

## Opinion No. 89-21

June 20, 1989

**OPINION OF:** HAL STRATTON, Attorney General

**BY:** Andrea R. Buzzard, Assistant Attorney General

**TO:** Carlos A. Gallegos, Executive Secretary, Public Employees Retirement Association, P.O. Box 2123, Santa Fe, New Mexico 87504-2123

### QUESTIONS

May the Public Employees Retirement Board accept an expense-paid trip to Columbus, Ohio to be hosted by Public Employees Benefit Services Corporation?

### CONCLUSIONS

No.

### ANALYSIS

The Public Employees Benefit Services Corporation ("PEBSCO") has invited members of the Public Employees Retirement Board ("Board") to travel to Columbus, Ohio at PEBSCO's expense. PEBSCO will also pay for the Board members' accommodations. The purpose of the trip is to visit PEBSCO's home office. The trip will be informational as well as entertaining. PEBSCO has been the state's deferred compensation plan administrator since 1981. The Board has contracted with PEBSCO to provide services as the administrator. We commend the Board in questioning the propriety of the proposed trip and in requesting our counsel about the matter. We conclude that the Board members may not accept PEBSCO's offer.

The Conflict of Interest Act, Sections 10-16-1 through 10-16-16 NMSA 1978 (Repl. Pamp. 1987), provides, in part, that: No employee...shall...accept a gift...for himself or another if:

...

(2) he, within two years, has been involved in any official act directly affecting the donor...or knows that he will be involved in any official act directly affecting the donor.

Subsection 10-16-3(A). Subsection 10-16-2(D) defines "employee" as "[a]ny person who has been **elected to, appointed to** or hired for any state office and who receives compensation in the form of salary or **is eligible for per diem or mileage.**" (Emphasis added.) Board members are "employees" for purposes of the Act. An "official act" is "an official decision, recommendation, approval, disapproval or other action which involves

the use of discretionary authority." Subsection 10-16-2(G). Within the past two years, the Board has been involved in an "official act" affecting PEBSCO, specifically, contracting with PEBSCO to act as the plan's administrator. The Board will, in the future, be involved in official acts affecting PEBSCO. Subsection 10-16-3(B)(1) excepts from the prohibition against gifts "an occasional nonpecuniary gift, insignificant in value." That exception, however, would not apply because the proposed trip is not insignificant in value. No other exception authorizes the proposed gift of travel and accommodations.

In *State v. Bartz*, 224 N.W.2d 632 (Iowa 1974), the Iowa Supreme Court held that the conduct of county supervisors in accepting gratuities from county contractors warranted removal of the officials from office. The gratuities were expense-paid trips to a resort in Minnesota and to a baseball game in Minneapolis. One of the host contractors testified that the trips were in consideration of small past favors. There was no evidence that the donors reaped any specific benefit to a greater degree after the trips than they had enjoyed before extending the hospitality. The Iowa statute prohibited a public officer from accepting a gift from a corporation relating to an official business transaction. The court concluded: "[D]efendants' misconduct here in accepting favors from private contractors constitutes strong evidence of corruption under [the statute]." *Id.* at 636.

In *State v. Prybil*, 211 N.W.2d 308 (Iowa 1973), the same court held that county supervisors violated the Iowa statute by accepting gifts from companies that did business with the county. The gifts were books, hotel expense and free dinner and drinks at a supper club in celebration of a large purchase by the county. The court stated: "[These gifts] would ordinarily be no different under the statute than an outright payment in cash to the public officer for his own use and, if related to a business transaction, would constitute prohibited corrupt influence." *Id.* at 314. The court compared Iowa's statute to a similar federal statute, whose purpose the court articulated in *United States v. Irwin*, 354 F.2d 192, 196 (2d Cir.), cert. denied, 383 U.S. 967 (1966):

The awarding of gifts thus related to an employee's official acts is an evil in itself, even though the donor does not corruptly intend to influence the employee's official acts, because it tends, subtly or otherwise, to bring about preferential treatment by government officials or employees, consciously or unconsciously, for those who give gifts as distinguished from those who do not....

The iniquity of the procuring of public officials, be it intentional or unintentional, is so fatally destructive to good government that a statute designed to remove the temptation for a public official to give preferment to one member of the public over another, by prohibiting all gifts "for or because of any official act," is a reasonable and proper means of insuring the integrity, fairness and impartiality of the administration of the law.

The court in *Prybil* rejected the majority's opinion in *Dukehart-Hughes Tractor & Equipment Co. v. United States*, 341 F.2d 613 (Ct. Cl. 1965), which allowed a company to deduct expenses for entertainment of and gifts to public officials notwithstanding Iowa's statute prohibiting public officials from accepting gratuities. The gifts were characterized as "goodwill" gifts furnished to representatives of potential buyers, both in

and out of government. No distinction was made by the company on the basis of past purchases; they were not conditioned on future transactions. The majority construed Iowa's statute to be aimed at "kick-backs" and concluded that it did not bar entertainment of or gifts to agents of potential customers. The court also noted that the taxpayer's expenses were "representative of a widespread commercial practice in Iowa and elsewhere." *Id.* at 618. The dissenting justice disagreed, believing that the larger expenditures, such as the hosted trips, were prohibited by the statute, because they were related to business transactions, past and potential, between the taxpayer and the government. Prybil agreed with the dissent's view of Iowa's statute.

In *Westinghouse Elec. v. Grand River Dam Auth.*, 720 P.2d 713 (Okla. 1986), Westinghouse sought to enjoin the Authority from awarding a generator contract to Brown Boveri, a Swiss corporation. Because Westinghouse did not seek a stay of the award or of the lower court's judgment denying the injunction, the project was substantially completed when Westinghouse appealed. Therefore, the Oklahoma Supreme Court dismissed the appeal as moot. The supreme court discussed, nonetheless, an ethical question that Westinghouse raised, specifically, the propriety of the Authority's acceptance of expense-paid travel from the Swiss corporation. The Swiss corporation had flown the Authority's chairman, spouse, staff members and their spouses to London, where they attended a play; then to Germany, where they toured the bidder's facilities and went sightseeing; and then to Switzerland, where they toured the bidder's manufacturing plant. Westinghouse provided for Authority members and staff the same travel-tours to its facilities in Pennsylvania and North Carolina. Westinghouse also gave the Authority's members and staff checkerboard sets, model trains and allegedly world series tickets. The Oklahoma Supreme Court took a dim view of these gratuities. It quoted the state's ethics act that prohibited state employees from accepting "gifts", "entertainment," and "favors" and stated:

It is certainly debatable whether [the Swiss corporation's] all-expense paid trip to Europe for the spouses of [Authority] members, as well as tickets to a play, were given for the purpose of influencing the members' decisions, but we doubt if such behavior is truly in accord with legislative policy. Acceptance of these gratuities appears to violate the spirit, if not the letter of the law. It may be true that these activities are standard operating procedures in private industry; this Court, however, does not condone such practices in the area of public contracting.

*Id.* at 717. The court further stated that it did not condemn the officials for taking the time to tour the bidders' facilities to insure that they could perform. But the court protested the hospitality extended during those tours. The court did not expressly state its view of a "no-frills" tour, but it seems improbable that a host, particularly a host contractor or bidder, would shun his guest officials after ferrying them to a far-away location. In any event, a public official who quibbled about the extent of amenities he received would probably do so in vain. The Oklahoma Supreme Court evidenced its attitude in this manner: "Government officials and employees must exercise great care to avoid even the appearance of impropriety in their duties; for they, like Caesar's wife, must be above reproach."<sup>1</sup> *Id.* at 717-18.

According to this authority, Board members may not accept PEBSCO's travel offer. Nor may PEBSCO reimburse the Public Employees Retirement Association ("Association") for its expense in paying for Board members to travel to Ohio, under the theory that the Association may accept gifts. Section 10-11-138 NMSA 1978 (Repl. 1987), which permits the Association to accept gifts, is clearly intended to cover gifts to the retirement funds and not gifts for the personal benefit of Board members or Board employees. Moreover, one cannot do indirectly that which he is prohibited from doing directly. *State v. Bloom*, 90 N.M. 226, 234, 561 P.2d 925, 933 (Ct. App. 1976).

We conclude, therefore, that Board members must decline PEBSCO's invitation. We also advise staff members to decline the invitation.

### **ATTORNEY GENERAL**

HAL STRATTON Attorney General

### **GENERAL FOOTNOTES**

[n1](#) See also Annot., 67 A.L.R.3d 1231, 1236-37, discussing meals, lodging, or travel as the subject of bribery:

One of the principal results of the so-called Watergate affair has been an increased public interest in the ethics of governmental employees.... [B]usinessmen and government officials can expect problems with some customary amenities that were previously considered acceptable business practices...

[P]ublic officials would be best advised to avoid even the appearance of undue influence by keeping at arms length all who are affected by their decisions.