



August 6, 2018

John B. McCuskey, State Auditor
State Capitol, Building 1, Suite W-100
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Purchase of meals by Supreme Court

Dear Mr. McCuskey:

Thank you for your letter of July 26, 2018, outlining the position of your office concerning the Supreme Court of Appeals' use of a state purchasing card to pay for working lunches for the Justices and their staff members on days when the Justices worked together throughout the course of a day, for example, argument docket days and administrative conference days.

We are aware of the Advisory Opinions issued by the West Virginia Ethics Commission on the subject, which, although instructive, do not apply to the judicial branch of government. In this regard, W. Va. Const., art. VIII, §3 establishes the Court's power to control the administrative business of the judiciary. *See, e.g.,* Syllabus Point 1, *State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 507 S.E.2d 376 (1998): "Not only does our Constitution explicitly vest the judiciary with the control over its own administrative business, but it is a fortiori that the judiciary must have such control in order to maintain its independence." *See also* Syllabus Point 2, *State ex rel. Lambert v. Stephens*, 200 W. Va. 802, 490 S.E.2d 891 (1997). This latter factor is why the "working lunches" issue concerning the Court was properly submitted for resolution to the Judicial Investigation Commission, not the West Virginia Ethics Commission. The JIC concluded that "there is no probable cause to believe that you violated the Code of Judicial Conduct. You employed an already well-established policy utilized by other State agencies to make the Court run more efficiently and effectively on argument docket and administrative conference days."

We respectfully disagree with your statement that "members and employees of the Supreme Court may not use public funds to purchase personal meals during a non-travel workday." As noted above, the Court has both express and implied authority under the West Virginia Constitution to make that determination as to the judicial branch of government, subject to the limitation, as set forth by the JIC, that the expenditure of public funds must be "consistent with [the Court's] public mission and where there is a commensurate benefit to the governmental body and to the public." ¹

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We also respectfully disagree with your statement that the Court's use of a p-card to purchase working lunches is "contrary to the policies and procedures of the purchasing card program, and generally prohibited under law." None of the Advisory Opinions noted above support this sweeping conclusion; indeed, none of the opinions cited in your letter even mention the p-card issue. Further, nothing in the p-card regulations supports the conclusion that a card cannot be used to purchase a working lunch. Finally, the use of a p-card in these circumstances furthers the important goal of transparency, as the paperwork submitted for the purchase of working lunches contains not only a copy of the invoice but also the name of every individual who received a lunch. In short, there is and was nothing secret about the Court's working lunches.

As you probably know from the media reports to which you allude in your letter, the issue of working lunches is now moot, inasmuch as the Court has ceased the practice. However, we appreciate your offer to work cooperatively with us on other issues as they arise, and will most certainly take you up on that.

Please feel free to contact me if you have any questions or concerns.

With kindest regards, I remain

Very Truly Yours,

Barbara H. Allen
Interim Administrative Director

BHA/mg

cc: Margaret L. Workman, Chief Justice
Robin Jean Davis, Justice
Elizabeth D. Walker, Justice
Teresa Tarr, Esq., Judicial Investigation Commission

¹ In this regard, in Advisory Opinion 2012-27, the Ethics Commission concluded that a state licensing board could purchase meals for members and staff "who are required to be present at the meeting as part of their job duties, when the meal is provided for the benefit of the Board, i.e., to accomplish its work." Further, in Advisory Opinion 2018-02, the Commission reviewed (and in some cases distinguishes) a number of its prior opinions and stated, *inter alia*, that "[t]he decision to purchase the meal must be based upon a legitimate government reason, i.e., that the agency is having a working lunch or dinner in order that agency business may be conducted most efficiently and effectively."