



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 95

December 10, 1992

Whether state employees may use state credit cards for personal expenditures. (AOR-73A)

A state agency has asked the Texas Ethics Commission if a state employee may use a "state" credit card issued to that employee for a personal expenditure. Some background information will be helpful in discussing the issues raised by this question.

Under an existing contract (the "Agreement") between the State of Texas ("State") and a company that issues charge or credit cards¹ ("Card Company"), the Card Company agrees to issue a card to state employees² designated by the State "who routinely incur expenses on behalf of the state." Agreement, art. III at 1. The Card Company reserves the right to determine the creditworthiness of each such employee, and may in its sole discretion decline to issue a card to any person. The State may require cancellation by the Card Company of a card at any time, with or without cause and without prior notice. For cause, the Card Company may suspend or cancel an issued card at any time.

The Card Company sends monthly statements to each employee issued a card. That employee is solely and exclusively responsible for paying all charges incurred by use of the card. By explicit provision of the Agreement, the State has and assumes no liability for any of those charges. The employee, in turn, is reimbursed by the State for all authorized business charges, as determined by the State. Under another provision of the Agreement, the State agrees to instruct each employee who receives a card that the card is to be used for "official State business expenses that are reimbursable in accordance with applicable State law." Agreement, art. VII at 3.

The requestor suggests that some state employees who receive a card under this program use that card for personal expenses.³ Separate and apart from any issues relating to contract administration, the requestor asks whether this use of the card raises any issues under laws subject to our jurisdiction to issue advisory opinions under section 1.29 of article 6252-9d.1, V.T.C.S.⁴ We believe the question presented raises issues under chapter 39 of the Penal Code.

The card furnished to a state employee under the Agreement--and the privilege and benefit of its use--belongs to the State. Only an employee designated by the State may receive one of these cards, and the employee comes into possession and gains the right to use the card only by virtue of state office or employment. The State, through the Card Company, may cancel the card "at any time with or without cause and without prior notice." Agreement, art. V at 3. Even though the employee is entrusted with possession of the card and with the additional responsibility of receiving and paying all charges incurred on that card, the powers retained by the State under the Agreement to control and cancel the card establish the card's character as property of the State.

Section 39.01 of the Penal Code (Official Misconduct) provides in material part as follows:

- (a) A public servant⁵ commits an offense if, with intent to obtain a benefit or with intent to harm another, he intentionally or knowingly:

- (1) violates a law relating to his office or employment; or
- (2) misapplies any thing of value belonging to the government that has come into his custody or possession by virtue of his office or employment.

Intentional or knowing use by a state employee of a state-issued card for other than state purposes violates both subsections (a)(1) and (a)(2) of Penal Code section 39.01. The use of state property for other than state uses is prohibited by law.⁶ A knowing or intentional violation of this law by a state employee constitutes a violation of Penal Code section 39.01(a)(1).⁷

Neither may a state employee, with the intent to obtain a benefit, intentionally or knowingly misapply "any thing of value belonging to the government that has come into his custody or possession by virtue of his office or employment." *Id.* § 39.01(a)(2). A state employee benefits simply from the *use* of a state-issued card to charge goods or services, because the card substitutes for cash or other payment otherwise required from the cardholder. The use is therefore a benefit for purposes of section 39.01; certainly any goods or services obtained by the state employee with the card are even more tangible benefits.⁸ Use of the card for anything other than a state-reimbursable business expense is a misapplication of the state-owned card.⁹ A state employee violates section 39.01(a)(2) whenever the employee knowingly or intentionally uses the card to acquire goods or services that are not official state business expenses reimbursable in accordance with applicable state law. Punishment for an offense under section 39.01(a)(2) depends on the value of the use of the thing misapplied, ranging from a Class C misdemeanor to a felony of the second degree. *Id.* § 39.01(c).

SUMMARY

A credit card issued to a public servant under a program where the card is issued at the direction and under the control of the State of Texas for state purposes may not be used for personal expenditures or any other type of expenditure not reimbursable as a state business expense under state law.

¹ Any distinction between a "credit" or a "charge" card is not material for purposes of this opinion, since the use of that card to acquire particular goods or services is at issue, not the extension of credit.

² Although the Agreement uses the term "employee," the issues and laws discussed in this opinion apply equally to any state official who receives a credit card under the Agreement.

³ Although the requestor questions use of the card for "personal" expenditures, our response addresses any use of the card for other than a reimbursable state business expense, whether the expenditure is characterized as "personal" or otherwise.

⁴ The Ethics Commission has authority to interpret six statutory schemes:

- (1) chapter 305 of the Government Code (lobby);
- (2) chapter 302 of the Government Code (speaker's race);
- (3) title 15 of the Election Code (campaign finance);
- (4) article 6252-9b, V.T.C.S. (financial disclosure and standards of conduct);
- (5) chapter 36 of the Penal Code (bribery); and
- (6) chapter 39 of the Penal Code (abuse of office).

⁵ A state employee is a public servant. Penal Code § 1.07(a)(30).

⁶ "STATE PROPERTY USE FOR STATE PURPOSES REQUIRED. No person shall entrust state property to any state official or employee or to anyone else to be used for other than state purposes." General Appropriations Act, Acts 1991, 72d Leg., 1st C.S., ch. 19, art. V, § 83, at 1037.

⁷ Proof that an act is intentional or knowing is necessary to impose criminal sanctions under section 39.01(a). A bona fide mistake by the employee should not result in criminal sanctions. We assume appropriate management and supervision will minimize instances of unintentional or negligent misuse of state credit cards.

⁸ A "benefit" means "anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested. Penal Code § 1.07(a)(6); *see also id.* § 36.01(5); [Ethics Advisory Opinions Nos. 75, 69, 66, 64, 62, 61, 60, 36, 29, 12](#) (1992) (defining benefit for purposes of chapter 36 of the Penal Code).

⁹ "Misapplication" means an improper, illegal, wrongful, or corrupt use or application of funds, property, etc. *Ferguson v. State*, 189 S.W. 271 (Tex. Crim. App. 1916).