

New York State Ethics Commission

Advisory Opinion No. 05-1: Conditions under which a State employee may accept a discount on goods or services.

INTRODUCTION

The following advisory opinion is issued in response to two separate questions regarding whether State officers and employees may accept broad-based commercial discounts from private companies. The first question is submitted by [] an attorney at the Office of Temporary and Disability Assistance (“OTDA”). She asks whether an OTDA employee may accept personal discounts of goods and services offered by a telecommunications company, Sprint PCS, that provides wireless telephone service to her agency. The second question is submitted by [] an employee of OTDA, who inquires whether he may obtain a hotel room for personal use at the government rate where the hotel management is aware that he is not traveling on government business. Because the discounts at issue are broadly available to all State employees and there is no indication that the companies involved intend to influence any employee in the performance of his or her public duties, the Commission concludes that the discounts may be accepted.

BACKGROUND

A. The Wireless Telephone Discount

Sprint PCS (“Sprint”) provides wireless telephone services for OTDA and other State agencies through a contract approved by the State Office of General Services. The contract was signed on June 1, 2004. In September 2004, Sprint introduced a national discount plan for all government employees. The plan gives a 15 percent discount on one’s personal Sprint bill to any federal, State or local government employee, nationwide, including any employee of a public school or public university.¹ Shortly thereafter, Sprint made a mass mailing to all New York State employees in which it announced (i) that it had been designated as an approved State contractor and (ii) that State employees could secure a 15 percent discount from their personal Sprint bill.² Employee interest prompted [the first State employee] to inquire whether OTDA employees could accept the 15 percent discount consistent with the Public Officers Law.

B. The Hotel Room Discount

According to [the second State employee], he is able to receive a room discount, worth as much as \$70 per day, by showing his State identification at the time of check in, even when he advises hotel management that he is not traveling on official State business. To confirm his observation, the Commission staff surveyed several major lodging chains as to their discount policies. Although policies vary widely, some hotels do, in fact, offer government employees discounts when they are traveling on personal business. The question then is whether a State employee may accept such a discount.

APPLICABLE STATUTES

Public Officers Law §73(5) provides:

No statewide elected official, state officer or employee, member of the legislature or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.

Portions of the State's Code of Ethics, contained in Public Officers Law §74, are applicable to gifts in certain circumstances. The provision that sets forth the rule with respect to conflicts of interest is found in subdivision (2), which reads as follows:

No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Public Officers Law §74(3) recites the standards applicable to conflicts of interest for State officers and employees. Relevant to this discussion are the following subsections:

3. Standards.

....

d. No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

....

f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

....

h. An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

DISCUSSION

The questions presented raise issues under §§73(5) and 74(3)(d)-(h) of the Public Officers Law. The former provision prohibits public employees from receiving “any gift having a value of seventy-five dollars or more under circumstances in which it could reasonably be inferred that the gift was intended to influence [the employee], or could reasonably be expected to influence him, in the performance of his official duties.” Under Advisory Opinion No. 94-16, the Commission has made clear that a “gift” includes anything of value given to a State officer or employee, including “a discount.” The Opinion also makes clear that as a general rule, a gift from a disqualified source -- one that “does business with, seeks to contract with or has contracts with a State agency with which the State officer or employee is employed or affiliated” -- of more than \$75 is per se impermissible. Finally, the Opinion emphasizes that “during any twelve-month period” gifts that “individually are worth less than \$75 but in the aggregate are equal to or exceed a value of \$75 meet[] the statutory threshold.”

Mechanical application of these principles to a discount plan such as that offered by Sprint might lead one to conclude that an OTDA employee who accepts the discount violates §73(5). A discount is a gift; Sprint is a prohibited source for OTDA, since it does business with the agency; and the discount is worth more than \$75 on an annual basis. For the Commission to follow a mechanical approach, however, would be mistaken. Where a discount is made available broadly to all State employees and the offeror’s purpose is merely to solicit a large group of potential customers, there is no realistic possibility that the offeror is seeking to influence any governmental decision or to reward any employee for any official action. Under such circumstances, it seems inconceivable that the Legislature intended for §73(5) to be read to prohibit an employee from accepting such a discount.

The same conclusion applies when such discounts are considered under §74(3), which prohibits an employee, inter alia, from securing “unwarranted privileges or exemptions for himself or others.” It is a common business practice for vendors to offer discounts to large groups to increase market share -- to gain more in volume than is lost in price. Lawyers who join bar associations, union employees, teachers, students, senior citizens, and the like are regularly solicited to switch brands to gain price discounts. No one would claim that a lawyer who availed herself of a discount on a rental car that was available to all members of a State Bar Association had gained an unwarranted privilege based on her status as a lawyer. Similarly, where a discount plan is broadly available to all government employees, no one could fairly conclude that the employee had improperly exploited his government position by accepting the discount or was engaged in conduct that could raise a suspicion that he was violating the public trust. The reality is that the employee is being offered the discount because he is a member of a large group and not because of the performance of his public duties.

Notably, other ethics agencies that have considered the issue have reached the same conclusion. The federal government, to which the Commission has frequently looked for guidance, specifically exempts from its definition of “gift” any “commercial discounts . . . available to the public or to a class consisting of all government employees.” 5 C.F.R. §2635.203(b)(4). Discussing this provision, the federal Office of Government Ethics (“OGE”) has noted that:

[U]nder this exclusion employees may accept discounts on automobile or hotel rates that are offered to all Government employees. In contrast, the exclusion does not cover discounts or benefits to subgroups of employees, such as free magazine subscriptions offered to all agency field inspectors . . . or discounts on automobiles if the offer is extended only to United States diplomats.

See, OGE Informal Opinion Letters 92x26 and 94x19. See also, 5 C.F.R. §2635.204(c) (prohibiting discounts that discriminate among government employees “on a basis that favors those of higher rank or pay”). The point here is obvious: although broad-based discounts do not create a risk that the offeror is seeking to influence government action or can be viewed as an unwarranted privilege, more narrowly tailored discounts may have that purpose and can create the impression that the offeror is hoping that favored employees will reciprocate in some way.³

The conclusion that broad-based commercial discounts to government employees do not raise ethical concerns also finds support in the decisions of the City of New York Conflicts of Interest Board and the Commonwealth of Massachusetts State Ethics Commission. The former has opined that because of its “generalized’ nature” no violation of the City’s ethics law would likely result “when a gift is extended to all City employees, for example, the annual offer during the holidays of a discounted ticket to Radio City Music Hall.” Advisory Opinion 2000-04, at n. 8. And the latter has concluded that the Massachusetts conflict-of-interest law allows government employees to accept a discounted “government rate” for personal cellular telephone service. CMSEC EC-COI-95-5. In so ruling, the Massachusetts Commission observed: “[a] broad-based and uniform employee discount precludes any appearance that particular employees have been so selected because they may be in a public position where they can benefit the giver.” Id.

Against this backdrop, the Commission has no difficulty in concluding that a State employee may participate in the Sprint national discount plan. That plan is sufficiently broad-based to allay concerns that the discount is offered to influence employees in the performance of their public duties. It is available not only to all state employees (which would be sufficient in itself) but to federal and city government employees as well. As such, it cannot be considered a prohibited gift (for employees whose agencies do business with Sprint) or an unwarranted privilege of government service.

The same holds true for a discount to government employees offered by hotels when an employee is on personal travel. The federal OGE has reached this very conclusion, reasoning that because “the discount is to a class as large and diverse as all Government employees, there is little likelihood that the [hotel] is seeking to gain influence or to supplement employees’ salaries.” OGE Memo 85 x 13. In approving the practice, the OGE, however, emphasized that “the employee may not misrepresent the purpose of the travel, i.e., say that he or she is on business, in order to get rates that are not available for personal travel.” Id. The Commission believes that New York employees should go one step further. In such situations, a State employee must affirmatively represent to hotel management that he or she is on personal business. Not to do so would create too high a risk that the employee has improperly gained a benefit to which he or she was not otherwise entitled. If, knowing that an employee is traveling

on personal business, a hotel chooses to extend a discount as part of its standard practice, the State's ethics law are not offended.

CONCLUSION

For these reasons, the Commission concludes that a State employee may accept a broad-based commercial discount that is not intended (or could not reasonably be perceived as being intended) to influence the employee in the performance of his or her public duties.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the persons who requested it and who acted in good faith, unless material facts were omitted or misstated by the persons in the request for opinion or related supporting documentation.

All Concur:

Paul Shechtman, Chair

Robert J. Giuffra, Jr.

Carl H. Loewenson, Jr.

Lynn Millane

Susan E. Shepard, Members

Dated: March 28, 2005

End notes

- 1 The discount could save employees anywhere from \$63 to \$207.00 annually depending on their service plan.
- 2 Although the mass mailing, unfortunately, linked Sprint's designation as an approved State contractor with its nationwide discount plan, the two are unrelated. The award of the state contract was not, to the Commission's knowledge, influenced in any way by the possibility of discounts to employees on their private bills.
- 3 OGE gives this example of a prohibited discount: For example, a manufacturer of air-conditioning equipment offers discounts to certain "key" employees of Government-owned utilities who might be asked by utility customers for recommendations on various types of air-conditioning equipment. Because the motivating factor behind the manufacturer's offer is to encourage the employee to look favorably on it and to promote its product among the customers, the Federal Government employee should not accept the discount.