



TEXAS ETHICS COMMISSION



****Overruled, Modified, Clarified, or Superseded****

ETHICS ADVISORY OPINION NO. 293

December 15, 1995

Questions about section 36.10(a)(3) of the Penal Code. (AOR-328)

The Texas Ethics Commission has been asked to consider several questions about section 36.10(a)(3) of the Penal Code. Section 36.08 of the Penal Code prohibits public servants from accepting "benefits" under various circumstances. Section 36.10 contains exceptions to those prohibitions. One of those exceptions, section 36.10(a)(3), provides that the prohibitions do not apply to:

a benefit to a public servant required to file a statement under Chapter 572, Government Code, or a report under Title 15, Election Code, that is derived from a function in honor or appreciation of the recipient if:

- (A) the benefit and the source of any benefit in excess of \$50 is reported in the statement; and
- (B) the benefit is used solely to defray the expenses that accrue in the performance of duties or activities in connection with the office which are nonreimbursable by the state or political subdivision.

In summary, that provision excepts from the benefits prohibitions a benefit received at a function in honor or appreciation of the recipient as long as the benefit is properly reported and as long as the benefit is used to defray expenses in connection with the recipient's office that are not reimbursable with public funds.

In regard to section 36.10(a)(3), the request letter first asks:

By agency name, which state agency heads are considered to be "state officers" required to file a financial statement under Chapter 572 of the Government Code?

All "state officers" must file personal financial statements in accordance with section 572.021 of the Government Code. The term "state officer" includes "the executive head of a state agency." Gov't Code § 572.002(12). "Executive head of a state agency" means:

the director, executive director, commissioner, administrator, chief clerk, or other individual who is appointed by the governing body or highest officer of the state agency to act as the chief executive or administrative officer of the agency and who is not an appointed officer. The term includes the chancellor or highest executive officer of a university system and the president of a public senior college or university as defined by Section 61.003, Education Code.

Id. § 572.002(5). Because there are approximately 200 state agencies whose executive heads are required to file personal financial statements under chapter 572, it is impractical to list all of those agencies in an advisory opinion. The Ethics Commission will, of course, issue advisory opinions in response to questions about whether an individual in a specific position is required to file a personal financial statement.

The next question raised is about the purposes for which an agency head may use a benefit accepted in accordance with section 36.10(a)(3). The request letter asks whether Ethics Commission determinations about permissible "officeholder use" of political contributions accepted under title 15 of the Election Code apply to questions about an agency head's use of benefits accepted under section 36.10(a)(3) of the Penal Code.

Title 15 of the Election Code regulates contributions and expenditures made in connection with campaigns as well as contributions and expenditures made to defray expenses incurred by an officeholder "in performing a duty or engaging in an activity in connection with the office." *See* Elec. Code § 251.001(4), (9). Under title 15, candidates and officeholder are prohibited from converting contributions to "personal use." *Id.* § 253.035. The term "personal use" does not include "payments made to defray ordinary and necessary expenses incurred in connection with activities as a candidate or in connection with the performance of duties or activities as a public officeholder." *Id.* § 253.035(d). The language describing permissible "officeholder" use of contributions under title 15 is similar to the language identifying permissible use of a benefit accepted under section 36.10(a)(3).¹ Consequently, in many cases a permissible "officeholder" use of contributions accepted under title 15 will also be a permissible use of a benefit accepted under section 36.10(a)(3). We cannot, however, state as a general principle that all determinations about permissible officeholder use under title 15 will necessarily apply to questions about permissible use of a benefit under section 36.10(a)(3).² The nature and duties of a particular office will always be relevant to questions about what type of expenditures may be made in connection with that office.

The request letter specifically asks whether the holding of [Ethics Advisory Opinion No. 133](#) (1993) in regard to moving expenses would apply to a question about permissible use of a benefit accepted under section 36.10(a)(3) of the Penal Code. That opinion concluded that an appellate judge could use contributions accepted under title 15 to pay the expenses of moving from his home city to the city where the court sits. That holding, in our opinion, extends to an agency head using funds accepted in accordance with section 36.10(a)(3). In other words, an agency head may use funds accepted in accordance with section 36.10(a)(3) to pay the expenses of moving from one city to the city in which he or she has headquarters.

The next question is whether section 36.10(a)(3) permits an agency head to accept a benefit from a corporation. Section 36.10(a)(3) does not place any limitations on the source of the benefits that may be accepted by an agency head under that section.

The request letter also asks about the application of the standards of conduct set out in section 572.051 of the Government Code. One of those standards of conduct states that a state officer should not:

accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct.

Gov't Code § 572.051(1). Another one of the standards of conduct provides that a state officer should not:

intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.

Id. § 572.051(5). A state officer must determine for himself or herself whether acceptance of a particular gift or benefit would be in violation of those standards of conduct. *See* [Ethics Advisory Opinion No. 156](#) (1993) (Compliance with standards of conduct set out in section 572.051 is a matter of personal ethics.)

SUMMARY

An agency head may use funds accepted in accordance with section 36.10(a)(3) of the Penal Code to pay the expenses of moving from one city to the city in which he or she has headquarters as an agency head.

Section 36.10(a)(3) of the Penal Code does not place any limitations on the source of the benefits that may be accepted by an agency head under that section.

¹ We note, though, that a permissible expenditure under section 36.10(a)(3) is one that is not reimbursable by the state or political subdivision. The language in title 15 that describes permissible "officeholder" use does not contain that restriction. Elec. Code § 253.035(d). For reporting purposes, the term "officeholder expenditure" in title 15 is limited to an expenditure to defray expenses that "are not reimbursable with public money." Id. § 251.001(9). Personal use of a payment received as reimbursement for an expenditure made from political contributions would, of course, be impermissible.

² Indeed, a specific determination under title 15 about what is a permissible "officeholder" use for one officeholder may not apply to other officeholders. For example, there are surely activities in connection with the office of General Land Commissioner that would not be connected to the office of State Treasurer, and vice versa.