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February 24, 2003

Informal Opinion 2003-INF-0224-1

Kenneth B. Marshall, Chief Inspector
Ohio Department of Job and Family Services



Dear Mr. Marshall:

In a letter that the Ethics Commission received on November 13, 2002, you ask whether the Ohio Ethics Law and related statutes prohibit an Ohio Department of Job and Family Services (ODJFS) official or employee who receives reimbursement from ODJFS after charging state business travel expenses on a personal credit card from accepting the benefits of a reward program provided by the credit card issuer.

Brief Answer

As explained below, an ODJFS official or employee is not generally prohibited from receiving the benefit of a reward program provided by a credit card issuer, in connection with business travel expenses charged on a personal credit card, with two exceptions. The two exceptions are: (1) where an ODJFS official or employee chooses to use a specific credit card to obtain the benefit of the reward program and the use of the card results a higher cost for ODJFS; and (2) where an ODJFS official or employee seeks reimbursement from ODJFS for any amount that is greater than the debt actually owed to the credit card issuer. In these two situations, the ODJFS official or employee must either waive the benefit or seek reimbursement for the amount actually owed to the credit card issuer.

Facts

You state that when ODJFS is unable to cover the travel expenses of its officials and employees, the officials and employees will pay for these expenses using their personal credit cards and seek reimbursement from ODJFS at a later date. Credit card issuers routinely offer reward program incentives uniformly to their cardholders with the motive of encouraging the use of their credit card rather than a card issued by a competitor. These incentives take the form of pecuniary benefits such as cash rebates, free merchandise, frequent flyer miles, discounts on future purchases, and other things of value provided directly by the card issuer to the individual cardholder. The amount of the pecuniary benefits that the cardholder receives increases with the amount of goods and services charged with the card.

Therefore, an ODJFS official or employee who charges state business expenses on a personal credit card that offers a reward program incentive will receive a definite and direct personal pecuniary benefit as a result of having using his card to charge reimbursable expenses incurred with conducting ODJFS business.

Expenses and Reimbursement

At the outset, the Commission recognizes three basic concepts that underlie its consideration of the question you have presented. First, it is sometimes necessary for public officials and employees to use personal credit cards to charge travel expenses when engaged in travel related to their public service. Further, a public agency should fully and efficiently reimburse its officials and employees for any necessary travel expenses they incur in the course of travel related to their public service. Finally, the primary concern of all public officials and employees when making decisions regarding the use of personal credit cards and all other travel matters should be obtaining goods and services at the lowest available cost, rather than securing any personal benefit

R.C. 102.03(D) and (E)—Securing or Accepting Improper Things of Value

Your question implicates the conflict of interest provisions of the Ethics Law set forth in R.C. 102.03(D) and (E):

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is appointed or employed by a state department. R.C. 102.01(B) and (C).

The Ethics Commission has held that R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his position to secure anything of value from a party that is regulated by, interested in matters before, or doing or seeking to do business with, the agency he serves, or where the receipt of such a thing of value could impair his objectivity and independence of judgment with regard to his official decisions and responsibilities. Ohio Ethics Commission Advisory Opinions No. 86-011, 89-006, and 90-001.

The term "anything of value" is defined, for purposes of R.C. 102.03, to include money, goods and chattels, and every other thing of value. R.C. 1.03; 102.01(G). Cash rebates, free merchandise, frequent flyer miles, discounts on future purchases, and other things of value offered by a credit card issuer to cardholders as reward program incentives fall within the definition of "anything of value" for purposes of R.C. 102.03. See Adv. Ops. 86-003 (gifts); 91-010 (frequent flyer miles); and 92-015 (discounts).

The Ethics Commission has held that a party that is interested in matters before, regulated by, or doing or seeking to do business with, a public agency is an improper source to provide things of value to officials and employees of that public agency. Adv. Op. No. 89-014. In Advisory Opinion No. 84-010, the Ethics Commission explained the inherent conflict confronting a public official or employee who is in a position to receive a thing of value from an improper source. In that opinion, the Commission held:

The receipt of something of value from a party that is interested in matters before, regulated by, or doing or seeking to do business with the agency with which the public official or employee serves is of such [a] character as to manifest a substantial or improper influence upon the public official or employee with respect to his official duties, because it could impair his independence of judgment in the performance of his duties and affect subsequent decisions in matters involving the donor of the thing of value.

The issue becomes whether the personal pecuniary benefit that an ODJFS official or employee receives directly from a credit card issuer through its reward program incentive on charges made for state business travel could manifest a substantial and improper influence upon the ODJFS official or employee with respect to his official duties and impair his independence of judgment in matters involving the donor of the thing of value.

Precedent

In Advisory Opinion No. 91-001, the Ethics Commission explained that R.C. 102.03(D) and (E) prohibit a public official or employee from accepting, soliciting, or using the authority or influence of his public position to secure "frequent flyer" benefits from a commercial airline that

were accrued while traveling on public business. The Commission explained that the airline is a vendor because a public agency purchases the tickets to enable its officials and employees to travel to conduct public business and that R.C. 102.03(D) and (E) prohibit public officials and employees from receiving substantial things of value from a vendor to their public agency. In the same opinion, the Commission explained that a public agency's purchase of airline tickets for its officials and employees is the expenditure of public funds for a public purpose and that the public agency is entitled to the benefits that arise from its business transactions.

The Commission stated, in Advisory Opinion No. 91-010:

[A] public official or employee who is permitted to utilize "frequent flyer" benefits obtained [from a vendor] during the course of state travel for her own personal travel could be swayed to reserve official flights with a specific airline in order to accrue "frequent flyer" miles, rather than to reserve flights with the most economically priced carrier. The offer of "frequent flyer" miles [from a vendor] could result in an improper influence upon a public official or employee if she were permitted to use such "frequent flyer" miles for her own personal travel.

While the employees in Advisory Opinion No. 90-010, like the employees in your question, were traveling on public business, and their expenses were reimbursable, the instant situation differs considerably in other respects from the facts and circumstances addressed in Advisory Opinion No. 90-010.

Credit Card Transactions

The difference between frequent flyer miles and the benefits received through a reward program incentive provided by a credit card issuer can be readily distinguished by examining the fundamentals of the financial transaction services that a credit card issuer provides to its cardholders. Attorney General Advisory Opinion No. 93-024, succinctly explains a credit card transaction, stating:

A credit card . . . "signifies that the legal owner thereof is a good credit risk and the issuer [of the credit card] guarantees payment [to the vendor] for goods, wares and merchandise sold and delivered on the basis of the card." *Williams v. U.S.*, 192 F.Supp. 97, 100 (S.D. Cal. 1961). Generally, "the holder of a credit card presents it to the merchant and, upon the strength of the credit card, a charge slip is made out and signed by the purchaser. The original charge slip is then sent to the proper place for redemption and is paid by the issuer of the credit card. This may be either before or after the holder of the credit card is billed for the merchandise sold to him when he presented his credit card." *Id.*

It is important not to confuse the party that is supplying goods or services for the conduct of state business (the vendor) with the party who provides a mere financial transaction service through which the vendor is guaranteed payment (the credit card issuer).

Kenneth B. Marshall

February 24, 2003

Page 5

The legal agreement between the credit cardholder and the credit card issuer exists regardless of whether the cardholder chooses to use the credit card to charge travel expenses that may later be reimbursed by ODJFS. The credit cardholder is personally responsible to the card issuer for the payment that the issuer makes to the vendor of the goods and services. The cardholder is also personally responsible for all annual and other fees incurred in connection with use of the card, and for any interest charges on the balance. The fact that ODJFS has an obligation, either through state law or a collective bargaining agreement, to reimburse its officials and employees for legitimate state travel expenses does not mean that ODJFS stands as a guarantor to the credit card issuer for expenditures charged by an ODJFS official or employee while conducting state business. Nor does it mean that ODJFS will pay any of the fees or interest incurred by the cardholder.

Thus, it is apparent that the issuer of a personal credit card used by an ODJFS official or employee while conducting state business is not a vendor to ODJFS. In the absence of this connection between the credit card issuer and ODJFS, the benefits of a reward program provided by a credit card issuer to an ODJFS official or employee would not automatically create an improper influence upon the official or employee with respect to his official duties. R.C. 102.03(D) and (E) do not absolutely prohibit an ODJFS official or employee from soliciting or accepting incentives related to the use of a personal credit card for reimbursable state travel expenses. For example, R.C. 102.03(D) and (E) do not prohibit an ODJFS employee from accepting a year-end benefit on aggregated purchase throughout the year even though some of the purchases may have been incurred in connection with state travel.

However, despite the fact that the credit card issuer is not a vendor to ODJFS and is providing a financial transaction service for the ODJFS official or employee through a private agreement, it is foreseeable that the receipt of a reward program incentive from a credit card issuer could, in some situations, impair the independence of judgment of an ODJFS official or employee in the performance of his official duties by affecting his decisions regarding the issuer to the direct detriment of ODJFS. If the cardholder were to charge state business travel expenses on a personal credit card that offers a reward program incentive in order to receive the incentive and, by doing so, created higher expenses for ODJFS, rather than securing services the lowest cost services, then the pecuniary benefits of a reward program provided by the credit card issuer to an ODJFS official or employee clearly create an improper influence upon the official or employee with respect to his official duties. R.C. 102.03(D) and (E) prohibit an ODJFS official or employee from accepting or soliciting the benefits of a reward program for using a personal credit card to charge reimbursable state travel expenses if the use of the credit card results in a higher cost for ODJFS.

There are also some credit cards that offer a discount on particular goods or services if the cardholder uses the credit card. For example, some credit cards have cooperative arrangements with hotels, airlines, and other purveyors of travel related services to offer discounts in connection with travel purchases. In such a situation, if an ODJFS official or employee were to use a credit card to pay for a hotel room, airline ticket, or other expense, the credit card may charge the cardholder less than the cardholder is billed directly by the merchant.

Kenneth B. Marshall

February 24, 2003

Page 6

The merchant receipt may show that the official or employee charged one amount to the credit card, while the card statement demonstrates that the official or employee will pay the credit card company a lower amount as a result of the discount. If that is the case, R.C. 102.03(D) and (E) prohibit the official or employee from seeking reimbursement from ODJFS for any amount greater than the amount he or she is billed by the credit card company for the goods or services charged.

For example, the Ohio Ethics Law prohibits an ODJFS official or employee from booking a hotel room at a hotel that offers an incentive related to the use of his or her credit card if a lower priced hotel room is available at a hotel that does not offer an incentive. Further, if the ODJFS official or employee books a hotel room at a hotel chain that offers a discount on the room rate when he or she uses a particular credit card, the Ethics Law prohibits that official or employee from seeking reimbursement for any amount greater than the discounted room rate.

Conclusion

As explained above, an ODJFS official or employee is not generally prohibited from receiving the benefit of a reward program provided by a credit card issuer, in connection with business travel expenses charged on a personal credit card, with two exceptions. The two exceptions are: (1) where an ODJFS official or employee chooses to use a specific credit card to obtain the benefit of the reward program and the use of the card results a higher cost for ODJFS; and (2) where an ODJFS official or employee seeks reimbursement from ODJFS for any amount that is greater than the debt actually owed to the credit card issuer. In these two situations, the ODJFS official or employee must either waive the benefit or seek reimbursement for the amount actually owed to the credit card issuer.

The Ohio Ethics Commission approved this informal advisory opinion at its meeting on February 21, 2003. The Commission commends you for seeking advisory guidance.

The opinion is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please contact this Office again.

Sincerely,



John Rawski
Staff Attorney