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Advisory Opinion 14-01

(Acceptance of Gifts)

SUMMARY: It would be a violation of Article XXIX for the employees of a County Clerk and Recording Office to accept a gift under the circumstances of this request.

I. BACKGROUND

Matt Crane, the Clerk and Recorder of Arapahoe County¹ (“Requestor”) submitted a request to the Independent Ethics Commission (“IEC” or “Commission”) asking whether it would be permissible for the Office of the Arapahoe County Clerk and Recorder (“Clerk’s Office”) to accept various items from the Denver Broncos and then hold an internal office drawing to determine which employees of the office would receive the items.

According to the request, the Clerk’s Office received a holiday gift box containing approximately twelve items, including t-shirts, signed footballs, a pair of cleats signed by a current member of the Broncos and a baseball hat signed by a former Broncos player. The Requestor acknowledges that the value of the signed items exceeds \$53. The gift box is currently being held at the Clerk’s Office.

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

The Requestor is proposing to distribute the 12 items by way of an “office lottery” in which all 118 employees of the office (excluding the Requestor) would participate. The Requestor contends that the office employees provide ministerial and transactional services to the public and cannot be influenced by the gifts and he would like to reward them “for their hard work throughout the year.”

According to the Requestor, the Arapahoe Clerk’s Office has no direct or official business with the Broncos organization. The Broncos headquarters and training facilities are located in Arapahoe County. There are no pending contracts or matters in which the Clerk’s Office is involved or for which the Requestor is in a position to take direct official action.

However, the Requestor has advised the Commission that the Clerk’s Office has established a procedure whereby individual Bronco players may conduct various personal transactions, like registering their vehicles or recording a document, in a private setting by entering the building through a back entrance. This private access arrangement arose several years ago (before the Requestor was the Clerk and Recorder) because a Bronco player appeared at the Clerk’s Office, and his attendance caused a commotion which interfered with the ability of the Clerk’s Office staff to perform their duties. According to the Requestor, this incident also raised public safety concerns for both the Clerk’s Office and for the individual Bronco players. The Requestor contends that the private access for the Bronco players is not special treatment because other customers, for example, high volume car dealerships, are also permitted a separate area to conduct official business with the office.

II. JURISDICTION

The IEC finds that the Requestor is a “local government official” and that his staff 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) 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 gift box from the Broncos would violate Amendment XXIX's gift ban because its value is over the \$53 limit.

Because the value of the entire gift, including t-shirts and signed items such as footballs, a pair of cleats and a hat, is over \$53, it may not be accepted by the Clerk's Office under the gift ban. The Requestor stated that the retail value of the items without signatures may be less than \$53, but "any additional value the signatures bring if they were sold is unknown," but most likely in excess of \$53. Upon inquiry, the Requestor has conceded that the total value of the gift box from the Broncos is over the allowable limit. In addition, the Requestor declared that the gift was given to the Clerk's Office and not any particular individual.

Article XXIX specifically prohibits any covered local government official or government employee from accepting or receiving a gift over \$53 in value. 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. "The gift as a whole cannot exceed a value of \$53," page 7. In the current case, the Broncos left a box at the Clerk's Office containing approximately 12 items ranging in value from minimal to a possible

significant value, i.e., the signed items. The gifts may not be split up into 12 different value amounts according to who wins what in the raffle. On its face, the gift's value is over \$53 and violates the gift ban. Therefore, the gift box from the Broncos to the Clerk's Office is impermissible under Article XXIX.

B. Exceptions to the gift ban do not apply in this case.

The Requestor asks the Commission to invoke one or more exceptions to the gift ban. The Commission determines that these exceptions do not apply to the gift in this case.

1. Unsolicited tokens of appreciation

The Requestor asserts that the gift qualifies as an unsolicited token of appreciation under the gift ban's exception (3)(c): "an unsolicited token or award of appreciation in the form of a plaque, trophy, desk item, wall memento, or similar item."

While the gift box may have been unsolicited, the token of appreciation was likely a thank you for the "private entrance" policy developed to serve individual Broncos. No other reason has been offered by the Requestor to explain why the Broncos would give a gift to the Clerk's Office. What is more, exception 3(c) seems to contemplate an award coming from one's employer, associates, or institution and not from a member of the public who uses the services of a specific government office.

Finally, the signed items from the Broncos can easily be distinguished from such objects as a plaque, desk item or wall memento. They are higher in dollar value, could be sold for a profit, would likely be sought after by the general public and involve the notoriety of a local and well known football team. The gift box from the Broncos does

not apply under exception 3(c) and therefore the Clerk's Office cannot accept it as an unsolicited token of appreciation.

2. Gift being utilized as an incentive/bonus

The Requestor claims that the gift qualifies as a bonus under the gift ban's exception (3)(h): "[a] component of the compensation paid or other incentive given the recipient in the normal course of employment." The Requestor wants to use the gifts to say thank you, to provide a "bonus to the employees of the County Clerks and Recording Office for their hard work throughout the year."

It is not "normal" in the course of their employment for public employees to receive gifts from football stars. Here again, the implication is that the incentives allowed in exception (3)(h) are provided by an employer, associates, or institution, but not from outside customers. The Requestor is welcome to provide opportunities for additional compensation, or create incentives to reward hard workers. The gift box from the Broncos does not apply under exception 3(h) and therefore the Clerk's Office cannot accept it as a component of compensation or as an incentive.

C. Acceptance of the gift would violate C.R.S. § 24-18-104 (1)(b)(II)

Accepting the gift box from the Broncos would violate C.R.S. § 24-18-104 (1)(b)(II): "a local 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 the Clerk's Office would likely know that the gift from

the Broncos is in return for official action taken by the Office, i.e., allowing individual Broncos to have private appointments for official services such as motor vehicle, recording and voter registration.

Although it may be that the private appointment process developed by the Clerk's Office is not limited to the Broncos, this fact does not change the likelihood that the motivation behind the gift box is to thank the Office for providing the Broncos with a service that is not available to the general public. Further, a reasonable person in the Clerk's Office would likely view the Broncos gift as primarily being given for the purpose of rewarding them for the official action of developing a separate "private entrance" procedure for individual Broncos to transact business. Therefore, the Clerk's Office acceptance of the gift from the Broncos violates C.R.S. § 24-18-104 (1)(b)(II) and is not permissible.

D. The creation of an "office exclusive raffle" does not avoid the gift ban.

1. Raffles cannot be exclusive for public employees

In Position Statement 08-01 (Gifts), the Commission specifically addressed raffles in relation to the gift ban. The Commission determined that acceptance of winnings in a raffle was permissible "provided that these contests are not rigged in favor of the public employees or officials based upon his or her government status," page 9. The raffle addressed in Position Statement 8-01 addressed a situation where public employees were included in a raffle along with non-public employees, or the general public. Thus, whether a public employee won an item in the raffle as opposed to a non-public employee would be driven by chance alone.

In the present case, all of the entrants for the Broncos gift raffle are public employees and the gifts are specifically based upon their government status as employees of the Clerk's Office. The request fails to meet the requirements of Position Statement 08-01.

What is more troubling is that the raffle has been suggested as a mechanism to avoid the application of the gift ban. The Requestor seeks permission to side-step what he characterizes might be a one-time event to reward and incentivize employees. In a broader sense, the Commission believes that the request is a 'slippery slope' that will eventually lead office after office and agency after agency to eventually accept gifts to perform what they otherwise should perform in their duty to the public.

2. Improper influence

The gift ban under Amendment XXIX of the Colorado Constitution mandates that no government employee "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). C.R.S. § 24-18-104 (1)(b)(I) states that a government employee shall not [a]ccept a gift of substantial value which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties..." While it may be argued that a private entrance or private meetings are necessary to conduct public business with sports celebrities, the faithful and impartial discharge of public duties need not be rewarded.

E. Even if improper influence is not involved, the acceptance of the gift box could result in an appearance of impropriety.

The Requestor argues that there is no breach of the public trust because the Broncos are unable to influence the Clerk's Office employees due to the distribution by raffle and the transactional duties of his staff. 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. See also, Advisory Opinion 09-06, page 3 and C.R.S. § 24-18-103.

In the present case, the public may conclude that the gift box was in exchange for a special favor: private appointments for individual Broncos to conduct official business. While the general public has to wait on seemingly unending lines, the Broncos get in and out privately and quickly. When the public hears about the Broncos gift to the Clerk's Office, it may well be viewed as a gesture that governmental services are for sale. This is just the sort of conduct that Article XXIX was created to prevent.

The Commission believes that all covered individuals in offices and agencies of the state should perform their jobs without extra compensation from the public it serves. 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 will provide special services if they get something in return. And such a policy reinforces public confidence that public employees do not expect a reward for providing quality service to all customers. The gift from the Broncos to the Clerk's Office may create an appearance of impropriety and is thus impermissible under Article XXIX.

IV. CONCLUSION

The Commission believes that acceptance of the items from the Broncos under the circumstances of this request does constitute a violation of Article XXIX under the Commission's jurisdiction. 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: April 14, 2014