

Office of Government Ethics

86 x 6 -- 06/23/86

Letter to a Government Employee dated June 23, 1986

This is in response to your letters of May 22 and 23, 1986. In your May 22 letter, you have described the situation which resulted in a determination by your Ethics Officer that you and two other employees of [the agency] had violated ethical statutes and standards of conduct regulations, as detailed in an intra-agency letter and file.

As you have stated in the attachment to your letter, you and another employee purchased discount airline tickets from an airline employee who was the wife of an employee subordinate to you and [the other employee].

The provisions properly applicable to your situation include 5 U.S.C. § 7351, Executive Order 11222, and the standards of conduct regulations at 5 C.F.R. Part 735. Both 5 U.S.C. § 7351 and 5 C.F.R. § 735.202(d) prohibit the acceptance of gifts from subordinate employees. We note that 5 C.F.R. § 735.202(d) specifies that voluntary gifts of nominal value may be made to superiors on the special occasions of marriage, illness, or retirement, whereas the statute at 5 U.S.C. § 7351, which the regulation implements, does not allow for any exceptions. Both section 201(c) of Executive Order 11222 and 5 C.F.R. § 735.201a prohibit any actions by employees which might result in or create the appearance of impropriety.

It could be argued that neither you nor [the other employee] accepted a "gift" from a subordinate employee in violation of 5 U.S.C. § 7351 or 5 C.F.R. § 735.202. As stated by this Office previously in our Informal Advisory Letter 85 x 13 (emphasis in original):

[A] discount is not necessarily a gift. In general, a discount that falls within the normal range of discounts available to the public from a particular entity is not considered a gift under section 209 of Title II of the Ethics in Government Act because the vendor is receiving consideration of equal or greater value in the form of a sale to the customer On the other hand, if the discount is outside the normal range and does not reflect

a legitimate commercial motive in inducing increased sales volume, the agency should inquire further into the circumstances surrounding the discount in order to verify that it is not merely a disguised gift given to influence a particular employee in the performance of his or her duties. The determination whether a discount is a gift for purposes of financial disclosure must be made on a case by case basis.

It appears that the discount on the airline tickets offered to you was the same as that available to relatives and friends of the airline employee and that the discount reflects the airline's legitimate commercial motive to induce increased sales volume, based on statements in the airline memorandum you enclosed.

The more difficult question, it would seem to us, concerns whether, in purchasing the discounted tickets, you and [the other employee] engaged in actions which might cause appearance problems in violation of section 201(c) of the Executive Order and 5 C.F.R. § 735.201a. As further stated in our 85 x 13 advisory letter:

In the area of commercial discounts, concerns about the appearance of impropriety may pre-clude a particular employee from accepting a discount that is offered to the general public or to other employees of his or her agency. In the realm of appearances, the determination whether a particular employee may accept a discount must take into account the employing agency's relationship with the entity offering the discount, the types of duties the employee performs in his or her official capacity, the commercial enterprise's motives in offering the discount, and the nature and size of the group to whom the discount is offered.

We will not attempt to second-guess the decision of your Ethics Officer, who determined that there was a violation of the appearance provisions on the facts of your case. Appearance questions require decisions on a case-by-case basis, and ordinarily our Office does not overturn factual determinations made at the agency level. In your case, however, there seem to be factors which might have supported a contrary outcome. We are not aware of any business relationship between your agency and the airline offering the discounted tickets. The airline offering the tickets arguably did so with the motive of

increasing sales. The motives of the individual airline employee selling the tickets arguably were to earn the 10% commission while it was being offered, as well as to improve her own standing with the airline. The discounted tickets were to be offered among the airline employee's circle of friends and relatives, although these tickets were limited to twenty-five for relatives and twenty for friends during a one-month sales period.

We are enclosing our Informal Advisory Letter 85 x 13 on commercial discounts, a copy of which we are also forwarding, under separate cover, to your Ethics Officer.

Sincerely,

David H. Martin
Director