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Amy C. DeVan, *Executive Director*

Advisory Opinion 15-10

(Acceptance of Travel Expenses from a Nonprofit Entity)

Summary: It would not be a violation of Colorado Constitution Art. XXIX for the Pharmacy Clinical Supervisor of the Colorado Department of Health Care Policy & Financing to accept travel expenses from the Western Medicaid Pharmacy Administrators Association (WMPAA) under the circumstances of this request.

I. Background

The Pharmacy Clinical Supervisor of the Colorado Department of Health Care Policy & Financing has submitted a request asking whether she may accept travel expenses in excess of \$59 to participate in a conference in Whitefish, Montana, September 27-30, 2015.

The Western Medicaid Pharmacy Administrator's Association (WMPAA) is a regional member organization of the national American Medicaid Pharmacy Administrator's Association (AMPAA). The stated purpose of AMPAA, and by extension WMPAA, is "to provide a venue for pharmacy program directors to meet and discuss topics pertinent to the administration of the states' Pharmacy Medical Assistance Programs." The specific organizational goals are to:

- 1) Promote communication and the exchange of information among Pharmacy Medicaid Assistance programs;

- 2) Foster understanding and compliance with federal initiatives impacting Pharmacy Medical Assistance programs;
- 3) Share information and principles in order to assist Pharmacy Medical Assistance programs in the fiscally responsible management of such programs;
- 4) Adopt policies and principles which serve as guidance for the association in the establishment or improvement of Pharmacy Medical Assistance programs; and,
- 5) Work closely with appropriate bodies and committees of other regional and national health care organizations interested in improving the quality and scope of medical care to recipients of Pharmacy Medical Assistance programs.

The AMPAA membership consists of representatives of Pharmacy Medicaid assistance programs from each state; each representative also belongs to one of the regional organizations. Colorado is a member of WMPAA and pays dues to the organization. Each member state has one representative in the organization, typically it is the person who manages the pharmacy benefit in that state. The requester, who is the supervisor of the pharmacy unit at the Department, is Colorado's member representative to WMPAA.

Each organization holds an annual conference and member representatives from all states are invited to attend. As Colorado's WMPAA representative, the requester was invited to attend the conference in September. A scholarship is provided to cover the cost of attendance of one Pharmacy Administrator, and the conference is designed to meet the needs of the person holding that position. The requester received the invitation, addressed to "State Medicaid Pharmacy Director" in her role as clinical supervisor of the pharmacy unit at the Department, and as the state representative to WMPAA.

In addition to attending as the clinical supervisor and state representative, the requester has also been asked to participate on two panels at the conference. She will be one of three participants on each panel, with her fellow panelists also serving as Medicaid pharmacy administrators. The first panel will cover Medicaid Expansion where each state representative will report on the experience in her state; since Colorado is one of the states that did its own Medicaid expansion, the requester will provide insight on that experience. Other states will be interested in learning about the results of Colorado's expansion. The second panel will address New Payment Methodology, which will discuss changes in reimbursement methodology. Members from states considering this change are hoping to hear from other states who have already changed methodologies. Colorado changed to Average Acquisition Cost (AAC) methodology recently, and was one of the first states to do so. Therefore the requester will discuss the experience here, and provide insight into lessons learned. It is anticipated that this information will be useful to participants from other states contemplating such a change.

WMPAA was designated a nonprofit entity by the Internal Revenue Service (IRS) in 1984, holding 501(c)(6) status. WMPAA is funded primarily through registration fees for conferences and, because vendors may attend the conferences and pay the fee, WMPAA receives more than five percent (5%) of its funding from for profit sources.

The requester states that, although vendors such as claims system vendors and pharmaceutical representatives are present at the conference, there is no risk of conflict of interest or appearance of impropriety because Colorado's claims system vendor has been chosen recently and will be

the vendor for the next several years. Thus, Colorado will not be entertaining a bid for a new vendor for quite some time. When it comes to pharmaceutical companies, Colorado has a number of safeguards in place to ensure that the process for entering into contracts is as fair and transparent as possible. Department employees are not permitted to accept items of any value from pharmaceutical representatives, whether in a conference setting or otherwise. While pharmaceutical representatives will attend the conference, there will be no discussion of drug rebates or contract processes. Rather discussion will be limited to the clinical aspects of the product. The requester states there is no other contract process with which she is involved.

The cost of attending the conference is estimated at \$850 for lodging, registration and meals. Airfare may be valued at approximately \$500-700 depending on the airline, airport and flight selected.

The question before the IEC is whether the requester may accept payment of costs to attend the conference.

II. Jurisdiction

The IEC finds that employees of the Colorado Department of Health Care Policy & Financing, including the Pharmacy Clinical Supervisor, are government employees and therefore subject to the jurisdiction of the Commission. *See* Colo. Const. Art. XXIX, sec 2(1) and (3).

III. Applicable Law

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 thing of value having either a fair market value or aggregate actual cost greater

than fifty (\$50) dollars in any calendar year, including but not limited to gifts, loans, 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:

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

IV. Discussion

As stated in Position Statement 12-01, “[s]tate agencies and institutions and local governments belong and pay dues to numerous organizations that hold conferences and events designed to foster the exchange of ideas across jurisdictional boundaries. When dues to these organizations include travel allowances to the members, reimbursement to covered individuals is acceptable. *See* Position Statement 10-01 (Nonprofits) and C.R.S. §24-18-106(2)(c).” AMPAA and WMPAA are such organizations. It does appear that Colorado is a member of AMPAA/WMPAA and pays dues to the organization. This rationale was echoed in advisory opinions and position statements issued both before and after PS 12-01 was issued. Specifically, in Advisory Opinion 10-03 the Commission stated that, where dues are paid to an organization and cover travel and related expenses to annual meetings or conferences “then there is valid consideration for the travel provided, and the gift is not a prohibited gift under Article XXIX, even if the sponsor of the conference is a nonprofit which receives more than 10% of its funding from for-profit sources.” Thus this would appear support the propriety of the request.

Additionally, the Commission addressed the issue of payment of travel expenses in Position Statement 12-01, which clearly stated the difference between the gift of travel when extended to an individual as compared to the institution or the State. In this instance, the invitation was

extended to the requester in her official capacity, as bolstered by the invitation addressed to “State Medicaid Pharmacy Director.” In this instance, as Colorado’s member representative to WMPAA, the requester would appear to be the most appropriate person to attend on behalf of the State. It appears clear the invitation was extended to her in her official, rather than individual capacity, and the topics about which she will speak are consistent with and directly related to her duties with the Department. Thus, it does appear the offer is made *ex officio*.

The Commission has addressed the issue of payment of travel expenses previously in other advisory opinions, most recently in Advisory Opinion 15-02. Several of the prior advisory opinions relate to speaking requests at conferences. In Advisory Opinion 12-04 the commission stated that while it was not a violation for a requester to accept a waiver of the registration fee for a conference at which the requester was invited to speak, it would not be appropriate to attend privately hosted dinners or other recreational or extracurricular activities. This same issue was raised in 15-02 and that requester was advised, as is this one, to avoid attending events that are extracurricular in nature; or if she does attend such events, to pay the cost of attendance herself. This situation differs from that posed in Advisory Opinion 12-08, where the Commission found it would not be a violation for the requester to accept a waiver of the registration fee for a conference at which he was speaking, but he could not accept travel expenses. However, in that instance the requester was going to be a participant only on one panel at an event taking place before the actual conference for which the request was made; in this instance the requester will be participating on two substantive panels during the conference itself. The requester states this conference is important because it enables representatives of state Medicaid pharmacy programs to meet and discuss issues of common interest or concern, and ensure that they are operating

according to best practices.

The Commission also reviewed this question in Advisory Opinion 13-11 and determined it was permissible for the Chairman of the Public Utilities Commission to accept a waiver of registration fees and free hotel accommodations and meals at a Forum which appeared to be quite similar to that outlined here. In that instance the Commission found the travel described to be permissible because:

- 1) The invitation to speak was sent to the Chairman based on his position with the Public Utilities Commission and his expertise in the area of participation, and the conference as described was relevant to his responsibilities and expertise as Chairman;
- 2) There was no apparent conflict of interest or impropriety; and,
- 3) The focus of the event was educational.

Those same factors would appear to be present here. The invitation to participate in panel discussion(s) was extended to the requester based on her position with the Department and the topics about which she will speak are directly in line with her areas of expertise and responsibility. There does not appear to be a conflict of interest or an attempt to curry favor by the host of the conference. However, it is noted there may be paying attendees who will have the desire to curry favor with the requester or the State for various reasons, and she is cautioned to be mindful of this issue and avoid any interactions which may appear to be a conflict of interest or lend themselves to an appearance of impropriety. The focus of this event is educational. Additionally, as noted in AO 13-11, because the requester will be participating in events throughout the conference, and is will be attending the entire conference in furtherance of her duties for the State, acceptance of the fee-waiver for this conference is consistent with section

3(3)(e) of Article XXIX of the Colorado Constitution.

In addition, as noted above, the Commission has previously analyzed travel issues of this type in Position Statement 12-01, in which a distinction was drawn between gifts to the state and gifts to covered individuals. Only gifts to covered individuals, as opposed to gifts to the state, are subject to Article XXIX. The relevant questions under Position Statement 12-01 are:

- 1) Is the offer made to a specific individual, or to a designee of an agency or government entity?
- 2) Is the offer made *ex officio*?
- 3) Is the event relevant to the duties of the covered individual?
- 4) Is there an existing or potential conflict of interest or does an appearance of impropriety exist?
- 5) What is the purpose of the conference?

In this instance, the offer is extended to the requester in her official capacity and is relevant to her duties to the State. Also addressed by PS 12-01 is the question of consideration and whether it exists. It is determined that, in this instance, it does since the requester will be speaking and participating on substantive panels during the three day event. This activity may, therefore, be analyzed pursuant to the previously issued opinions issued discussed above, and/or under PS 12-01, in which case the activity is not subject to the restrictions of Article XXIX.

Also, as noted in Advisory Opinion 15-02, the Commission clarified that PS 12-01 included reasonable lodging costs in the travel expenses exempted by that position statement.

V. Conclusion

For the reasons noted above, it would not be a violation of Colorado Constitution Article XXIX for the requester to accept a waiver of the conference fee and related travel expenses under the circumstances of this request. The Commission cautions public officials and employees that this opinion is based on the specific facts presented in the request and that different facts could produce a different result. The IEC, therefore, encourages individuals with particular questions to request fact specific advice for their circumstances through requests for advisory opinions or letter rulings.

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