

Office of Government Ethics

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Letter to a Designated Agency Ethics Official dated October 21, 1993

This is in reply to your letter dated September 23, 1993, in which you request our assistance in resolving the question of whether full-time employees of [your agency], who have as their duty station a new [agency] facility which is located on land owned by a State next to [a State] University, may accept certain benefits and privileges from the University.

The benefits and privileges in question would be available to the employees through an "affiliated organization identification card" the University has offered to issue to them. Holders of the card would: (1) have borrowing privileges at University libraries; (2) be able to purchase a recreation facility card; (3) qualify for faculty/staff ticket rates to cultural events and other productions at a theater on the [University] campus and "other select locations;" (4) be eligible to join the University's faculty club for a \$40 annual fee, which would give them full access to the club's facilities and functions, and a 10% discount on meals there; (5) receive faculty/staff discounts at the University Book Center; and (6) be permitted to use the campus shuttle services to and from [the agency facility], the [University] campus, the City [where the University is located], and three [public transit] locations, for the same fee of \$27 per semester that is charged to part-time students at the University (if there is a sufficient demand for this service).

Each of these benefits and privileges is discussed below in the context of subpart B of the Standards of Ethical conduct, which prohibits an employee from accepting anything of value "[f]rom a prohibited source" or "[g]iven because of the employee's official position," unless it is excluded from the definition of a gift, or falls within one of the exceptions, set forth in that subpart. You have noted in your letter that the University is a prohibited source of gifts for [agency] employees. In addition, the benefits and privileges are being offered because of the employee's official position, i.e., the benefits and privileges would not be available to an employee but for the fact that the employee works for [the agency]. 5 C.F.R. § 2635.203(e).**1**

Library Borrowing Privileges

The University libraries are open to the public. However, we understand that personal borrowing privileges at those libraries ordinarily are available to nonaffiliated persons only through membership in the Friends of the Library Association and that a membership in the Association costs \$100 per year. The free personal borrowing privileges being offered to [agency] employees at [the facility] represent a waiver of this membership fee and would be a prohibited gift to which no exclusion or exception would apply.

Recreation Facility Card

The recreation facility card entitles its holder to use the [University] campus fitness centers and swimming pools. Employees would pay a fee of \$75 per semester for the card.

"Anything for which market value is paid by the employee" is not a gift under the Standards. 5 C.F.R. § 2635.203(b)(9). "Market value," as used here, means the retail cost the employee would incur to purchase the gift. 5 C.F.R. § 2635.203(c). Therefore, the use of the campus fitness centers and swimming pools would not be a "gift" to an employee if you determine that the fee paid by the employee for such use is equivalent to the retail cost the employee would incur for access to similar recreation facilities.

Note that this situation differs from the situation involving discounts on health club memberships, made available to tenants of specific buildings housing Government agencies, which is described in the supplementary information that accompanied the publication of the Standards as a final rule, at 57 Fed. Reg. 35013 (Aug. 7, 1992). To the extent that such offers are made by the owner or manager of the building and flow to all tenants, they are a consequence of the Government's lease for that space and may be accepted by agency employees working there in accordance with the exception from the definition of gift for "[a]nything which is paid for by the Government or secured by the Government under Government contract." 5 C.F.R. § 2635.203(b)(7). In contrast, neither this benefit nor any of the other benefits and privileges being offered by the University are being secured under Government contract or otherwise obtained by the agency as part of the agreement between the United States and the State which provided the land for [the facility].

Faculty/Staff Ticket Rates, Faculty Club Membership, and Faculty/Staff Discounts at the University Book Center

The exclusion in section 2635.203(b)(4) of the Standards, for "favorable rates and commercial discounts available to the public or to a class consisting of all Government employees . . . , whether or not restricted on the basis of geographic considerations," would not apply to the special rate for tickets to cultural events, discounts at the University Book Center, and discounts on meals at the University's faculty club. In order for that exclusion to apply, the favorable rate or commercial discount would have to be broadly available and could not be confined to the employees of a specific agency. The reference in that exclusion to rates and discounts "restricted on the basis of geographic considerations" was included to recognize that some rates and discounts are available regionally to the public or all Government employees; the reference does not mean that rates and discounts are acceptable if they are expressly restricted to employees at a single Government facility.

The exception for discounts and similar benefits, in section 2635.204(c) of the Standards, also would not apply to the special rate and discounts. That exception has various conditions, none of which would be met in this case.² Section 2635.204(c)(2)(i) would not apply because the employees' affiliation with the University is related to their Government employment. Section 2635.204(c)(2)(ii) would not apply because the offer is not being made to all members of an employee organization, nor, even if it were, is the same offer "broadly available to large segments of the public" through organizations of similar size. Section 2635.204(c)(2)(iii) would not apply because, as you acknowledge in your letter, the University is a prohibited source of gifts to [agency] employees, and that provision would apply only to discounts and similar benefits offered by a person who is not a prohibited source.

Campus Shuttle Services

We understand that [the facility] is not, as yet, on or near a public bus or shuttle route and that this poses a serious problem for employees who depend on public transportation to get to work. Nevertheless, as discussed above with regard to the recreation facility card, the fee of \$27 per semester that each employee would pay for the shuttle services would have to be the "market value" of that service in order for it to fall within the exclusion at

section 2635.203(b)(9) of the Standards. It would appear that \$27 per semester is substantially less than the cost that public bus or shuttle transportation would be for the number of equivalent trips that could be taken during such a period, and that \$27 therefore is not the market value of that service for purposes of the Standards.

It is possible that the University would be willing to offer this service to [agency facility] employees for a fee that reflects its "market value." If so, employees who pay that fee would not be accepting a gift, and their use of the shuttle service would be permissible.

Thank you for seeking our advice on this matter. We trust that the foregoing information will be of assistance to you.

Sincerely,

Stephen D. Potts
Director

1 We note that in your letter you have also asked how the supplementation of salary prohibition in 18 U.S.C § 209 might apply to this situation. By its terms, that prohibition applies to payments from non-Federal sources as compensation for a person's services as a Federal agency employee, "except as [those payments] may be contributed out of the treasury of any State, county, or municipality." Assuming arguendo that the benefits and privileges being offered are compensation for the employees' services, those benefits and privileges would be contributed out of the treasury of the State, and excluded from the coverage of 18 U.S.C. § 209, to the extent that a state university is bearing their cost.

2 Section 2635.204 (c) provides that in addition to those opportunities and benefits excluded from the definition of a gift by section 2635.203 (b) (4), an employee may accept:

- (1) Reduced membership or other fees for participation in organization activities offered to all Government employees or all uniformed military personnel by professional organizations if the only restrictions on membership relate to professional qualifications; and
- (2) Opportunities and benefits, including favorable rates and commercial discounts not precluded by

paragraph (c) (3) of this section:

- (i) Offered to members of a group or class in which membership is unrelated to Government employment;
 - (ii) Offered to members of an organization, such as an employees' association or agency credit union, in which membership is related to Government employment if the same offer is broadly available to large segments of the public through organizations of similar size; or
 - (iii) Offered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay; provided, however that
- (3) An employee may not accept for personal use any benefit to which the Government is entitled as the result of an expenditure of Government funds.