

Executive Branch Ethics Commission
ADVISORY OPINION 07-37
December 14, 2007

RE: May employees accept award of \$25 in gas from vendor based on agency fleet credit card purchases?

DECISION: No, unless the agency is authorized to allow such private use.

This opinion is issued in response to your October 4, 2007 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 14, 2007 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You are employed as the Deputy Executive Director for a district highway office of the Transportation Cabinet. In one of the counties within your district, a gasoline station is offering a promotion where for every \$50 of gasoline purchased from the gas station, you may drop your name in a jar. At the end of each week a name is drawn out of the jar to win \$25 worth of gasoline. The employees of the local district office use this gas station for their state-owned vehicles, purchasing the gas with a Transportation Cabinet fleet credit card. You ask whether they may put their names in the jar after purchasing \$50 in gasoline for their state-owned vehicles and accept \$25 if their names are drawn.

Other questions similar in nature that have recently been asked and the Commission will attempt to address by this opinion include: 1) whether an employee may accept a gift card from a vendor when the agency accumulates points for purchasing certain products from a vendor and, as a result of such accumulation of points, a gift card is offered to the employee responsible for such purchasing; and 2) whether employees may allow frequent flyer miles to be accumulated in their own names when the flights may have been purchased or reimbursed by their state agencies.

Relating to the acceptance of gifts, KRS 11A.045(1) provides the following:

- (1) No public servant, his spouse, or dependent child knowingly shall accept any gifts or gratuities, including travel expenses, meals, alcoholic beverages, and honoraria, totaling a value greater than twenty-five dollars (\$25) in a single calendar year from any person or business that does business with, is regulated by, is seeking grants from, is involved in litigation against, or is lobbying or

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attempting to influence the actions of the agency in which the public servant is employed or which he supervises, or from any group or association which has as its primary purpose the representation of those persons or businesses. Nothing contained in this subsection shall prohibit the commission from authorizing exceptions to this subsection where such exemption would not create an appearance of impropriety.

“Gift” is defined in KRS 11A.010(5) to mean a payment, loan, subscription, advance, deposit of money, services, or anything of value, unless consideration of equal or greater value is received; "gift" does not include gifts from family members, campaign contributions, or door prizes available to the public.

In previous advisory opinions, the Commission advised that executive branch employees may accept discounts on such things as lodging rates from hotels/motels, and computer products/equipment from vendors as long as the discount is offered to all executive branch employees and not limited to a select group of employees or a particular agency, and provided the vendor offers a reasonably consistent discount to its other customers. See Advisory Opinions 93-88, 01-1, and 02-39, copies of which are enclosed.

Further, in advisory opinion 97-28, the Commission opined that an agency may accept credit certificates to purchase new equipment, etc., awarded through an incentive program offered by a vendor to all of its customers based on the percentage of certain purchases, if the credit earned is a result of the agency’s initial agreement with the vendor and the credit is used for items related to the mission of that agency, rather than promotional items for employees.

Thus, based on the statutory provisions above and the conclusions in the above listed advisory opinions, the Commission provides the following guidance regarding these and other related concerns. Pursuant to KRS 11A.045(1), the Commission believes that employees (and state agencies) may accept any gifts from vendors of their agencies if such gifts are \$25 or less for a single calendar year. An employee (or a state agency) is not prohibited from accepting \$25 worth of gasoline once during a calendar year from a gas station that does business with the employee’s agency.

Moreover, it appears that the \$25 gas award in the scenario detailed above is not so much a “gift” or door prize as it is part of the purchase agreement/discount that a customer has with the gas station to purchase \$50 in gas and also receive a chance to receive an additional \$25 in gas. Because employees of the Transportation Cabinet are aware of this agreement/discount upon the purchase of gasoline, because the potential gas award is related to the mission of the Transportation Cabinet, and because the agreement is offered to all other customers of the vendor, the Transportation Cabinet is not prohibited from accepting such \$25 gas awards as they

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are viewed as part of the agreement the state has with the gas station upon purchase of gasoline, and not a gift.

In view of the fact that the employees are making the purchase via a Transportation Cabinet fleet credit card, the Commission believes that the agreement to purchase gas is between the gas station and the Transportation Cabinet, not the employee, although the employee may be authorized by the Transportation Cabinet to make the purchase. Thus, the \$25 awards of gasoline that may be drawn under an employee's name actually are owned by the Transportation Cabinet and should be used by the employees for state-owned vehicles. The issue of whether the Transportation Cabinet may allow an employee to use the \$25 gas award for his own private vehicle is a matter not under the Commission's jurisdiction, but more appropriately should be addressed by Transportation Cabinet management in conjunction with the Finance and Administration Cabinet to determine whether it is even statutorily allowable for the employee to use it privately.

Similarly, if a purchasing officer or state agency is offered a gift card based on the amount of purchases that an agency has made from a specific vendor, several questions must be addressed. First, it must be determined whether or not the gift card is a "gift" as defined in KRS 11A.010 (5) or whether it is a part of the agreement/discount that the state agency has with the vendor. If it is a gift to the agency, and not part of an initial agreement that the agency has with the vendor upon purchase, then neither the employee nor the agency may accept the gift card if the value exceeds \$25 per year, but are not prohibited from accepting a gift card from the vendor if it is less than \$25 per year.

Conversely, if the award of the gift card is determined to be part of an initial agreement that the state agency has with the vendor based upon the amount of purchases by the agency, and is not considered to be a gift, then in accordance with the above advice the state agency may accept the gift card and use it for products or services consistent with the mission of the state agency. On the other hand, a gift card offered to an employee from a vendor as a result of agency purchases would be considered a gift to the employee from the vendor since the employee has not provided equal or greater consideration for the gift card, and should not be accepted by the employee if greater than \$25.

The Commission points out that the statutory provisions in KRS 11A.045(1) do not prohibit an employee from participating privately in a purchase agreement with a vendor that is offered to all customers of the vendor which rewards the individual with points, credit, or gift cards that can be applied toward products or services for the employee privately, even if the purchase made by the employee is subsequently reimbursed by his employer. Since consideration is being provided to the vendor by the employee, such an agreement between an

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employee and a vendor in a private capacity does not appear to be a “gift” provided the same award program is offered to all other customers of the vendor for similar purchases.

Accordingly, the Commission believes if an employee purchases an airline ticket on his personal credit card or pays for it directly for a trip he is making on behalf of his agency, any frequent flyer miles awarded to the employee are not considered a “gift” to the employee from the airline, but are a part of the purchase agreement the employee has made with the airline. Even though the cost of the airfare may be subsequently reimbursed to the employee, the Commission does not believe that the employee is prohibited from accepting such frequent flyer miles from the airline. Conversely, if a state agency directly purchases an airline ticket on behalf of a state employee, then the state agency has a purchase agreement with the airline/travel agency and any frequent flyer miles offered to an employee are actually owned by the employee’s state agency and should be used for future benefit of the state agency. Again, the issue then of whether the agency may allow an employee to use the frequent flyer miles for his own private use is a matter not under the Commission’s jurisdiction, but more appropriately should be addressed by agency management in conjunction with the Finance and Administration Cabinet to determine whether it is even statutorily allowable for the employee to use them privately.

In summation, a distinction may be made that when an employee makes purchases using state resources such as a fleet credit card, or an agency makes purchases on behalf of an employee, then any additional benefit that may accrue as a result of those purchases belongs to the state, but when an employee uses his own resources to make such purchases, such as using a personal credit card, then the employee may accept any additional benefit that may accrue. However, nothing prohibits an employee from accepting a gift with a value of \$25 or less once per year from any one source that does business with the employee’s agency.

If the Commonwealth wishes to ensure that all award programs accrue to the benefit of the state agency, then all purchases for airfares, office products, gasoline, etc., should be made by the state agency directly and not by employees who are subsequently reimbursed.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Vice Chair: E. Patrick Moores

Enclosure: Advisory Opinion 93-88
Advisory Opinion 01-1
Advisory Opinion 02-39
Advisory Opinion 97-28