



ADVISORY OPINION 18-08

Date: August 8, 2018

Decision by Commissioners: Paula Jenkins-Massie, Sally Jensen, Robert Ralston, Kellie Tetrick, Charles Toliver

Question

Whether a New Castle County Department of Public Safety employee may accept the gift from the marketers of a cutting-edge DNA tracking system of the cost of the conference registration fee and airfare to attend an international symposium at which the officer will be presenting a poster on the Department's use of such cutting-edge system?

Conclusion

Under the circumstances presented here, yes, the County employee may accept the gift of the cost of the symposium registration and airfare from the marketers of the DNA tracking system, so long as such gift is recorded in the departmental gift log as required by the Ethics Code, and so long as this is a one-time occurrence. This approval is limited to this situation only and should not be interpreted to apply to any other circumstance. Should the Department determine that any future attendance at any symposium or conference regarding the use of the cutting-edge system is appropriate and necessary, the Department should plan accordingly and provide for such expenses in its budget. Attendance at the symposium will give the County employee an opportunity to receive and exchange highly valuable information for public safety purposes which could not be obtained without attendance at the symposium. This benefit outweighs any potential adverse perception on the part of the public resulting from the acceptance of this comparatively modest gift. While the presentation of a poster at the symposium by the County employee about the cutting-edge technology benefits the marketers of the machine, it likewise benefits the Department and the County.

Facts

The Commission was contacted by a member of the Department of Public Safety (the “Requester”) about the propriety of the acceptance of a gift from the manufacturer of a cutting-edge DNA processing system. The County purchased the system last year with a grant from the Bureau of Justice Administration (“BJA”).¹ The Department is one of less than five such departments in the United States using this DNA rapid processing system. Once a year the International Symposium on Human Identification is held, and it is one of the few large-scale conferences which focuses on forensic genetics. Attendance at the symposium provides the attendee with an opportunity to learn what work is being performed in the subject area and to discuss practices and results with 1000 or more professionals who are currently working in the field. Attendance at this symposium will provide the Requester with a chance to present the Department’s experiences with the DNA tracking system and will also give the Requester a unique opportunity to learn more about this new and ever-developing area of public safety practices from people with real-time experience with forensic technologies.

This year, the symposium is being held in Phoenix, AZ. The BJA grant funds, received over a year ago, have been expended on the purchase and use of the DNA machine, and are, thus, not available for attending the symposium. The company which markets the DNA machine has offered to defray the costs of the Requester’s presentation of a poster² about the DNA tracking system and attendance at the symposium by paying for the registration and airfare.³ The Requester will present a poster at the symposium which will be observed by other attendees, inuring a benefit to the marketers of the DNA system. The County and the Department also benefit by presenting a poster at the symposium by informing persons in the field and beyond about its status as one of a very small number of Departments with experience in this form of forensic DNA tracking.

Code or Prior Opinion:

Relevant Ethics Code Provisions and Case Law

In Section 2.03.102, the following relevant terms are defined by the Ethics Code, as follows:

Business means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding

¹ Such systems can cost more than a quarter of a million dollars.

² The Requester provided the Commission with the content of the proposed poster.

³ The anticipated break down of the costs here include about \$1200 from the County for registration, per diem, and rental car/taxi; and \$1313 as a one-time gift for hotel and airfare.

company, joint stock company, receivership, trust or any legal entity organized for profit.

Conflict or conflict of interest means conduct which is prohibited by Section 2.03.103.

County means New Castle County, including any County Department.

County Employee means any person who receives compensation as an employee of a County Department or County row office.

Gift means anything that is received without consideration of equal or greater value. ... A gift is considered accepted upon receipt or control or direction unless it is promptly returned in its entirety. An email invitation, unless specifically accepted, is not considered a gift.

Governmental body means any department, authority, commission, committee, council, board, bureau, division, service, office, official, administration, legislative body, or other establishment in the executive, legislative or judicial branch of a state, a nation or a political subdivision thereof or any department performing a governmental function.

Private enterprise means any activity conducted by any person, whether conducted for profit or not for profit and includes the ownership of real or personal property. Private enterprise does not include any activity of the federal, State or local government or of any department, authority or instrumentality of the federal, State or local government.

The New Castle County Ethics Code prohibits conduct on the part of County officials or employees which either creates the appearance of impropriety even where no direct conflict of interest is present. Specifically, conduct which creates an appearance of impropriety is prohibited by Section 2.03.104(A) of the New Castle County Code.⁴ To determine if an appearance of impropriety exists, the Delaware courts have stated that “[t]he test is... if the conduct would create in reasonable minds, with knowledge of all relevant facts, a perception that an official’s ability to carry out [his or] her duties with integrity, impartiality and competence is impaired.” *Hanson v. Delaware State Public Integrity Com’n*, 2012WL3860732, at *16 (Del.Super. 2012), aff’d, 69 A.3d 370 (Del.Supr. 2013); and “[t]he test for appearance of impropriety is

⁴ New Castle County Code Section 2.03.104(A) states: “No County employee or County official shall engage in conduct which, while not constituting a violation of Subsection 2.03.103(A)(1), undermines the public confidence in the impartiality of a governmental body with which the County employee or County official is or has been associated by creating an appearance that the decisions or actions of the County employee, County official or governmental body are influenced by factors other than the merits.”

whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the [official's] ability to carry out [the official's] responsibilities with integrity, impartiality and competence is impaired.” *In re Williams*, 701 A.2d 825, 832 (Del.Super. 1997). The courts have advised the Commission to look at the totality of the facts presented, and this Commission has historically applied this standard when reviewing the conduct of County officials and employees.

It is a violation of the New Castle County Ethics Code if a County official or employee uses his or her office or employment for his or her personal or private benefit, the benefit of a member of his or her immediate family, or a business with which he or she is associated.⁵ Economic benefits thereby derived with a *de minimus* impact may be exempted.⁶

The acceptance of gifts by New Castle County employees and officials can be complicated, and the acceptance of gifts by County employees and officials is discouraged.⁷ The Ethics Code must be consulted to determine the circumstances under which a gift may be accepted. The Code includes a description of the limited circumstances under which a gift may be accepted, and the “[p]ayment of training expenses, including reasonable transportation/lodging/subsistence costs or reasonable reimbursement for such expenses from governmental bodies or associations of governmental bodies may be accepted at any time without recording in a public gift log if approved by a department manager, agency head, or elected office holder.” Section 2.03.104.I.7. Section 2.03.104.I.9 of the Code states that “[a]n Advisory Opinion request shall be made to the Ethics Commission prior to the acceptance of any gift not described by or limited in Subsections I.1. through I.9.”

Prior Commission Opinions

In Advisory Opinion AO17-08, the Commission was consulted as to whether a County vendor may provide travel expenses for two County employees for three days for the purpose of inspecting emergency vehicles being purchased by the County per contract, the purchase of which has been placed on hold by the County due to a previous delivery of vehicles from this vendor which did not meet the bid specifications, had warranty issues, and required post-delivery repairs and adjustments, at delay and cost to the County. The Commission approved the gift, stating:

Acceptance of gifts by County officials and employees often raise serious issues which can negatively affect the public

⁵ New Castle County Code Section 2.03.103(A)(1).

⁶ Id.

⁷ See New Castle County Code Section 2.03.104.H.

trust. These issues include potential conflicts of interest, decisions made through improper influence, appearance of impropriety, and personal gain by virtue of County employment. The potential for the existence of these issues is enhanced when the gift is offered by a County vendor. The facts presented here and outlined above, however, reduce or nullify the likelihood that these issues will result from the acceptance of travel expenses by this County vendor under these limited circumstances. The need for these emergency vehicles to perform as specific in the contract is a critical matter. Acceptance of the gift of travel expenses must be promptly reported in the departmental gift log.

In Advisory Opinion AO16-02, the Ethics Commission approved the gift of the cost of attendance of a County employee for HAZMAT training being offered by a private railroad company. In approving the gift, however, the Commission stated:

The purpose of the program is not an attempt by the sponsoring company to find new business among the attendees and to raise its profits in that manner. ... The overwhelming benefit of such training programs inures to the citizens through state-of-the-art training to emergency responders. The acceptance of the gift, here, would not create an appearance of impropriety or conflict in the mind of the reasonable observer. The County employee accepting this gift must, however, record the gift in the departmental gift log.

In Advisory Opinion 04-07, an official asked whether he could accept a gift in the form of transportation and hotel expenses on behalf of an association of counties in which New Castle County was a member in order to participate in a forum sponsored by another non-profit organization to which the association of counties was invited. The Commission held that the official could accept the gift of reasonable transportation and hotel expenses from the non-profit association of counties because he was not acting in his official capacity as a County official and because the circumstances do not reasonably raise the potential for the appearance of impropriety. Both of the organizations involved were nonprofit, government-based entities.

In Advisory Opinion 08-02, a County employee, who serves on a State board, asked whether he could accept gifts of reasonable costs of attendance at professional conferences given by the State board. The Commission approved, and stated:

Section 2.03.104.I.7 of the New Castle County Ethics Code gift law is determinative regarding this request. Unlike gifts, training expenses from private non-governmental sources which may not be accepted unless they are approved in advance by the Ethics Commission, gifts from governmental bodies or associations of governmental bodies of “training expenses, including reasonable transportation/lodging/subsistence costs or reasonable reimbursement for such expenses,” may be accepted at any time without the recording in a public gift log if approved by a department manager, agency head, or elected office holder.” (footnotes omitted.)

Analysis

The Ethics Code prohibition against the acceptance of gifts includes an exception specifically designed for the gift of the costs associated with the attendance at programs which are sponsored or organized by other governmental bodies. While the training program at issue here is technically not organized by a governmental body, it is underwritten by federal funds and the attendees are all governmental emergency responders. The purpose of the program is not an attempt by the sponsoring company to find new business among the attendees and to raise its profits in that manner. Further, by sponsoring this training program, the sponsoring company is not trying to place itself in a more advantageous competitive position in its marketplace. The purpose of the program is to expend federal funds earmarked for HazMat training in order to meet federal regulations placed upon transporters of hazardous materials. The overwhelming benefit of such training programs inures to the citizens through state-of-the-art training to emergency responders. The acceptance of the gift, here, would not create an appearance of impropriety or conflict in the mind of the reasonable observer. The County employee accepting this gift must, however, record the gift in the departmental gift log.

Finding

Under these circumstances, accepting the gift of the cost of the airfare and the registration for the symposium from the marketer of the DNA tracking system already purchased by the County to defray the entire cost of the employee’s attendance at the symposium will not violate the Ethics Code. The details of the gift must be timely entered into the Department’s gift log. The benefit to the County of attendance at this annual international symposium outweighs any potential negative perception by the public regarding the acceptance of this gift. This is a one-time approval and the Department should plan for this expense in the future if it determines that an employee from its ranks should attend the symposium again. This opinion should not be interpreted as approval for any other or future situation, even if similar.

In rendering this advisory opinion, this Commission has applied the New Castle County Ethics Code, which establishes the minimum level of ethical conduct required of County officials and employees.

BY AND FOR THE NEW CASTLE COUNTY ETHICS COMMISSION

ON THIS 8TH DAY OF AUGUST 2018.

Eric J. Monzo, Chairperson
New Castle County Ethics Commission

Decision: 5 – 0, unanimous