IEC therefore encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinions and letter rulings.

The Independent Ethics Commission

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Dated: July 7, 2014