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Advisory Opinion No. 09-01 (University Professors)

SUMMARY: 1. A professor or other university employee may be reimbursed by a nonprofit organization for the reasonable expenses of attending a meeting or fact-finding mission even though that nonprofit organization receives 5% or more of its funding from a for-profit entity, provided that the five conditions set forth in Position Statement 08-02 (Travel) are satisfied.

2. A professor or other university employee may be reimbursed by the federal government for the reasonable expenses of testifying before a congressional committee or attending a meeting with federal government officials, under two analyses, namely, lawful consideration and/or the five conditions set forth in Position Statement 08-02 (Travel), depending upon the circumstances.

3. A professor may accept an "examination copy" of a textbook that sells for more than \$50 if it was unsolicited. Solicited copies may also be accepted as a gift to the University. Regardless of whether the professor decides to use the book for his or her courses, he or she may not sell it to a student, another professor or a book-buyer.

4. A professor or other university employee may accept tickets to an annual banquet provided that he or she is speaking or answering questions as part of the scheduled program. Tickets may also be accepted if from a nonprofit organization that receives less than 5% of its funding from for-profit sources.

5. A professor or other university employee may be recruited for or negotiate consulting contractual arrangements otherwise permitted by the University provided that the compensation to be paid is commensurate with the value of the work to be performed.

I. BACKGROUND

The Independent Ethics Commission (“IEC” or “Commission”) has received a request for advisory opinion from a professor at the University of Colorado, asking several questions relating to the interpretation of CO Const. Art. XXIX. Each question is addressed separately below. The request also inquires whether specific provisions of Art. XXIX violate the First Amendment or substantive due process.

II. JURISDICTION

Professors at the University of Colorado are employees of a public institution of higher education and thus, “government employees” under CO Const. Art. XXIX Sec. 2(1). “Government employees” are subject to Art. XXIX and thus, under the jurisdiction of the Commission. The Commission, however, declines to respond to the inquiries relating to possible violation of the First Amendment or of substantive due process at this time.

III. APPLICABLE LAW AND PRECEDENT

Section 2 of Article XXIX (Definitions) reads in relevant part:

(1) “Government employee” means any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the general assembly or a public officer.

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

(1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such 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 accepted or received the money, forbearance or forgiveness of indebtedness.

(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.

(3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

* * *

(d) Unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties;

(e) Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program;

(f) Reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities;

In Position Statement 08-01 (Gifts), the Commission stated its desire to interpret Article XXIX in a manner that preserves what it believes was the intent of the electorate - "to improve and promote honesty and integrity in government and to assure the public that those in government are held to standards that place the public interest above their private interests." The Commission also referenced Section 6, which provides that those who breach the public trust for private gain or induce such breach shall be liable for monetary penalties.

IV. DISCUSSION

The requestor has posed several questions. Each will be discussed separately.

A. May a professor or other university employee be reimbursed by a nonprofit organization for the reasonable expenses of attending a meeting or fact-finding mission if a for-profit entity provides 5% or more of the funding of a sponsoring nonprofit organization?

Art. XXIX Sec. 3(1) prohibits a public official or employee from accepting or receiving any money from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception.

Art. XXIX Sec. 3(2) prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception. This prohibition extends to the solicitation, acceptance or receipt, either directly or indirectly, as the beneficiary of a gift or thing of value given to a spouse or dependent child.

The Sec. 3 gift ban does not apply where the person or entity seeking to give the money or gift receives “lawful consideration of equal or greater value in return.” The Commission finds no lawful consideration being given in return for mere attendance at a meeting or fact-finding mission, unless that person’s participation is vital to the meeting or mission. The assertion made in the request that “attendance at such events promotes faculty academic stature (as well as that of the university) and allows faculty members to participate in groups that share their values (and leverage their political impact)” may be true, but the Commission does not believe that that would constitute lawful consideration.

Exception (f) permits a government official or employee to accept “reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities.” Exception (f) is not applicable here if the nonprofit organization receives 5% or more of its funding from for-profit organizations or entities.

In Position Statement 08-02 (Travel), the Commission recognized that “travel that is not expressly exempted from Section 3 may nonetheless be permissible in certain circumstances.” The Commission determined that “the acceptance of travel-related expenses may be considered a gift to the State or local government, rather than to the

public official or employee, and therefore permissible, when five conditions are met.”

The five conditions that must be met are:

1. The travel is for a legitimate State or local government purpose.
2. The travel arrangements are appropriate to that purpose.
3. The trip is no longer than reasonably necessary to accomplish the business which is its purpose.
4. The government official or employee who will be traveling is not currently, was not in the recent past, and will not in the reasonably foreseeable future, be in a position to take direct official action with respect to the donor.
5. Government officials and employees are required to verify compliance with conditions #1 through #4 through any of four means specified in the Position Statement.

Therefore, provided that all five conditions set forth and explained in Position Statement 08-02 are satisfied, a professor or other university employee may be reimbursed by a nonprofit organization for the reasonable expenses of attending a meeting or fact-finding mission even though that nonprofit organization receives 5% or more of its funding from a for-profit entity. See Position Statement 08-02.

B. May a professor or other university employee be reimbursed by the federal government for the reasonable expenses of testifying before a congressional committee or attending a meeting with federal government officials?

Again, Art. XXIX Sec. 3(1) prohibits a public official or employee from accepting or receiving any money from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception. Sec. 3(2) prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception. “Person” means “any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.” Art. XXIX Sec. 2(4).

The Commission will address the definition of “person” in a separate Position Statement, and will discuss at that time whether the federal government, or indeed any governmental body, should be deemed a “person” under Article XXIX.

Notwithstanding that determination, however, the Commission finds that a professor or other university employee may be reimbursed by the federal government for reasonable expenses of testifying before a congressional committee or attending a meeting with federal government officials, for the following reasons:

Under the facts presented, the Commission finds lawful consideration being given in the form of testifying before a congressional committee, an important civic act, where the individual testifying is making available his or her expertise and experience to further Congress’ ability to act.

However, mere attendance at a meeting with federal government officials may or may not meet the lawful consideration test, depending upon whether that person’s participation is vital to the meeting.

Exception (f) permits a government official or employee to accept “reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities.” Although one could argue that the inclusion of state or local government and the exclusion of the federal government was merely an oversight by the drafters of Amendment 41, its absence is noted. Therefore, exception (f) is not applicable here because it does not appear to apply to expenses paid by the federal government.

In Position Statement 08-02 (Travel), the Commission recognized that “travel that is not expressly exempted from Section 3 may nonetheless be permissible in certain circumstances.” The Commission determined that “the acceptance of travel-related expenses may be considered a gift to the State or local government, rather than to the public official or employee, and therefore permissible, when five conditions are met.” The five conditions that must be met are detailed above.

Therefore, the Commission finds that reimbursement by the federal government is appropriate where a professor or other university employee is testifying before a congressional committee because there is lawful consideration of equal or greater value. In the absence of lawful consideration, where there is mere attendance at a meeting with nothing further, reimbursement by the federal government would still be appropriate, provided that all five conditions set forth and explained in Position Statement 08-02 are satisfied.

C. Is the receipt by a university professor of an "examination copy" of a textbook, that sells for more than \$50, a "gift" that is banned under section 3(2) of Amendment 41?

The Commission will address this question in two parts, differentiating between whether the examination copy of a textbook is "solicited" or "unsolicited."

University professors frequently receive examination copies of textbooks so they can evaluate them and determine whether they would like to use them in their courses. This enables the professors to review new resources and choose the best ones available for their students. This is an industry practice and of high beneficial use to both the professors and their students.

The Commission believes that if these books are unsolicited, acceptance would be permissible under exception (d) as "unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties."

The Commission also believes that acceptance would be permissible even if the books were solicited. University professors are continually researching their respective fields of study, and new resources are constantly coming to their attention. If a professor were not able to ask to examine a new resource, they might be compelled to use inferior materials in their classrooms. It is akin to test-driving a car; one must see it and evaluate it before making a purchase. Further, if professors at state universities are unable to remain current, the level of service provided by state universities will decline as compared with private universities, and they will become less competitive. Therefore, these examination copies should be considered a gift to the University, rather than a gift to the individual professor.

Consistent with that, a professor should not be permitted to sell the particular book, either to a student, another professor, or to a book-buyer, regardless of whether that professor decides to use the book in his or her coursework. This is in order to avoid any possible conflicts of interest or appearances of impropriety. The Commission also takes note that books get updated frequently and therefore, after a relatively short amount of time, become obsolete and of no value.

D. Is the receipt of tickets by a professor or other university employee from a professional association (like a minority bar association) to attend the association's annual banquet a "gift" that is banned under section 3(2) of Amendment 41? Does the answer change if the tickets are provided by a third party?

Art. XXIX Sec. 3 prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception.

The Sec. 3 gift ban does not apply where the person or entity seeking to give the gift receives "lawful consideration of equal or greater value in return." The Commission finds no lawful consideration being given in return for simply attending an annual banquet.

Exception (e) permits a government employee to accept admission to, and the cost of food or beverages consumed at a reception by an organization before whom the recipient is appearing to speak or to answer questions as part of the scheduled program. Therefore, if the professor or other university employee were speaking or answering questions as part of the scheduled program, he or she would be permitted to accept the tickets to the banquet.

Exception (f) permits a government official or employee to accept "reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities." Exception

(f) is applicable here only if the professional association offering the gift is a nonprofit that receives less than 5% of its funding from for-profit organizations or entities.

A similar analysis must be employed if the tickets are provided by a third party. Exception (e) no longer applies because it is no longer the hosting organization that is paying. Exception (f) might apply if the third party is a qualifying nonprofit or a state or local government, and if the individual attending the banquet is scheduled to “deliver a speech, make a presentation, participate on a panel, or represent the state or local government.” In any event, however, the tickets may not be offered at all if the third party is a “professional lobbyist.” See Sec. 3(4).

E. If the definition of “gift” in section 3(2) of Amendment 41 is limited to gifts intended to influence official action, are gifts to professors or other university employees banned if the gift (1) influences inconsequential or benign actions (such as the adoption of a textbook) or (2) benefits the university and its students or promotes public policy (such as good will lobbying)?

The Commission declines to respond to this question because it is premised on an inaccurate reading of the Constitution. The language of Art. XXIX does not limit the gift ban to “gifts intended to influence official action”.

F. Are professors and other university employees and their family members barred under section 3(2) of Amendment 41 from negotiating future employment or receiving a promise of future employment?

The Commission has decided to address this question separately in a Position Statement.

G. Are professors and other university employees barred under section 3(2) of Amendment 41 from being recruited for or negotiating consulting contractual arrangements otherwise permitted by the university?

The Commission does not believe that Art. XXIX prevents a professor or other university employee from being recruited for or negotiating consulting contractual

arrangements otherwise permitted by the University, provided that the compensation is commensurate with the value of the work to be performed.

Art. XXIX Sec. 3 prohibits a public official or employee from soliciting, accepting or receiving any gift or other thing of value worth more than \$50 in any calendar year, from a person, without that person receiving lawful consideration of equal or greater value in return, unless it falls under a listed exception.

The Sec. 3 gift ban does not apply where the person or entity seeking to give the gift receives “lawful consideration of equal or greater value in return.” The Commission finds lawful consideration being given in return for accepting a consulting contract, namely, the work that will be done in exchange, provided that the compensation is commensurate with the value of the work to be performed. That lawful consideration, the Commission believes, removes the activity from the Sec. 3(2) gift ban.

In addition, the Commission believes that this is an outside employment issue, best left to the policies and oversight of the government employer.

V. CONCLUSION

Of the seven questions posed by the requesting university professor, five are answered in full, one is declined as premised on an inaccurate reading of the Constitution, and one will be addressed in a separate Position Statement.

The Independent Ethics Commission

Nancy E. Friedman, Chairperson (recused on textbook question)

Matt Smith, Vice Chairperson

Sally H. Hopper, Commissioner

Larry R. Lasha, Commissioner

Roy Wood, Commissioner

Dated: February 20, 2009