

ARKANSAS ETHICS COMMISSION

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ADVISORY OPINION NO. 2015-EC-004 Issued July 24, 2015

In response to Advisory Opinion No. 2015-EC-002, the University of Arkansas (hereinafter the "University") has sought further analysis regarding the sale of football tickets by the University to members of the General Assembly and other officials covered by Amendment 94. The University explains that it is the entity selling the tickets at face value and that membership level contributions for seat locations are controlled by the Razorback Foundation, Inc. (hereinafter, the "Foundation"), which is a separate 501(c)(3), non-profit corporation that is distinct and independent of the University.

The University states that the Foundation controls the membership level contributions for seat locations and that the Foundation is the entity which is responsible for waiving the membership level contributions. The University further states that the Foundation does not meet the definition of a lobbyist¹, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, and therefore, questions whether the Foundation comes within the scope of Amendment 94.

While the University and the Razorback Foundation might be considered separate entities in certain respects (e.g., tax purposes), it is not clear that they are, in fact, separate entities with respect to the sale of football tickets. Although the University states that it has contracted away the control of seat locations and waiver of membership level contributions, it is still the University's decision that the tickets be sold with such a waiver in accordance with the contract. Moreover, it seems unlikely that the Foundation would be waiving the membership level contributions in question

¹ 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. Likewise, 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) Expends 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) Expends 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.

unless there was some benefit to the University. In that regard, it could be argued the two entities are acting jointly in connection with the sale of football tickets.

If, as the University contends, it is the Foundation giving the “thing of value” (i.e., the waiver of the membership level contribution) and the Foundation waives \$400 or more in a calendar quarter in membership level contributions for members of the General Assembly, then the Foundation itself would arguably meet the definition of a lobbyist and come within the scope of the Amendment 94 prohibition against gifts from lobbyists. In Advisory Opinion No. 91-EC-009, the Ethics Commission accepted as controlling two Attorney General Opinions, 89-E-7 and 89-E-26, which stated that any employee whose duties require him to lobby public officials, occasionally or frequently, must register as lobbyist. It further added that whether particular contact between a business and a government official is considered a “lobbying act” would vary depending on the circumstances of the contact. The presumption would be that in any contact between a lobbyist and a public official wherein the lobbyist paid the cost of meals, that the contact was a lobbying act.

More recently, in Advisory Opinion No. 2009-EC-003, the Ethics Commission again looked at what circumstances might trigger lobbyist registration and reporting. In that opinion, the Commission noted that persons who contribute \$400 or more in a calendar quarter to hosting a special event could logically and would likely meet the definition of a lobbyist, because hosting special events is a core lobbying activity. It should be noted that “special event” is a term that predates Amendment 94, which employs the term “planned activity” and has a slightly different definition. More recently, in Advisory Opinion No. 2015-EC-001, the Commission noted those opinions. While a Razorback football game would not be a “special event”, the logic that spending more than \$400 in a calendar quarter on gifts for legislators, for example, could trigger registration as a lobbyist is still applicable.

Whether it is the University or the Foundation giving the “thing of value” to officials covered by Amendment 94 of the Arkansas Constitution (as amended Act 1280 of 2015) presents a question of fact. Likewise, whether or not waiving membership level contributions for members of the General Assembly would cause the Foundation to meet the definition of lobbyist presents a question of fact. It is not necessary for the Commission to answer these questions of fact, however, because even if the Foundation were determined to be the entity providing the thing of value, and the Foundation was determined to not be a lobbyist, there would still be a \$100 limit on what it could give a public servant under the gift prohibition found in Ark Code Ann § 21-8-801. This statute provides, in pertinent part, as follows:

(a) No public servant² shall:

² 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.

(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

(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.

The term "gift" is defined in Ark. Code Ann. § 21-8-402 (5) 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:

(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;

If the waiver of the membership level contribution exceeded \$100 in value, then the waiver would constitute a prohibited gift in accordance with Ark. Code Ann. §§ 21-8-801 and 21-8-402. In other words, the Foundation would be prohibited from waiving membership level contributions in excess of the \$100 limit.

In addition to the foregoing, the Commission notes that Ark. Code Ann. § 21-8-304 would be applicable to the facts presented. That particular statute provides, in pertinent part, as follows:

(a) No public official or state employee shall use or attempt to use his or her official position to secure special privileges or exemption³ for himself or herself or his or her spouse, child, parents, or other persons standing in the first degree of relationship that is not available to others except as may be otherwise provided by law.

³ "Special privileges or exemptions" is defined in § 400(p) of the Ethics Commission's Rules on Conflicts to mean "a particular benefit or advantage unfairly extended to a person beyond the common advantages of others or the unjustified release of a person from a duty or obligation required of others."

If the public servant utilizes this waiver option and is able to buy his or her ticket(s) at face value without the membership level contribution, while others must pay the membership level contribution, it appears that they are utilizing their official position to secure a special privilege or exemption for themselves. Waiving a fee of between \$50 and \$20,000 to obtain tickets would certainly be considered a benefit or advantage and/or the unjustified release of a person from a duty or obligation required of others. Ark. Code Ann. § 21-8-304 (a) is not dependent on who is providing the special privilege or exemption, so whether or not it is the University or the Foundation giving the waiver/ "thing of value" would be irrelevant to whether it would be in violation of Ark. Code Ann. § 21-8-304 (a) for the public servant⁴ to accept it.

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

ARKANSAS ETHICS COMMISSION

By: 
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⁴ All public servants including, specifically, the public servants listed in Act 1280: (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.