

Anne Arundel County Ethics Commission

Advisory Opinion 02-64

Issues:

1. Whether and to what extent the Public Ethics Law covers gifts to the county from controlled donors.
2. Whether and to what extent, county employees may accept gifts from controlled donors during shows and training sessions.
3. Whether and to what extent county employees may accept discounts on personal purchases from controlled donors, where the discounts are offered to all county employees because of their employment with the county.

Facts:

The county contracts with a number of entities to provide equipment and services to the county's various departments and agencies. On occasion, these entities have offered to donate goods to the county for its discretionary use. These same vendors often come to county buildings to give shows to introduce their products. The entities also offer, in conjunction with the county's purchasing office, training sessions to county employees to demonstrate the proper use of purchased products. During these shows and training sessions, the entities give employees free food and gifts. On occasion, they hold raffles and give prizes to employees. In most cases, the gifts given to employees are small items, pens, pencils, sticky notes, and similar things. Some gifts, particularly those gifts that are raffled, exceed the \$25 limit for permitted gifts of nominal value.

One of the large vendors with the county has expressed an interest in offering discounts on personal purchases to county employees. The employees would be able to order only online through the website established for government users. The employees would use their personal credit cards to make the purchases. The amount of the discount available to employees may be as high as 40% on some items, although the vendor has indicated that the amount and availability of discounts may be negotiable, depending on ethics law limitations.

Discussion:

There are two provisions of the Public Ethics Law that apply to these questions. Section 3-104(a) provides that employees may not receive personal benefits because of their official position. Sections 3-106(b) and (c) prohibit or restrict the gifts that employees may accept from controlled donors. Controlled donors include people who are doing or seeking to do business with the county, regulated by the county, lobbying the county, or those who have financial

interests that may be substantially affected by the performance or nonperformance of official duties of potential gift recipients.

These provisions apply primarily to employees, not to the county itself. The county may accept gifts made to the county, as long as the gifts are given in furtherance of the county's public purposes, and as long as the beneficiaries are the people served by the government. The ethics laws prohibit solicitation by employees of gifts to the county, but do not prohibit their acceptance, as long as the gifts are neither offered nor accepted with the intent to impair the impartial or independent judgment of county employees. See for example,

Gifts are defined as "something of value" given without adequate and lawful consideration. Discounts may be considered gifts, if they are offered for less than adequate consideration. When a discount is in fact a gift, it may be accepted if it is for a nominal value, both to the intended recipient(s) and to the donor.

A discount is not always a gift. The ethics commission has issued a number of advisory and informal opinions relating to discounts. Generally, the commission has advised that if a discount is offered to all county employees as part of a commonly used marketing technique directed to all employees of large organizations, and if employees pay an adequate and legal consideration for the discounted items, then the discount is not really a gift.

In IO-98-17, the commission advised that a contractor may offer a discounted deal to county employees for the purchase of cell phones. The consideration to the contractor consisted of the money paid by employees for the phones and the monthly services, the assurance that the employees were likely to be steadily paying customers, and the availability of a large pool of potential customers. Although county employees would not be paying retail prices, they would be paying "adequate consideration". This type of discount is a commonly used marketing technique. See also, IO-98-74.

In IO-00-191, the commission advised that a coupon for a free drink (or other item) at a local restaurant was not a gift, but was an inducement to buy additional food. This type of offer is also a commonly used advertising tool, frequently offered to large groups through newspapers and other media. In this case, the value of the free item was nominal, and the consideration, adequate.

However, in IO-01-165, the ethics commission advised that an offer of a discounted chiropractic exam with discounts for follow-up care was not a permissible discount. In the first place, it was only offered to public safety employees. Second, the discount was so significant that it appeared to be a gift, as well as an inducement to buy additional services. Although the entity making the offer of these services was not a controlled donor, the employees were not permitted to accept the gift because of it was offered solely because of the employees' official positions.

These opinions are supported by the opinions of other jurisdictions as well. The federal

government has by specific exemption, allowed the acceptance of discounts "available to the public or to a class consisting of all Government employees or all uniformed military personnel. . ." 5 C.F.R. §2635.203(b)(4). The Office of Government Ethics has determined that this exception does not permit discounts offered to subgroups of employees, or to just those employees of agencies with more than a certain number of employees, or only to employees who work at agencies with a contractual relationship with the business offering the discount. See, OGE Informal Advisory Letter 94x19.

If the discount is made to all employees, and if adequate consideration is required, the discount may be accepted. Adequate consideration may be determined by a number of factors. The federal government, which also has an exception permitting discounts to employees who pay "market value" or even "fair value". Referring to "fair value", the Office of Government Ethics has determined that one component of "fair value" would be the that the price of the item is "sufficient to cover the company's anticipated costs and allow for a fair profit." OGE 96x20.

If a discount is offered to government employees, the government agency considering the acceptability of the discount must determine if the discounted item being offered will require payment of adequate consideration or "fair value". If the discount being offered to government employees is comparable to the discounts offered to the employees of other large groups, or to members of the public, the agency may reasonably conclude that this requirement is met.

Conclusion:

The ethics commission advises that the ethics law does not apply to gifts given to the county government if the gift is given to further the county's purposes, the gift is not offered with the intent to impair the impartial or independent judgment of county employees, and if the beneficiaries of the gift will be the public, as opposed to the employees. The commission also advises that county employees may accept gifts of food or other items from controlled donors at trade shows or training sessions if the gifts are of nominal value both to the recipients and to the donor. Finally, the commission advises that a discount offered by a controlled donor to county employees on personal purchases may be accepted if the discount is offered to all county government employees as part of a generalized marketing technique and if the discounted item to be purchased requires the payment of legal and adequate consideration. A discount that does not meet these criteria is considered to be a gift, and is subject to the gift restrictions of 3-106(b).

Date: June 12, 2002

By: The Anne Arundel County Ethics Commission