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Position Statement 12-01

(Travel)

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission ("IEC" or "Commission") to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law. The Commission at its discretion may issue position statements. See IEC Rule 6. Position Statement means a "generally applicable written statement addressing ethics issues, which provides guidance for public officers, members of the General Assembly, local government employees and members of the public." IEC Rule 3(15). The Commission reminds public officials and employees and members of the public that should they have a question regarding the applicability of a position statement to a particular set of facts, they are encouraged to seek fact-specific advice through a request to the IEC for an advisory opinion or request for a letter ruling.

In November 2008, the Commission issued Position Statement 08-02 (Travel) ("08-02"). In that opinion the Commission set out five criteria which if met, would qualify the gift of travel as "a gift to the state", rather than a gift to a covered individual. See Position Statement 08-02 (Travel) at pages 4-5. The five criteria were based on

statutory language found in the laws of other states. Since the issuance of that opinion, the Commission has determined that the opinion created an overly broad exception to the gift ban contained in Article XXIX and that the reasoning of that opinion is not firmly rooted in the language of the Constitution. The Commission issued several advisory opinions in 2010 and 2011 that addressed the issue of gifts of travel reimbursement to covered individuals using a different analysis than that contained in Position Statement 08-02. See, e.g., Advisory Opinions 11-06, 11-03, 10-17, 10-12, 10-11 and 10-06. However, the Commission did not overrule Position Statement 08-02 thus creating ambiguity as to the continuing viability of the “gift to the state” exception articulated in that opinion.

Today, the Commission expressly overturns the “gift to the state” exception set forth in Position Statement 08-02 and offers the following guidance to covered individuals seeking to accept reimbursement for travel expenses.

II. 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 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, 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.

(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.

* * *

(4) Notwithstanding any provisions of this section to the contrary, and excepting campaign contributions as defined by law, no professional lobbyist, personally or on behalf of any other person or entity, shall knowingly offer, give, or arrange to give, to any public officer, member of the general assembly, local government official, or government employee, or to a member of such person's immediate family, any gift or thing of value, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public officer, member of the general assembly, local government official or government employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist's business or in connection with a personal or social event; provided, however, that a professional lobbyist shall not be prohibited from offering or giving to a public officer, member of the general assembly, local government official or government employee who is a member of his or her immediate family any such gift, thing of value, meal, beverage or other item.

The purposes and findings section of Article XXIX states that “. . . there are certain costs associated with holding public office and that to ensure the integrity of the office, such costs of a reasonable and necessary nature should be born [sic] by the state or local government.” Colo. Const. Article XXIX, Sec. 1(2). The IEC believes that this section means that the government’s business should be paid for by the government so as to minimize the perception that gifts and payments for entertainment and travel buys influence. The purpose of the Amendment therefore is to restrict gifts to public employees and officials acting in their official capacities. The Commission recognizes

that in the current economy this means that many public employees and officials will be precluded from attending conferences and other events which may be beneficial. The IEC, however, must interpret the Constitution as it is written.

III. Discussion

Section 3 of Article XXIX provides that payment of travel expenses valued in excess of \$53¹, is a prohibited gift. However, reimbursement that is supported by consideration of equal or greater value from the recipient of the reimbursement is permissible. Moreover, reimbursement for attendance at a convention, fact finding mission or trip by (1) a non-profit that receives less than 5% of its funding from for-profit organizations or entities, or by (2) other state or local governments is permissible. It is important to note that reimbursement by professional lobbyists, either directly or on behalf of any other person or entity, is prohibited.

Because Article XXIX is a remedial provision intended to ensure propriety and to preserve public confidence in public officers, members of the General Assembly, local government officials and government employees, its prohibitions must be interpreted broadly and its exceptions must be interpreted narrowly. *See Quaglia v. State Ethics Commission*, 986 A.2d 974, 979 (Pa. Cmwlth. 2010). Moreover, as acknowledged in Section 1(2) of Article XXIX, the costs of holding state or local public office should be borne by the state or local government.

Given the foregoing, in evaluating the propriety of reimbursement of travel expenses to covered individuals, the Commission starts with the question of whether

¹ In Position Statement 11-01, the Commission raised the constitutional gift limit from \$50 to \$53 to adjust for inflation pursuant to Article XXIX section 3(6).

the gift is to a covered individual. Only gifts to covered individuals, i.e., public officers, members of the General Assembly, local government officials and government employees, are subject to the Commission's jurisdiction pursuant to Article XXIX.

A. *Defining a Gift to a Covered Individual*

Reimbursement of travel expenses to covered individuals is a prohibited gift unless it is established that such reimbursement does not inure to the benefit of the covered individual but rather to the governmental entity, department, agency, or institution that employs the covered individual. At the outset, the covered individual should consider whether a public benefit is conferred to a governmental entity as distinct from an individual benefit conferred to the covered individual. Because this analysis focuses on institutional benefit, governmental entities should play a critical and active role in assisting covered individuals to determine whether a gift of travel is permissible under Article XXIX.

The Commission offers the following factors for covered individuals to consider when weighing acceptance of offers of payment or reimbursement:

1. Is the offer to a specific individual or to a designee of an agency or governmental entity?

Offers to specific individuals more likely inure to the personal benefit of such individuals, whereas offers to designees of department heads, legislative leadership or local government officials indicate an institutional benefit. Grants to research institutions that are administered by that institution pursuant to established procedures generally are not gifts to covered individuals.

Other circumstances to consider are whether there are statutory or regulatory requirements or joint governmental programs that provide for covered individuals to attend a particular meeting or conference or participate in a decision making process that would not be considered a gift to a covered individual. For example, many state agencies have close working relationships with their federal counterparts. These agencies coordinate their activities through meetings and conferences. In those circumstances, the federal government often pays expenses for state and local employees and officials to travel to Washington, D.C. or other locations. This coordination exists in the public safety, energy, banking, securities, transportation, agriculture, and insurance fields, among others. The State also implements federally-authorized federal programs such as Medicaid and natural resources and environmental laws, including the Clean Water Act, Clean Air Act, the Resource Conservation and Recovery Act, etc. These offers are to the affected agencies, rather than to a covered individual.

2. Is the offer *ex officio*?

Offers of reimbursement to individuals by virtue of their specific position or area of responsibility or expertise (e.g., to the Chairman and Ranking Member of the House Judiciary Committee or to the Executive Director of the Department of Transportation or his designee, five attorneys from the natural resources section of the Department of Law) are indicative of institutional benefit. Federal government agencies often provide reimbursement to state and local employees for travel for training and conferences because of such employees' functional positions in administering federal or joint

local/state/federal programs. Such reimbursement provides an institutional rather than an individual benefit.

3. Is the event related to the public duties of the covered individual?

A nexus between the legitimate functions and expertise of the covered individual and the subject of the events to which he or she has been invited is an indicator of institutional rather than individual benefit. For example, if the Executive Director of the Colorado Department of Public Safety is invited to attend a meeting regarding the coordination of various entities following a Colorado wildfire, that would be an institutional invitation.

4. Is there existing or potential conflict of interest or appearance of impropriety?

Offers of reimbursement from individuals or entities with financial or regulatory interests that can be affected by the covered individual likely present a potential conflict of interest rather than a benefit to the governmental entity. Therefore travel reimbursed in that circumstance would not be permitted. For example, if a covered individual is in position to take direct official action with respect to the donor, such as the awarding of a contract, the gift will be perceived as a gift to an individual.

5. What is the purpose of the trip or conference?

The purpose of the proposed trip or conference must be educational or to conduct the governmental business of the agency or entity, not primarily a networking opportunity for either the covered individual or the donor. If the conference largely consists of receptions, golfing, and sightseeing, then acceptance of expenses for those activities is not permissible.

If the gift is determined to be to a covered individual after the foregoing analysis, then such reimbursement is a prohibited gift under Article XXIX unless such reimbursement is (a) supported by consideration of equal or greater value, or (b) falls within an enumerated exception contained in section 3(3)(f). Article XXIX contains no additional exceptions to the gift ban.

The Commission rejects the proposal that the exceptions contained in Article XXIX section 3(3) are a non-exhaustive list of permissible exceptions. Gifts of travel are permissible only if they are to a governmental entity rather than an individual public employee or official, are supported by consideration of equal or greater value, or if they fall under an enumerated exception.

No one factor described above is determinative, and the entire context of the proposed travel reimbursement should be evaluated before acceptance. The IEC cautions public officials and employees relying on Commission advisory opinions that even slight factual differences may alter the constitutional analysis and result in different conclusions. These distinctions therefore should be evaluated.

B. *Lawful Consideration*

When reimbursement of travel expenses to covered individuals is supported by lawful consideration of equal or greater value, such reimbursement does not constitute a gift under Section 3 of Article XXIX. The following is a non-exhaustive list of examples of offers supported by consideration:

1. Government Exchange Organizations

State 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 permissible. See, Position Statement 10-01 (Nonprofits), and C.R.S. § 24-18-106(2)(c).

2. Contracts and Grants

Attendance at conferences and other events may be provided for in contracts or grant agreements entered into by state and local agencies and other governmental entities. In such instances, assuming sufficient consideration, reimbursement for travel expenses would be permissible.

The Commission previously found that preparation for a speech or panel, by itself, is not lawful consideration of equal or greater value. Advisory Opinion 11-12, and Advisory Opinion 10-06. See III.A.1 *supra*.

C. *Reimbursement from Non-Profits and Governments*

1. Non-profits

The Commission has been consistent in the application of the non-profits exception to the gift ban of Article XXIX. Covered individuals may rely on representations made by non-profits that they receive less than 5% of their funding from for-profit sources. However, the Commission is aware of the potential for creative individuals to frustrate the 5% rule by the creation of multiple and affiliated entities. Going forward, the Commission may examine more carefully the subsidiaries, affiliates and activities of the non-profits seeking to reimburse expenses for covered individuals. See Advisory Opinion 10-07 (Organization and Funding of the Colorado Women's Legislative Caucus).

2. State and Local Governments

Section 3(3)(f) of Article XXIX explicitly exempts reimbursement of travel expenses by other state and local governments. Therefore, if the travel is paid for by local government or by the state of Colorado, (or another state), travel is permissible.

3. Federal Government

Article XXIX section 3(3)(f) does not expressly exempt payments by the United States government or foreign national or foreign local governments. Such payments generally are permissible under other analyses, see, section A.1, *infra*. The IEC encourages agencies and governmental agencies to require individuals to explain the nature of the state-federal connection in evaluating the permissibility of federally-financed travel.

D. Other Issues

The Commission cautions that although a reimbursement for travel to a conference or event may be permissible under Article XXIX, there may be portions of the conference that would constitute a violation of Article XXIX. For example, if there is a free golf trip, or free tickets to a play or sporting event, those aspects of the event would have to be independently evaluated. Many conferences include a dinner with a guest speaker which is considered part of the conference program. It is permissible for covered employees and officials to attend and participate in those meals, so long as they are part of the program, and are not primarily for entertainment purposes. If a meal is included in a conference, then attendance is permissible. Golf trips, sightseeing, cruises, and other recreational activities are never considered part of a conference, and

although the IEC recognizes that there may be benefits to these events, the covered individual should either not attend those events, or pay his or her own way (assuming that the event is valued at over \$53). See Advisory Opinion 12-06.

III. Conclusion

This Position Statement clarifies when acceptance of travel reimbursement or payment is permissible under Article XXIX. This opinion is meant to give general guidance, and the IEC 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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