

STATE ETHICS ADVISORY COMMISSION

ADVISORY OPINION 1984-6

Re: If a public servant's travel on official business, paid for by the public entity, results in a special discount or bonus travel, is the public servant entitled to use it for his own private purposes or to pay for the travel of a spouse or companion to accompany him on an official trip?

This opinion responds to a request (AOR 1984-2) from the Public Servant Standards of Conduct Advisory Committee for a State Ethics Advisory Commission opinion. The request was received by the Commission at its meeting on January 13, 1984, and relates to the following issue:

If a public servant's travel on official business, paid for by the public entity, results in a special discount or bonus travel, is the public servant entitled to use it for private purposes: (1) for the public servant's own travel? or (2) to pay for the travel of a spouse or companion to accompany the public servant who is on official business?

Use of a discount for the public servant's own travel and use for a spouse or companion to accompany the public servant on official business is included in the larger problem of whether any kind of personal use of a discount may be considered legal under the laws listed in Tex. Rev. Civ. Stat. Ann. art. 62529d, § 9(a)2 (Vernon Supp. 1983-1984).

Tex. Penal Code Ann. § 39.01(a) (Vernon Supp. 1983-1984) states that:

(a) A public servant 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.

"Benefit" is defined in Tex. Penal Code Ann. § 1.07(a)(6) as follows:

'Benefit' means anything reasonably regarded as economic gain or economic advantage, including benefit to any other person in whose welfare the beneficiary is interested.

The personal use of a travel discount constitutes a benefit to the public servant since the discount could reasonably be considered to be an economic gain or advantage.

A violation of § 39.01(a) requires the knowing or intentional (1) violation of a law relating to the public servant's office or employment, or (2) misapplication of a thing of value belonging to the government that has come into his custody or possession by virtue of his office or employment.

The only laws that relate to a public servant's office or employment and involved with the question are contained in the travel regulations of the general appropriations act. S.B. 179, 68th Leg. Reg. Sess. (1983) Art. V., sec. 13. If a public servant conformed to these regulations, his use of a travel discount would not violate § 39.01(a)(1). However, a violation of one of these regulations with the intent to derive a travel discount for personal use would constitute a violation of § 39.01(a)(1).

A special discount or travel bonus that has resulted from a public servant's travel on official business, paid for by the public entity and used for his private purposes or to pay for the travel of a spouse or companion to accompany him on an official trip would be a violation of § 39.01 (a)(2) if it were:

a. a thing of value,

- b. belonging to the government,
- c. in his possession by virtue of his office or employment, and
- d. misapplied.

Tankersley v. State, 105 Tex. Crim. 220, 288 S.W. 221 (1926) requires that something be of sufficient value in cases of theft for it to be considered a "thing of value". The discount is of sufficient value in cases of theft and therefore is a "thing of value" under § 39.01(a).

The discount is a benefit that has been derived from government funds and not through investment of the public servant's money or labor. This gives the state a greater right than the public servant to possession of the property; therefore, the discount does "belong" to the government. See Ex. parse Davis, 542 S.W. 2d 192 (Text Crim. App. 1976).

The public servant implicitly comes into possession of the discount by virtue of his employment, through his authority to receive compensation for state travel. See Appropriations-General Act, S.B. 179, 68th Leg. Reg. Sess. (1983), Art. V., §§ 12, 13.

A misapplication of a thing of value occurs when the manner in which a thing is applied prevents a more appropriate and correct application of that thing. Therefore, the personal use of a discount would be a misapplication if it could be used for official state business. However, private use of the discount would not be a misapplication of a thing of value belonging to the government if there is not a public use to which the discount could be put. The intent of § 39.01 is to prevent the improper use of state funds and property. In a case where a travel discount may only be used for personal use or not be used at all, the state has no interest in prohibiting this personal use. Therefore, if the use of that discount was limited in such a way that it could not be used for public business, it could be used for personal purposes. The determination as to whether or not the discount could be used for public business must be made by the financial management division of the public entity.

SUMMARY

If the financial management division of a public entity determines that a travel discount or bonus could not be used for the business of the public entity, the discount or bonus may be used for personal purposes.

W. Page Keeton, Chairman
State Ethics Advisory Commission
Adopted this 13th day of April, 1984.

FORMAL DISSENT FILED BY REPRESENTATIVE STEVE WOLENS.