



## MEMORANDUM B

**To: Virginia Conflict of Interest and Ethics Advisory Council**

**From: Rebekah Stefanski, Attorney**

**Date: November 21, 2016**

**Re: Formal Advisory Opinion 2016-F-010 Contractor event §§ 2.2-3101 & 2.2-3103.1**

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### ISSUES PRESENTED:

You ask about a state employee who is required to file the Statement of Economic Interests (the filer) and who attends an event that is held by an organization with which his state agency has a contract. You state that the purpose of the event is to recognize and support the activities of the organization. The filer is representing the state agency at the event, but attendance at the event is not part of his official duties listed in his job description. At least 25 individuals are expected to attend the event. You further state that the value of the filer's attendance, which includes food, beverages, and entertainment, exceeds \$20.

You then pose four questions based on slight variations in this scenario. First, you ask, if the event is open to the public without any admission fee, is the filer's attendance at the event a gift? If the filer's attendance is valued at over \$100, is the acceptance of such a gift permissible under the State and Local Government Conflict of Interests Act (the Act)?

Second, you ask, if the event is open to the public and the organization charges an admission fee that is paid by the filer's state agency, is the filer's attendance at the event a gift? If the filer's attendance is valued at over \$100, is the acceptance of such a gift permissible under the Act?

Third, you ask, if attendance at the event is by invitation, without any admission fee, is the filer's attendance at the event a gift? If the filer's attendance is valued at over \$100, is the acceptance of such a gift permissible under the Act?

Lastly, you ask, if attendance at the event is by invitation only and the organization charges an admission fee that is paid by the state agency, is the filer's attendance at the event a gift? If the filer's attendance is valued at over \$100, is the acceptance of such a gift permissible under the Act?

## DISCUSSION:

In order for an item to be a gift for purposes of the Act, it must meet the definition established in § 2.2-3101 of the Code of Virginia. That definition, however, merely clarifies what items qualify as gifts and which are excluded. It does not modify any existing common-law doctrines upheld by the Supreme Court of Virginia that pertain to the promise, donative intent, transfer, receipt, or acceptance of gifts. To the extent the common law is not expressly modified by the Virginia legislature, it is presumed to remain in effect.<sup>1</sup>

In Virginia, a gift is “a contract executed. It is to be executed by the actual delivery by the donor to the donee, . . . and the delivery must be made with an intention to give.”<sup>2</sup> The Supreme Court of Virginia has continued to uphold this standard, stating that “donative intent on the grantor's part is an essential element of a gift.”<sup>3</sup>

If an event is open to the general public with no admission fee, there is no donative intent by the organization hosting the event to give admittance to any one specific person or group of people. Therefore, in answer to your first set of questions, such an event is not a gift and there is no prohibition that prevents a filer from attending such an event.

In your second and fourth set of questions, it is the filer’s employer paying for his attendance at the event. For an analysis on gifts given to a state employee by his employer, please refer to Formal Advisory Opinion 2016-F-009 issued by this Council, which addresses such situations.

Regarding your third set of questions, attendance at such an event is a gift because it falls into the definition of a gift in § 2.2-3101 and, based on the facts provided, none of the exemptions to that definition apply.<sup>4</sup> Filers are prohibited from accepting in a calendar year any gift with a value, or gifts with an aggregate value, in excess of \$100 from a lobbyist, a lobbyist’s principal, or an entity that is a party to or is seeking to become a party to a contract with the filer’s agency (a contractor).<sup>5</sup> If a filer receives anything of value over \$100 from a lobbyist, lobbyist’s principal, or contractor, he will be in violation of § 2.2-3103.1. However, food, beverages, entertainment, and the cost of admission received at a widely attended event are exempted from this \$100 cap.<sup>6</sup>

In order to qualify as a widely attended event, an event must meet two requirements: First, the event must be “open to individuals (i) who share a common interest, (ii) who are members of a public, civic, charitable, or professional organization, (iii) who are from a

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<sup>1</sup> *Hannabass v. Ryan*, 164 Va. 519, 525 (1935), citing *N. & W. Ry. Co. v. Virginian R. Co.*, 110 Va. 631, 645-655 (1910).

<sup>2</sup> *Spooner's Adm'r v. Hilbish's Ex'or and Others*, 92 VA. 333, 341 (1895).

<sup>3</sup> *Ott v. L&J Holdings, LLC, Et Al.*, 275 Va. 182, 188 (2008), citing *Theismann v. Theismann*, 22 Va. App. 557, 566 (1996). “The three elements of a gift are: (1) intention on the part of the donor to make a gift; (2) delivery or transfer of the gift; and (3) acceptance of the gift by the donee.”

<sup>4</sup> VA. CODE ANN. § 2.2-3101. “‘Gift’ means any . . . entertainment . . . . It includes . . . meals . . . .”

<sup>5</sup> VA. CODE ANN. § 2.2-3103.1.

<sup>6</sup> *Id.* “[S]uch officer, employee, or candidate or a member of his immediate family may accept or receive a gift of food and beverages, entertainment, or the cost of admission with a value in excess of \$100 when such gift is accepted or received while in attendance at a widely attended event and is associated with the event.”

particular industry or profession, or (iv) who represent persons interested in a particular issue.”<sup>7</sup> Second, at least 25 persons must have been invited to or be expected to attend the event.<sup>8</sup>

Here, the organization hosting the event has a contract with the filer’s agency. Therefore, the \$100 gift cap applies to gifts the filer receives from the event host. However, based on the facts you have provided, this event meets both criteria of a widely attended event because the event is open to individuals who share a common interest in the organization and at least 25 persons are expected to attend the event. Therefore, the value of the filer’s attendance would be exempted from the \$100 gift cap.

#### CONCLUSIONS:

In summary, events open to the general public at no charge are not gifts because there is no donative intent by the event host to give attendance to any specific individual or group of people. Attendance at an event given by a state employee’s employer is not a gift as it is related to his private occupation or profession. Finally, a filer is permitted to accept a gift of attendance at a widely attended event even if the value of his attendance exceeds \$100.

This analysis applies only to the stated facts. If the facts differ, the analysis will change.

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* “‘Widely attended event’ means an event at which at least 25 persons have been invited to attend or there is a reasonable expectation that at least 25 persons will attend the event and the event is open to individuals (i) who share a common interest, (ii) who are members of a public, civic, charitable, or professional organization, (iii) who are from a particular industry or profession, or (iv) who represent persons interested in a particular issue.”