

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2015-EC-003

Issued June 19, 2015

The Arkansas Ethics Commission has received a written advisory opinion request from Kenneth R. Hall, Executive Vice President of the Arkansas Chamber of Commerce and the Associated Industries of Arkansas. Therein, he raises the following questions:

- 1. Does the Amendment 94 prohibition on gifts from lobbyists apply to staff members of Constitutional officers, state agency directors, agency deputy directors, or agency employees?*
- 2. Does the Amendment 94 prohibition on gifts from lobbyists apply to any local elected officials or their staffs?*

The Commission has previously issued a number of advisory opinions addressing the gift prohibition found in Ark. Code Ann. § 21-8-801. See, e.g., Advisory Opinion No. 99-EC-007. The Commission is now being called upon to expand its gift prohibition analysis in light of the recent passage of Amendment 94 of the Arkansas Constitution, which created a new prohibition applicable to the solicitation or acceptance of gifts from a lobbyist<sup>1</sup>, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, by certain listed public servants.

Amendment 94 came into existence as the result of the passage of Issue 3 by the voters in the general election held on November 4, 2014. During the 90<sup>th</sup> General Assembly, the Arkansas Legislature passed SB 967, which became Act 1280. Said legislation amended the language of Amendment 94 by adding additional provisions to the prohibition concerning gifts from lobbyists. It is noted that the Commission's analysis of Ark. Code Ann. § 21-8-801 set forth in previous

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<sup>1</sup>Ark. Code Ann. § 21-8-402 (10) defines "Lobbying" to mean communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action. In turn, Ark. Code Ann. § 21-8-402 (11) defines "Lobbyist" to mean a person who: (A) Receives income or reimbursement in a combined amount of four hundred dollars (\$ 400) or more in a calendar quarter for lobbying one (1) or more governmental bodies; (B) Expend four hundred dollars (\$ 400) or more in a calendar quarter for lobbying one (1) or more governmental bodies, excluding the cost of personal travel, lodging, meals, or dues; or (C) Expend four hundred dollars (\$ 400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with any public servant to influence any legislative action or administrative action of one (1) or more governmental bodies unless the communication has been filed with the Secretary of State or the communication has been published in the news media. If the communication is filed with the Secretary of State, the filing shall include the approximate number of recipients.

advisory opinions such as Advisory Opinion No. 99-EC-007 is still applicable to gifts falling outside of the scope of Amendment 94.

As stated above, a separate prohibition was created by the passage of Amendment 94, with respect to gifts from lobbyists to certain public servants. In order to fall within the scope of that prohibition, however, the giver of the gift must be a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist. Otherwise, Amendment 94 does not apply. Moreover, the person soliciting or accepting the gift must be one of the types of public servants listed in Amendment 94. If not, then Amendment 94 does not apply.

Amendment 94 (as amended by Act 1280) provides, in pertinent part, as follows:

§30 Gifts from lobbyist.

(a) Persons elected or appointed to the following officers shall not knowingly or willfully solicit or accept a gift from a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist:

- (1) Governor;
- (2) Lieutenant Governor;
- (3) Secretary of State;
- (4) Treasurer of State;
- (5) Auditor of State;
- (6) Attorney General;
- (7) Commissioner of State Lands;
- (8) Member of the General Assembly;
- (9) Chief Justice of the Supreme Court;
- (10) Justice of the Supreme Court;
- (11) Chief Judge of the Court of Appeals;
- (12) Judge of the Court of Appeals;
- (13) Circuit court judge;
- (14) District court judge;
- (15) Prosecuting attorney; and
- (16) Member of the independent citizens commission for the purpose of setting salaries of elected constitutional officers of the executive department, members of the General Assembly, justices, and judges under Article 19, § 31, of this Constitution.

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(2)(A) "Gift" means any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor.

(B) "Gift" does not include:

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(ii) Gifts that are not used and which, within thirty (30) days after receipt, are returned to the donor;

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(iv) Anything of value that is readily available to the general public at no cost;

(v) (a)(1) Food or drink available at a planned activity to which a specific governmental body is invited, including without limitation a governmental body to which a person elected or appointed to an office under subsection (a) of this section is not a member.

(2) If a committee of the General Assembly is invited to a planned activity under subdivision (b)(2)(B)(v)(a)(1) of this section, only members of the committee of the General Assembly may accept food or drink at the planned activity.

(b)(1) As used in this subdivision (b)(2)(B)(v), "planned activity" means an event for which a written invitation is distributed electronically or by other means by the lobbyist, person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist to the members of the specific governmental body at least twenty-four (24) hours before the event.

(2) As used in this subdivision (b)(2)(B)(v), "planned activity" does not include food or drink available at a meeting of a specific governmental body for which the person elected or appointed to an office under subsection (a) of this section is entitled to receive per diem for attendance at the meeting.

(c) A lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist shall not offer or pay for food or drink at more than one (1) planned activity in a seven-day period;

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If a public servant soliciting or accepting a gift is not included in one of the sixteen (16) categories listed, then the Amendment 94 gift prohibition does not apply to that particular situation. With respect to Question 1 & 2, it is the Commission's opinion that the gift prohibition set forth in Amendment 94 (as amended by Act 1280) does not apply to staff members of Constitutional officers, state agency directors, agency deputy directors or agency employees, most local elected officials, or the staff of local elected officials, regardless of who is giving the gift. Under the laws under the jurisdiction of the Ethics Commission, Circuit Court Judges and Prosecuting Attorneys are considered "state and district candidates" while District Court Judges are viewed as "local candidates". While these three types of public servants might be considered local elected officials by some, the gift prohibitions set forth in Amendment 94 (as amended by Act 1280) would apply to persons holding these particular offices. As previously noted, however, the regular gift prohibition provided in Ark. Code Ann. § 21-8-801 would apply to other local elected officials and *all* elected official's staff. (emphasis added)

Gifts falling outside the scope of Amendment 94 are still subject to the analysis under Ark. Code Ann. § 21-8-801. Such analysis involves not only that statute but also Ark. Code Ann. § 21-8-402. The first of these statutes, Ark. Code Ann. § 21-8-801, provides, in pertinent part, as follows:

(a) No public servant<sup>2</sup> shall:

(1) Receive a gift or compensation as defined in § 21-8-401 et seq., other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position; or

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(b) (1) No person shall confer a gift or compensation as defined in § 21-8-401 et seq. to any public servant, the receipt of which is prohibited by subdivision (a)(1) of this section.

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The second such statute, Ark. Code Ann. § 21-8-402 (5), defines "Gift" to mean "any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor." It goes on to provide that:

(B) The term "gift" does not include:

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(vii) (a) Anything with a value of one hundred dollars (\$100) or less.

(b) The value of an item shall be considered to be less than one hundred dollars (\$100) if the public servant reimburses the person from whom the item was received any amount over one hundred dollars (\$100) and the reimbursement occurs within ten (10) days from the date the item was received;

It is specifically noted that the gift prohibition set forth in Ark. Code Ann. § 21-8-801 applies to all public officials, public employees, and public appointees, which would include staff members of Constitutional officers, state agency directors, agency deputy directors and agency employees, as well as all local elected officials and their staffs. (emphasis added)

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<sup>2</sup> Ark. Code Ann. § 21-8-402(18) defines "Public servant" to mean all public officials, public employees, and public appointees. Ark. Code Ann. § 21-8-402(17) defines "Public official" to mean a legislator or any other person holding an elective office of any governmental body, whether elected or appointed to the office, and shall include such persons during the time period between the date they were elected and the date they took office. Ark. Code Ann. § 21-8-402(16) defines "Public employee" means an individual who is employed by a governmental body or who is appointed to serve a governmental body and notes that "Public employee" shall not include public officials or public appointees. Ark. Code Ann. § 21-8-402 (15) defines "Public appointee" to mean an individual who is appointed to a governmental body and notes "Public appointee" shall not include an individual appointed to an elective office.

In short, to analyze which gift prohibition applies in a given situation, one would first look at the public servant and determine if he or she is on the sixteen (16)-person list set forth in Amendment 94 (as amended by Act 1280). If he or she is not on that list, then the gift prohibition in Ark. Code Ann. § 21-8-801 would apply. In the event that the public servant is on the sixteen (16)-person list set forth in Amendment 94 (as amended by Act 1280), the analysis would then turn to who is giving the gift. If the giver of the gift is a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, then Amendment 94 (as amended by Act 1280) would be applicable. If the giver of the gift is not a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, then Ark. Code Ann. § 21-8-801 would still apply.

This advisory opinion is issued by the Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By: Jill Baiham