



State of West Virginia
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State Auditor

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Barbara Allen
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West Virginia Supreme Court of Appeals
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1900 Kanawha Boulevard East
Charleston, WV 25305-0830

RE: Purchase of meals by Supreme Court

Dear Ms. Allen:

I have been made aware through media reports the Judicial Investigation Commission ("JIC") made a recent public finding that use of public funds for personal meals is permissible under West Virginia law. In particular, the JIC findings suggest it is permissible for the Supreme Court to use state purchasing cards to buy meals for themselves while performing their daily Constitutional duties (e.g. review decisions and hear arguments).¹ The JIC further indicated the Supreme Court needs to implement a policy allowing such meals to be purchased with public funds.

The conclusions reached by the JIC necessitates a reaffirmation of the position of the State Auditor's office. It also warrants examination of the practices of the Court, and the potential policy the Supreme Court intends to adopt.

Supreme Court is not authorized to use public funds to buy personal meals

Our office was neither consulted nor asked for an opinion by the JIC as to the propriety of using a State purchasing card ("p-card") to buy personal lunches. Had our office been asked, we would have opined that such use of a p-card is contrary to the policies and procedures of the purchasing card program, and generally prohibited under law. See W.Va. Code §6B-2-5(b) (prohibiting use of public office for private gain). On this point, the West Virginia Ethics Commission has issued multiple Advisory Opinions that support the proposition that public funds

¹ I wish to make clear the comments and conclusions contained in this letter relate to the Supreme Court as a whole, and not to any particular Justice. Indeed, it is my understanding none of the Justices have a state p-card in their name. Rather, this letter is addressed to the practices of the employees of the Supreme Court in the use of the p-card to buy lunches.

may not be used for the personal meals of public employees, barring express authorization or allowance under law. *See* A.O. 2018-04; A.O. 2018-02; A.O. 2012-50; and A.O. 2012-27. The only exception allowed was a State board or commission that was hosting a meeting of individuals that travelled from around the state to attend the meeting. *See* A.O. 2012-27. Rather than break for lunch, the Ethics Commission opined that a working lunch could be permissible. However, the Ethics Commission's opinion looked to whether there was a statutory allowance for meals (e.g. per diem for attendance), and further suggested consultation with the Auditor's office. More recently, the Ethics Commission in A.O. 2018-02 directed a County Commission to seek guidance from the Attorney General and/or State Auditor prior to using public funds for a working lunch.

While the JIC statement appears to try to encompass the A.O. 2012-27 opinion in its conclusion, the Court lunches do not fall within the guidelines or facts of the Advisory Opinion. First, there is no statutory allowance for the meals. The Court was not in travel status nor engaging in a training conference. Rather, the Court had lunch catered to them as part of their standard work day. Having food delivered understandably adds to the efficiency of the day. However, aide of efficiency does not require using public funds. The Justices and employees could have paid for the meal with their own personal money. Second, there is serious doubt as to an express authority for using public funds for lunches during a normal workday. If there is a belief that such authorization exists, then A.O. 2018-02 suggests consultation and/or opinion from the Attorney General and Auditor. While I am unaware of an Attorney General opinion, our office has not been contacted or consulted.

Accordingly, I wish to make clear, the position of the Auditor's office is that public employees and public officials, including specifically members and employees of the Supreme Court, may not use public funds to purchase personal meals during a non-travel workday. An expenditure of public funds for a personal meal will neither be processed nor approved by our office. Further, if a p-card is utilized, such purchases will also be deemed a violation of the policies and procedures governing the use of the State purchasing cards.²

Supreme Court Policy and defining allowable expenses

If the Supreme Court desires to adopt and implement a policy governing use of public monies for meals, then I would welcome and encourage consultation with our office. While our position is that public monies may not be used for "personal meals", there may be an allowable expense for hospitality purposes. While defining these allowable types of hospitality may be intricate, any allowance will likely center around (1) persons in travel status; (2) hosting a training or educational seminar; and (3) hosting a meeting with individuals from outside of the Court. However, the key principle underlying any such policy should be a prohibition of using public funds for the purchase of meals for individuals performing their daily duties or responsibilities (i.e. a personal meal).

² One of the main underlying prohibitions in the State p-card policies and procedures is to not use public monies for one's personal benefit.

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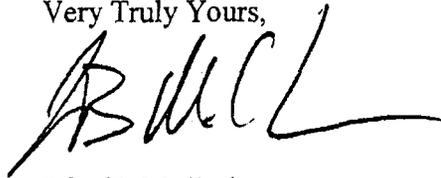
Again, we welcome the opportunity to work with you and your staff to craft such a policy which would clearly delineate allowable expenses and prevent any future misuse of public funds.

Expenditures going forward

Given the JIC findings and the longstanding practice of purchasing lunches and meals for Court staff and officials, I anticipate there may be disagreement with the position of our office. Indeed, I am very mindful of, and give deference to, the operations of another Branch of government. However, the finding of the JIC and recommendation that the Supreme Court may use public funds for personal use (e.g. meals), blends over to the powers and duties of the Auditor to ensure proper expenditures of public monies. Under this paradigm, I intend to review and disapprove expenditures that are for personal benefit.

I look forward to working through these issues with you, and welcome your cooperation going forward. It is my hope a cooperative approach may yield better guidance to prevent any potential misuse. If you have any questions, or wish to discuss further, please feel free to contact me.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'J. McCuskey', with a long horizontal flourish extending to the right.

John B. McCuskey
State Auditor

cc: Teresa Tarr, Judicial Investigation Commission