

SUBJECT: PUBLIC OFFICIAL/EMPLOYEE WHO IS A MEMBER OF AN ORGANIZATION WHICH IS ALSO A LOBBYIST'S PRINCIPAL ACCEPTING "THINGS OF VALUE" FROM THE ORGANIZATION.

SUMMARY: A public official/employee who is a member of an association which is also a lobbyist's principal may not accept things of value from that association unless other members of that association are provided the same opportunity to benefit from the things of value offered or given to its members and relevant factors are assessed to conform with the purview of the Ethics Reform Act.

DISCUSSION:

This formal advisory opinion results from several inquiries concerning the receipt of "things of value" by public officials and employees, who are members of a professional organization which is also a registered lobbyist's principal.

At the crux of the determination is whether the monetary cap in Section 2-17-90(B) is an absolute bar to the acceptance by a defined public official or employee of reimbursed expenses or other things of value from a professional organization which is also a lobbyist's principal, though not a lobbyist.

The Commission's jurisdiction is limited to the applicability of the Ethics, Government Accountability, and Campaign Reform Act of 1991 (Act No. 248 of 1991; Section 2-17-5 et seq. and Section 8-13-100 et seq., as amended, 1976 Code of Laws). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation. Pursuant to Regulation 52-302(A): "When a person receives an informal advisory opinion and believes the facts or law are contrary to the informal opinion, a formal opinion may be requested by writing the Commission and providing additional information and citation to law the requestor believes controlling, if any."

The State Ethics Commission offers interpretations and advice based on prior opinions of the State Ethics Commission, as well as those of the House of Representatives Ethics Committee, Senate Ethics Committee, and Secretary of State. Section 8-13-320(o)(11) confers the duty and power on the State Ethics Commission to render advisory opinions, and pursuant to Section 8-13-320(o)(12), the State Ethics Commission's Regulations 52-302 & 52-303 set out the process for informal and formal opinions.

The Commission is not reluctant to emphasize that any violation as to past conduct cannot be managed through its formal opinions. If a violation has occurred, there is another process for accomplishing the aim of the statutes and regulations pertaining to official conduct. This opinion is offered for future guidance and, of course, cannot take the place of the clear statutory enunciations.

At the outset, the Commission notes that Section 2-17-80 pertains to lobbyists, whereas 2-17-90 pertains to lobbyist's principals. Section 2-17-10(13) defines a "Lobbyist," whereas the term "Lobbyist's principal" is defined in Section 2-17-10(14). The distinction is based on who is performing the lobbying and on whose behalf the lobbying is being performed.

QUESTIONS:

QUESTION 1: DOES SECTION 2-17-80(B) EXPRESSLY PROHIBIT A PUBLIC EMPLOYEE FROM ACCEPTING THINGS OF VALUE FROM A LOBBYIST'S PRINCIPAL? IF NOT, UNDER WHAT EXPRESS GRANT OF STATUTORY AUTHORITY MAY A PUBLIC EMPLOYEE ACCEPT TRIPS, MEALS, LODGING, AND, IN GENERAL, THINGS OF VALUE SINCE A STATUTORY PROHIBITION CANNOT BE IGNORED?

QUESTION 2: THE INFORMAL OPINION DATED APRIL 27 STATES THAT "[A]PPPLICABLE STATE ETHICS COMMISSION OPINIONS ARE BASED ON THE RATIONALE THAT NOT ALL MEMBERS HAVE TO BENEFIT EQUALLY, RATHER THAT ANY MEMBER BE ELIGIBLE TO ATTEND AS A REPRESENTATIVE OF THE ORGANIZATION AND ATTEND WITH EXPENSES BEING PAID WITHOUT VIOLATING SECTION 2-17-90." APPLYING THE RULES OF STATUTORY CONSTRUCTION FOR THE PURPOSE OF RESOLVING AMBIGUITIES, RATHER THAN CREATING THEM, HOW DO YOU RESOLVE THIS ISSUE WITHOUT RENDERING 2-17-80(B) TOTALLY MEANINGLESS?

QUESTION 3: WHAT IS THE STATUTORY AUTHORITY FOR THE RULE THAT NOT ALL MEMBERS HAVE TO BENEFIT EQUALLY, RATHER THAT ANY MEMBER BE ELIGIBLE TO ATTEND AS A REPRESENTATIVE OF THE ORGANIZATION AND ATTEND WITH EXPENSES BEING PAID?

QUESTION 4: WHEN WOULD SECTION 2-17-90(B) EVER APPLY TO MEMBERS OF AN ORGANIZATION ACCEPTING "THINGS OF VALUE"?

QUESTION 5: WOULD A PUBLIC EMPLOYEE VIOLATE SECTION 2-17-90 IF HE RECEIVED ANYTHING OF VALUE IN EXCESS OF \$25 A DAY OR \$200 IN A CALENDAR YEAR?

Section 2-17-80 strictly prohibits the offer of lodging, transportation, entertainment, and food, meals, beverages, money, or "any other thing of value," and contributions to any member of the General Assembly, the Governor, the Lieutenant Governor, any other statewide constitutional officer, and any public official of any state agency engaged in covered agency actions and their employees *by a lobbyist or a person acting on behalf of a lobbyist*. However, Section 2-17-80(B) does not apply when the "thing of value [which] also is furnished on the same terms or at the same expense to a member of the general public without regard to status as a public official or public employee." (*See*, Section 2-17-80(C)).].

Section 2-17-90 is aimed at the lobbyist's principal, who is prohibited from furnishing lodging, transportation, entertainment, food, meals, beverages, or an invitation to a function paid for by a lobbyist's principal, unless there is an exception. For example, a public official of a board or commission may accept lodging, transportation, entertainment, food, meals, beverages, or an invitation to a function paid for by a lobbyist's principal, if the member's entire board or

commission is invited, under an exception created in Section 2-17-90(A)(2). However, the lobbyist's principal offer is capped at \$25.00 per day and \$200.00 per calendar year per person. The recipient is capped at the same rate per lobbyist's principal.

Section 2-17-100 creates another statutory exception. It allows public officials and employees to be reimbursed for actual expenses incurred at a speaking engagement, provided the public official/ employee and the lobbyist's principal each disclose the reimbursements on their Statement of Economic Interests as required by Section 2-17-35(5). Of course, reimbursement for an out of state speaking engagement will require prior written approval. Also, Section 8-13-715 allows a public official, public member, or public employee when acting in his or her official capacity to accept a meal provided in conjunction with a speaking engagement, provided the meal is incidental to the speaking engagement and all participants are entitled to the same meal. "Notwithstanding the limitations of Section 2-17-90, a public official, public member, or public employee may receive payment or reimbursement for actual expenses incurred for a speaking engagement." [Section 8-13-715]. It is worthwhile to note that the statutory cap in Section 2-17-90 is expressly directed at the lobbyist's principal.

Senate Ethics Committee Advisory Opinion 92-13 addressed the quandary of a Senator who also served as an officer of a professional organization which was a registered lobbyist's principal. The Senate member, who was also the president of a professional organization, a lobbyist's principal, was advised that s/he could accept reimbursement for expenses incurred while performing professional officer duties. The opinion reasoned that "members should not be discouraged from being active in associations which further and enhance their professional development." (SENATE ETHICS COMM. Adv. Op. 92-13, at p. 34). Of equal concern to the Committee was the separation of the professional membership from the Senate service, that is, that the things of value were being "furnished on the same terms' to any member of the public occupying an office within the association." (*Id.* at 33). *See 2-17-80(C)*. The Senate Ethics Committee recognized that service in a professional organization which is also a registered lobbyist's principal and the reimbursement of expenses for such service must in no way influence or be used to compromise official conduct. "Therefore, the Committee concludes that a bona fide professional association which is a lobbyist's principal may reimburse an officer of the association for the expenses related to his service in the same manner, and within the same limits, as have been traditionally provided, irrespective of whether the officer concurrently serves in the South Carolina Senate." (*Id.* at pp. 34-35).

While the Senate Ethics Committee opinion was issued in December of 1992, it is relevant for guidance as to the aim of Section 2-17-90 and other ethics rules pertaining to accepting things of value from a lobbyist's principal while acting in one's non-public official capacity. Likewise, it is helpful to examine the capacity of the lobbyist's principal, as in this case, when acting in its capacity as a professional membership organization. In State Ethics Commission Advisory Opinion SEC AO92-025, an opinion issued in February of 1992, a State Ethics Commission member inquired as to whether he could accept meals and other materials from the South Carolina Association of Realtors and the National Association of Realtors in which he paid dues and served as an official. When the

Advisory Opinion was issued, the State Ethics Commission recognized that public employees are often members of professional organizations, some of which are also lobbyist's principals. Also, a number of state agencies register as lobbyist's principals. *See, Section 2-17-40.* While a strict interpretation of Section 2-17-90 would have prohibited any thing of value being given to a state employee and even their employing agency, the State Ethics Commission considered both the involvement of state office holders as members in various professional associations, as well as the intent of this legislation, i.e., to prohibit undue influence on state employees. The Commission stated that any thing of value received from a lobbyist's principal must be disclosed on the Statement of Economic Interests and further said that it "would see no prohibition against a member of a professional organization receiving those benefits which accrue to all members of that organization."

To be balanced against those statutes allowing receipt of things of value is Section 8-13-705, which felonizes the improper use of one's public position. Section 8-13-705 prohibits something being given or solicited with the intent to influence a public member, public official, or public employee in the conduct of his/her official responsibilities. Both the offeror and the offeree are subject to the Ethics Reform Act.

While there is no specific statutory authority for a rule that not all members have to benefit equally, the Commission finds the prior opinions to be persuasive. Although not binding as precedence, previous opinions have expressly interpreted Section 2-17-90 as not being applicable to public officials/employees who also hold professional membership in an organization which is a lobbyist's principal. The State Ethics Commission recognizes the limited application of its interpretative guidelines and the statutory duty assigned to it to publish advisory opinions. Additional legislative action may prove useful for those public employees, public officials, and members who are members of and serve organizations which are registered lobbyist's principals.

Within a narrow exception, the public employee/official would be prudent to consider a variety of factors before accepting fringe benefits or perks of membership. In the absence of a Section 8-13-705 violation, the Commission advises that a public official/employee would be served by careful assessment of whether to accept reimbursement of actual and reasonable expenses incurred to attend a non-speaking function paid for from his/her membership benefits in a professional organization which is also a registered lobbyist's principal. As were the facts in the Senate Ethics Committee Opinion the organization's levels of membership or officer status, internal by-laws, or other operating guidelines are relevant indicators of the offeror's and offeree's intent. Whether all members of the professional organization may or must benefit equally is a relevant factor in determining the application of this opinion. Not only the status of the public employee's membership as an officer or committee chair, but also the prior approval of the employee's supervisor would be determinants of the appropriateness of the public official's/employee's acceptance of the reimbursed expenses to attend a non-speaking function.

It may be that those associations which are also lobbyist's principals have developed selection guidelines and justifiable criteria for those members, officers, or otherwise, who are chosen

to receive conference registration and/or travel reimbursement. Likewise, the stated membership benefits and the dues used to pay for expenses are relevant to the offeror's and the offeree's accountability. Just as the employee must examine his/her intent, so must the lobbyist's principal and those acting on its behalf.

Other factors must necessarily include:

- (1) Whether the organization has a legitimate professional existence apart from its lobbyist functions;
- (2) Whether the public official/ employee is active in the organization;
- (3) Whether the public official/employee is an officer, section chair, board member or immediate past holder of these positions;
- (4) Whether the public official's/employee's status is relevant to the function and mission of the activities of the organization;
- (5) Whether the public official's/employee's status is relevant to the activity for which the organization/lobbyist's principal offers reimbursement; and
- (6) Whether the acceptance of the benefit avoids the appearance of impropriety;

To be balanced in the assessment of the above factors are the import of Sections 2-17-90 and 8-13-705, which seek to balance the legitimacy of membership in an organization or professional association with the wrongful influence of a public employee/official. The public employee/official and the lobbyist's principal are equally responsible. The disclosure requirements apply, of course, to public employees, officials, and members, as well as to the lobbyist's principals.

Thus, the Commission is not prepared to offer blanket safe harbors without recognition that the application of the Ethics Reform Act to specific facts will clearly extend the Ethics Reform Act into the realm of regulating legitimate professional organizations and their members, and are especially affected by public perception.

QUESTION 6: MUST A PUBLIC EMPLOYEE WHO IS REQUIRED TO FILE AN ECONOMIC INTERESTS STATEMENT UNDER SECTION 8-13-1110 REPORT ALL THINGS OF VALUE RECEIVED FROM A LOBBYIST'S PRINCIPAL ON HIS STATEMENT OF ECONOMIC INTERESTS?

According to Sections 2-17-90(C), 8-13-710(A), & 8-13-1120(A)(4) & (9), the public employee must report anything of value, reimbursed actual expenses for speaking, and any gifts, including transportation, lodging, food, entertainment.

QUESTION 7: IS IT A VIOLATION OF THE ETHICS ACT FOR A PUBLIC EMPLOYEE WHO IS A MEMBER OF AN ORGANIZATION THAT IS A LOBBYIST'S PRINCIPAL TO FAIL TO REPORT "THINGS OF VALUE" GIVEN BY A LOBBYIST'S PRINCIPAL?

Section 8-13-710(A) specifically provides that those who are required to file the Statement of Economic Interests must report anything of value received from a lobbyist's principal.

QUESTION 8: IS IT A VIOLATION OF THE ETHICS ACT FOR A SPOUSE OF A PUBLIC EMPLOYEE TO ACCEPT THINGS OF VALUE FROM A LOBBYIST'S PRINCIPAL? IS IT LAWFUL FOR A LOBBYIST'S PRINCIPAL TO PAY FOR AN AIRLINE TICKET FOR THE SPOUSE IN ADDITION TO OTHER ASSOCIATED COSTS?

Without addressing the status of the spouse himself/herself and what the "other associated costs" are, the response to Question 8 is that there is no such prohibition. Section 2-17-90 does not prohibit the gift in and of itself; however, the gratuity is still subject to the scrutiny of Section 8-13-705.¹ The statute makes it a felony for a public employee, official, or member to directly or indirectly solicit or accept anything of value to influence actions.

KEY WORDS:	REIMBURSEMENT PROFESSIONAL ORGANIZATION LOBBYIST'S PRINCIPAL THINGS OF VALUE
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ANNOTATIONS:	SEC AO92-025 SEC AO92-061 SEC AO92-067 Senate Ethics Committee Advisory Opinion 92-13 House Ethics Committee Advisory Opinion 96-3
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¹ House Ethics Committee Advisory Opinion 96-3 specifically addressed Section 2-17-90(B) and stated that a lobbyist's principal is not prohibited from providing lodging, transportation, entertainment, food, meals, or beverages to the spouse of an affected member. The interpretation extends to public employees and public officials.