



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 427

March 10, 2000

*Whether the gift restrictions in the Penal Code or the expenditure restrictions in the lobby law prohibit a person from making a gift to charity in the name of a legislator or other public servant.
(AOR-470)*

The Texas Ethics Commission has been asked whether the gift restrictions in the Penal Code or the expenditure restrictions in the lobby law prohibit a person from making a gift to charity in the name of a legislator or other public servant.

Although we have not considered the issue raised here in the context of either the Penal Code gift restrictions or the lobby law, we have considered the issue in the context of the honorarium law.

The honorarium law prohibits a public servant from accepting an honorarium in consideration for services that the public servant would not have been requested to provide but for the public servant's official position or duties. Penal Code § 36.07(a). In a 1993 opinion, we considered whether an organization could make a donation to a charity in honor of a state senator who had been invited to give an address on issues of concern to the organization. In our opinion, we stated:

Because of [the honorarium] prohibition, a state legislator may not request that a payment be made to a third party in consideration for a speech by the legislator. [Ethics Advisory Opinion No. 19](#) (1992). Nor may a state legislator agree that a payment will be made to a third party in consideration for a speech by the legislator. *Id.* In other words, a state legislator may not exercise control over such a payment. A third party, however, is free to make a charitable donation in a state legislator's name, as long as the payment is not the result of an express or implied agreement with the legislator.

[Ethics Advisory Opinion No. 150](#) (1993). Our analysis in that opinion is also applicable in the context of the lobby law and the Penal Code.

Penal Code Gift Restrictions

The Penal Code contains a number of restrictions on gifts to public servants. A legislator is prohibited from accepting a "benefit" from any source unless there is an exception that permits acceptance of the benefit. Penal Code § 36.08(f); *see also id.* § 36.10 (exceptions to gift prohibitions). This rule also applies to the governor and the lieutenant governor as well as to a person employed by a member of the legislature, the governor, the lieutenant governor, or an agency of the legislature. *Id.* § 36.08(f). Subject to various exceptions, other public servants are prohibited from accepting "benefits" from various categories of donors. *Id.* § 36.08; *see also id.* § 36.10 (exceptions to gift prohibitions). A "benefit" is "anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest." *Id.* § 36.01(3). The issue raised in this request is whether a person who makes a donation to a charity in the name of a legislator or other public servant is providing a "benefit" to the legislator or public servant.

If a public servant is allowed to name or approve the recipient of a charitable contribution, the public servant has received the equivalent of a gift certificate, something the public servant can dispense according to his or her own interests. In contrast, if a public servant exercises no control in regard to a charitable contribution but is simply named as an honoree in connection with the charitable contribution, the public servant may feel honored or flattered, but the public servant receives nothing of pecuniary value to dispense or use. Therefore, in keeping with our conclusion in the context of the honorarium law, we conclude that a public servant would be receiving a “benefit,” for purposes of Penal Code chapter 36, if the public servant accepted a grant of the right to determine the beneficiary of a charitable contribution. As a practical matter, however, the Penal Code permits a public servant to make use of that right.

Penal Code section 36.08(i) provides as follows:

A public servant who receives an unsolicited benefit that the public servant is prohibited from accepting under this section may donate the benefit to a governmental entity that has the authority to accept the gift or may donate the benefit to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

That provision would permit a public servant to donate the right to choose the beneficiary of a contribution to a charitable organization, as long as the public servant had not solicited the right to choose the beneficiary.¹ The organization that received this right could then select itself as the recipient of the contribution.

Lobby Law Restrictions

In the context of the lobby law, Government Code chapter 305, we again rely on our analysis in the context of the honorarium law. The lobby law places restrictions on the expenditures a lobby registrant may “confer to” an officer or employee of the legislative or executive branch of state government.² Gov’t Code § 305.024; *see also id.* § 305.002(4) (defining “member of the executive branch”), (7) (defining “member of the legislative branch”). In our view, a lobby registrant would not be “conferring an expenditure” to a state officer or employee if the registrant made a charitable contribution in honor of the state officer or employee, as long as the state officer or employee did not have the opportunity to exercise discretion in regard to the decision to make the contribution to a particular organization. If the lobby registrant did provide the state officer or employee with the opportunity to exercise such discretion, however, the lobby registrant would be “conferring an expenditure” by making a gift to the state officer or employee. *See generally Ethics Advisory Opinion No. 259* (1995), n.1 (regarding expenditure categories and reporting “gifts”). A lobby registrant may not confer to an officer or employee in the legislative or executive branch of state government “an expenditure or series of expenditures for gifts that in the aggregate exceed \$500 in a calendar year.” Gov’t Code § 305.024(a)(5). Lobby registrants must report lobby expenditures in the form of gifts on a Lobby Activities Report. *Id.* §§ 305.006(b)(4), 305.0061(c).

SUMMARY

A charitable contribution made in honor of a public servant is not a “benefit” to the public servant if the public servant does not exercise discretion over the decision to make the contribution to a particular organization.

¹ A public servant is free to encourage or solicit others to make contributions directly to a charitable organization. What a public servant may not solicit under Penal Code section 36.08 is the right to exercise control over the ultimate recipient of someone else’s money.

² Both the lobby law restrictions and the Penal Code restrictions apply to gifts to officers and employees of the legislative and executive branches of state government. A gift to an officer or employee of the legislative or executive branch of state government from a lobby registrant that is both permissible and reportable under the lobby law is permissible under the Penal Code because there is an exception to the Penal Code prohibitions for “a gift, award, or memento to [an officer or employee] of the legislative or executive branch that is required to be reported under [the lobby law].” Penal Code § 36.10(a)(5); *see also* Gov’t Code § 305.002(4) (defining “member of the executive branch”); (7) (defining “member of the legislative branch”).