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Gifts
Frequent Flyer Miles

Charter Sections: 2604(b)(2), (b)(3), (b)(5), and (b)(13)

Opinions Cited: 92-10, 92-23, 94-09, 95-14, 2000-4, and 2006-4

Advisory Opinion No. 2006-05

The Conflicts of Interest Board (the "Board") has been asked whether, consistent with the conflicts of interest provisions of Chapter 68 of the City Charter, a City employee may use frequent flyer miles, earned while traveling on official business, to obtain awards for personal travel.

I. Background

Frequent flyer mileage is a benefit offered by most major airlines to individual travelers who take flights on their airlines. Frequent flyer miles are offered through plans whereby a traveler accrues the mileage based on travel and, based upon the mileage accrued, may receive free, upgraded, or discounted tickets, or other benefits, such as hotel and rental car discounts. Corporations and other legal entities are rarely permitted to enroll in frequent flyer programs and accrue miles. Frequent traveler

miles accrue to the individual traveler and are not tied to the source of funds used to purchase the ticket.¹

The City agency employing the inquiring City employee has no articulated policy regarding the use of miles earned for official travel; nor is there a Citywide policy on this question.

For the purposes of this Opinion, any major air carrier is presumed to do business with the City.

II. Relevant New York City Law and Precedent

Chapter 68 of the City Charter contains several provisions that are relevant to the question presented. Charter Section 2604(b)(2), as interpreted by Board Rules Section 1-13(b), prohibits the use of City resources for private or personal activities.

Charter Section 2604(b)(3) prohibits a public servant from using his or her City position “to obtain any financial gain, contract, license, privilege or other private or personal advantage, direct or indirect, for the public servant or any person or firm associated with the public servant.”

Charter Section 2604(b)(5) prohibits a public servant from accepting a valuable gift from any person or firm which such public servant knows is or intends to become engaged in business dealings with the City. The Rules of the Board (Title 53, Rules of the City of New York) defines “valuable gift” as any gift with a value of \$50.00 or more, whether in the form

¹ Besides the miles accrued through travel, miles can also be earned under some carriers’ programs via credit card purchases. Those miles are not at issue in this opinion.

of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form. See Board Rules Section 1-01(a).

Charter Section 2604(b)(13) provides that no public servant shall receive compensation except from the City for performing any official duty or accept any gratuity from any person whose interests may be affected by the public servant's official action.

Generally, the Board has not permitted City employees to accept gifts or other benefits incidental to job performance where acceptance of such gifts or benefits may create the appearance that the employee has misused his or her position or where the impartiality of the employee is or may be compromised. In Advisory Opinion No. 92-10, interpreting Charter Section 2604(b)(3), the Board held that, "in the absence of a governmental purpose," a public servant may not accept an invitation to attend an event when the acceptance of the trip may "create the appearance that he has received a valuable gift *solely because of his official position.*" See Advisory Opinion No. 92-10; emphasis added. Similarly, in Advisory Opinion No. 92-23, the Board determined that it would be a conflict of interest in violation of Section 2604(b)(3) for a public servant to accept free airline tickets received while an honoree at an event for personal use after leaving office. Because it appeared that the tickets were presented to the public servant *based on his City position*, the acceptance of the tickets would "create the appearance that he has received a valuable gift because of his official position, and without promoting any government purpose." See Advisory Opinion No. 92-23.

The Board similarly prohibited public servants from accepting for personal use gifts offered at events the employees attend on official business, even when such gifts are awarded through a random drawing. In Advisory Opinion 94-09, the Board allowed a public servant to accept, as a gift to the City, for City use, a prize he had won in a random drawing at a

conference attended as part of his official duties. However, the Board cautioned that it would violate Charter Section 2604(b)(5) for the employee to accept the award for personal use because the prize at issue was valued at more than \$50 and the company that awarded the prize was likely to bid on a contract with the employee's agency. Also, such acceptance "could create a perception that the public servant is obtaining a personal gain as a result of his or her official position" in violation of Charter Section 2604(b)(3). See Advisory Opinion No. 94-09.

Likewise, in Advisory Opinion No. 2000-04, the Board determined that it would be a violation of Section 2604(b)(5) for a public servant to accept event tickets for personal use because the cost of the tickets was \$50 or more and they were received from an organization doing or seeking to do business with the City. The Board further concluded that the acceptance of an offer to purchase tickets to "hot" events or to accept gifts of free, but hard-to-get, tickets will not violate Chapter 68, but that such acceptance will violate Section 2604(b)(3) in circumstances where the public servant affirmatively seeks out the tickets.

The Board has allowed City employees to accept discounts in certain circumstances, such as when the discounts do not specifically target City employees. In Advisory Opinion No. 95-14, for example, the Board allowed the employees of a City agency to accept an offer of special banking privileges and incentives from a local bank because the offer did not specifically target City employees and the special banking privileges and incentives were also made available to the employees of area businesses and other non-City organizations. See Advisory Opinion No. 95-14; see also Advisory Opinion No. 2000-04 ("another example where the 'generalized' nature of the gift will in all likelihood likewise mean that no Chapter 68 violation has occurred is when a gift is extended to all City employees").

Most recently, in Advisory Opinion No. 2006-04, the Board concluded that a City employee may accept a discount offered to government employees by a hotel chain, car rental agency, cellular service provider, or other similar vendor, for the City employee's private use, where the discount is available generally to all government employees and the vendor has been made aware that the City employee is not on official City business. See Advisory Opinion No. 2006-04 (acceptance of discounts permissible when "the discount is not being offered with any intention of influencing government action, but instead may be more accurately labeled an attempt 'to solicit a large group of potential customers.'" Id. at p. 4).

III. The Law in Other Jurisdictions

A. Federal Law

In 2001, at the request of the House Committee on Government Reform, the General Accounting Office, now called the Government Accountability Office ("GAO"), conducted an informal inquiry into the treatment of frequent flyer miles accumulated on official federal government employee travel. The GAO found that federal policies prohibiting federal employees from retaining frequent flyer miles for personal use and encouraging employees to use accumulated miles for official government travel were not advisable. Federal efforts to require agencies to encourage employees to use accumulated miles for official travel were difficult to implement because airlines typically "regard frequent flier miles as belonging to the individual traveler, not the organization that pays for the travel" and "employees are often reluctant to provide their employers with account statements detailing both official and personal travel." As a result, "practical constraints and the burden and cost of administering the program" limited any benefits to the government. See May 24, 2001, Letter from the US

Comptroller David M. Walker to the House Committee on Governmental Reform, detailing the GAO study.

Later in 2001, the President signed into law the National Defense Authorization Act for Fiscal Year 2002. Section 1116 of the act expressly authorized most federal employees to retain, for personal use, any “promotional item (including frequent flyer miles, upgrade, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at Federal Government expense,” provided that “the promotional item is obtained under the same terms as those offered to the general public and at no additional cost to the Federal Government.” See National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012. Similarly, the Code of Federal Regulations (“C.F.R.”) provides that Federal employees may retain for personal use promotional benefits received from travel service providers in connection with official travel. See 5 C.F.R. § 2635.203; 41 C.F.R. 301-53.2. While frequent traveler benefits may be used “to obtain travel services for a subsequent official travel assignment(s),” employees may also retain the benefits for personal use, including upgrading to a higher class of service while on official travel. See 41 C.F.R. 301-53.3. Federal employees may not, however, “select a travel service provider based on whether it provides frequent traveler benefits.” See 41 C.F.R. 301-53.4.

It is also worth noting that the United States’ Internal Revenue Service has issued an announcement clarifying its position that it will not assert a federal tax liability for frequent flyer miles or other promotional items received as a result of business travel and used for personal purposes. See IRS Announcement 2002-18, 2002-1 C.B. 621.

B. New York State

The New York State Ethics Commission has not issued an opinion on whether it is appropriate for a State employee to use for personal travel frequent flyer miles earned on official travel. However, the New York State Office of General Services has published a travel advisory, available at <http://www.ogs.state.ny.us/supportservices/travelinfo/travelfaq.html>, informing State employees of travel procedures. State employees traveling on State contract airfares are allowed to accumulate frequent flyer miles, but participation in a frequent flyer program must not influence employee flight selection. The travel advisory does not specify any restrictions on the use of frequent flyer miles for subsequent travel.

C. Decisions of Other States

A review of decisions from jurisdictions across the country reveals that there is no clear consensus on the appropriate treatment of frequent flyer miles of public employees. It is worth noting, however, that many of the latest state advisory opinions were issued prior to the passage of the National Defense Authorization Act of 2002 (Pub. L. No. 107-107, 115 Stat.1012), the federal law authorizing personal accumulation of frequent flyer miles for most federal employees.

Several states have determined that it would not be appropriate for state employees to accumulate frequent flyer miles for personal travel. The Ohio Ethics Commission prohibits a state official or employee from accepting a discounted or free frequent flyer airline ticket, if the benefit was obtained from the purchase of airline tickets for use in official travel. See Ohio Ethics Commission Advisory Opinion No. 91-010 (December 5, 1991). Personal

accumulation of miles is not allowed because (1) a public employee could be swayed to choose flights in order to accrue miles, rather than to choose flights with the most economically priced carrier; (2) the offer of “frequent flyer” miles could result in an improper influence upon the public employee; and (3) there is no provision in the state’s statutory law authorizing public employees to use, for their personal benefit, “frequent flyer” benefits as compensation or a fringe benefit. See Ohio Ethics Commission Advisory Opinion No. 91-010 (December 5, 1991).

Similarly, the South Carolina State Ethics Commission has stated that public employees are not to accumulate frequent flyer miles and other benefits from agency expenditures for personal use since such benefits result from the expenditure of public funds. See South Carolina State Ethics Commission Advisory Opinion 92-022 (December 18, 1991).

Other states have chosen to require public employees to transfer frequent flyer miles to the state agency that employs them, for use on official travel. However, in the event that the frequent flyer miles are not transferable, a public employee may use the miles for personal travel. See Hawaii State Ethics Commission Advisory Opinion 88-9 (July 20, 1988); Minnesota State Statute 15.435. The Hawaii State Ethics Commission further noted that it was sensitive to the fact that the public might perceive the personal use by state employees of travel benefits acquired from state travel as unfair or unjust compensation. However, the Commission did not believe that the state ethics code prohibits the receipt by employees of all benefits and privileges that may accompany public employment. See Hawaii State Ethics Commission Advisory Opinion 88-9 (July 20, 1988).

Other states have allowed personal accumulation of frequent flyer miles, provided that flight selection is not influenced by the practice. The Washington State Executive Ethics

Board has issued an opinion permitting state agencies to allow state employees to use frequent traveler benefits earned on official travel, provided that the state employees do not participate in the selection of a carrier when they receive frequent flyer miles for travel on that carrier.

See Washington State Executive Ethics Board Advisory Opinion 03-03 (February 14, 2003);

see also South Dakota Official Opinion of Attorney General No. 90-04 (January 12, 1990)

(“the mere fact that traveling on state business has caused certain incidental benefits to be conferred by third parties does not require that the employee account for them to the State”).

The Texas State Ethics Commission has stated that frequent flyer miles “are not things of value belonging to the government for purposes of the criminal law prohibiting misapplication of a thing of value belonging to the government.” However, the Texas State Commission further stated that a particular agency would not be prevented from adopting a policy requiring that such travel awards be used for agency purposes. See Texas State Ethics Commission, A Guide to Ethics Laws for State Officers and Employees, Revised September 1, 2005.

IV. Discussion

As discussed above, the Board has permitted City employees to accept commercial discounts in certain instances where the discounts are made available to a broad group of individuals. Acceptance in these circumstances is permissible because such discounts are offered without the intention of influencing official employee behavior, but merely as an attempt to “solicit a large group of potential customers.” See Advisory Opinion 95-14 (employees of a City agency may accept an offer of special banking privileges because the offer did not specifically target City employees); see also Advisory Opinion No. 2006-04 (a

City employee may accept for personal use a discount from a hotel chain or similar vendor when the discount is made available to all government employees, and the employee discloses that he or she is not on official business, because “the discount is not being offered with any intention of influencing governmental action,” but instead “to solicit a large group of potential customers.”); New York State Ethics Commission Advisory Opinion No. 05-1 (March 28, 2005) (because the discounts at issue were available to state employees as well as to federal and city employees, they could not “be considered a prohibited gift” or “an unwarranted privilege of government service”).

Under a similar analysis, the retention of frequent flyer miles earned while traveling on official business through participation in a widely accessible frequent flyer miles program would not, on its face, be prohibited under Chapter 68. As with permissible commercial and hotel discounts, frequent flyer miles programs available to City employees traveling on official business are also made available to a broad base of other travelers. While accumulation of frequent flyer miles for personal travel would usually have a monetary value greater than or equal to the \$50 threshold specified for a “valuable gift” as defined by the City Charter (see Board Rules Section 1.01(a)), the use of frequent flyer mileage for personal travel would not be prohibited because “there is no realistic possibility that the offeror is seeking to influence any governmental decision or to reward any employee for any official action.” See New York State Ethics Commission Advisory Opinion No. 05-1 (March 28, 2005).

Further, it is unlikely that the personal accumulation of frequent flyer miles would create the appearance that a City employee has received a valuable gift because of his or her official position, since such frequent flyer benefits are freely available from most airlines to

all of the airline's individual travelers. Frequent flyer miles are not accumulated by virtue of the fact that the City employee is a City employee, but rather that the City employee is a traveler on the airline. Thus, Charter Section 2604(b)(3) would not be violated, provided that the employee did not influence the selection of flights for the purpose of obtaining frequent flyer miles.

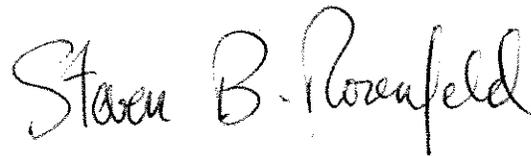
Frequent flyer benefits, however, unlike the commercial discounts examined in previous advisory opinions, accrue when City funds are used to pay for official travel. Because the City purchases the flights that generate frequent flyer mileage for City employees, the City could elect by statute, regulation, or policy to retain any benefit of such expenditures. The retention and use of these miles by employees for their personal travel might arguably violate the prohibition of Board Rules Section 1-13(b) against using City resources for personal purposes. However, because frequent flyer miles typically accrue to the individual traveler, the administrative and personnel burdens of enforcing such rules would seem to make them an unlikely way of saving costs. It would be impractical for the City to attempt to "harvest" these miles, or to require City employees to segregate miles earned from City travel from those earned on personal travel and to use these segregated miles for future City travel.

Accordingly, the Board concludes that City employees will not violate Chapter 68 if they retain for personal use frequent flyer miles accrued on City travel, *provided* that employees do not use their City positions to choose travel arrangements to accrue their own frequent flyer benefits at additional expense to the City. Moreover, should the City or individual City agencies elect to adopt and enforce a rule requiring the use of frequent flyer

miles earned on travel purchased by the City only for subsequent City travel, nothing in this opinion should be read to limit the adoption and enforcement of such a rule.

V. Conclusion

It would not be a violation of Chapter 68 for City employees to accumulate and use for personal travel frequent flyer miles earned while traveling on official business. A City employee must not, however, make a flight selection at additional expense to the City in order to receive or increase frequent flyer benefits. This opinion should not be read, however, to restrict a City agency from determining to require that miles earned on City travel be used only for subsequent City travel.



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