

The State of South Carolina



Office of the Attorney General

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November 2, 1992

The Honorable Herbert Kirsh
Member, House of Representatives
Post Office Box 31
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Dear Representative Kirsh:

Referencing proviso 129.35 of the 1992-93 Appropriations Act, Act No. 501 of 1992, and instances in which state employees are allowed to accumulate frequent flier miles for personal use when traveling on official state business, you have asked for our opinion as follows:

1. Does the practice of allowing state employees to accumulate frequent flier miles for personal use when traveling by air on official state business constitute a perquisite?
2. If this practice does constitute a perquisite, are state employees who currently accumulate such mileage in non-compliance with proviso 129.35?
3. If this practice does constitute a perquisite, are the state employees listed in the proviso exempt from coverage, and may they thus continue to receive such a perquisite?

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Proviso 129.35

Proviso 129.35 pertains to allowances for residences and compensation restrictions. The part of the proviso relevant to your inquiry is as follows:

That salaries paid to officers and employees of the State, including its several boards, commissions, and institutions shall be in full for all services rendered, and no perquisites of office or of such employment shall be allowed in addition thereto,

The proviso fails to define the term "perquisite," however.

Frequent Flyer Programs

To learn how frequent flier programs operate, this Office obtained information on such programs from two airlines, as representative of the several available programs. Each will be summarized.

A. USAir. USAir operates a Frequent Traveler Program. Its information booklet, effective November 1991, advises that individuals must enroll separately and may enroll only once in the Program. Corporations, partnerships, or other entities are not permitted to enroll as participants. Mileage earned will be credited only to the account of the frequent flier whose name is on the ticket, regardless of who actually pays for the ticket. Mileage credit is not transferable, and mileage of one frequent flier may not be combined with mileage of other fliers.

Once the necessary miles are accumulated, the flier redeems same for an Award Certificate as outlined in the booklet. The certificate is issued only in the name of the frequent flier earning the miles and may be exchanged for travel only by that person. However, the certificate may be transferred to a friend, relative, or traveling companion under conditions specified in the booklet. Proof of family relationship will be required for certain transfers.

B. Delta Air Lines. Delta's Frequent Flyer Program is outlined in Delta's "Awards, Rules & Conditions" booklet (copyright 1992). Individuals must enroll separately and may enroll only once, that one account to serve both business and personal travel needs. Neither corporations nor entities may enroll as participants. Individual fliers

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maintain their own credits; mileage from one account cannot be combined with mileage from other accounts.

Once the desired mileage has been accumulated, the flier redeems same for an award travel certificate, which may be exchanged for a ticket only by that individual. When a ticket is issued, the flier can designate a family member or dependent to fly on that ticket. Under certain circumstances, award tickets may be issued to a non-family member.

Both Delta and USAir provide notice that frequent flier travel award certificates are not to be brokered, bartered, sold, traded, altered, or the like. Such activity will void the certificates and can subject the certificates to confiscation.

"Perquisite"

Proviso 129.35 does not define "perquisite." In examining an earlier proviso (of identical language) in the 1983-84 appropriations act, this Office in an opinion dated March 29, 1984, stated:

Perquisite ordinarily means "a privilege, gain or profit incidental to employment in addition to regular salary or wages." ... There is nothing herein to suggest a legislative intent to define "perquisite" otherwise. ... Since the General Assembly has been most specific in listing the particular benefits of public employment, it is doubtful that additional benefits of public employment, such as receptions [for retiring employees, funded by public funds], may be assumed to be authorized.

See also Ops. Atty. Gen. dated May 22, 1989; December 22, 1988, August 5, 1988; and 63A Am.Jur.2d Public Officers and Employees § 450, which contain the same or substantially the same definition of "perquisite." Many judicial decisions from other jurisdictions are in accord with this definition of "perquisite." See, for examples, Bates v. Gulf States Utilities Co., 249 La. 1087, 193 So.2d 255 (1966); Harris County v. Hammond, 203 S.W. 445 (Tex.Civ.App. 1918); State ex rel. Harbage v. Ferguson, 60 Ohio App. 189, 36 N.E.2d 500 (1941); Scotts Bluff County v. McHenry, 266 N.W. 586 (Neb. 1936); Christopherson v. Reeves, 44 S.D. 634, 184 N.W. 1015 (1921); City of Kettering v. Berger, 4 Ohio App. 3d 254, 448 N.E.2d 458 (1982).

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If a participant state employee in a frequent flier program provides his/her account number when making reservations and when boarding the airplane, the individual would receive credit for the appropriate mileage. As understood by this Office, apparently no distinction is made between travel for business and travel for personal reasons; all mileage is accumulated in one account. If the participant-state employee subsequently redeems his/her frequent flier mileage for official travel, arguably the employee's agency or department benefits; while the agency cannot itself be a participant (at least with the USAir and Delta programs), the agency could save on the expense of the ticket for which the frequent flier has redeemed mileage. Because the agency would be spared the expense of the additional ticket, in that instance the participation in the frequent flier program might not be considered a perquisite of office or employment. No personal benefit in addition to salary or wages is accruing to the employee.

More troublesome, however, is the instance in which the participant-state employee redeems the frequent flier mileage, gained by flying on official state business on a ticket paid for with public funds, for tickets for personal travel. As to those miles traveled on official state business, the employee would not receive the benefit but for the fact of traveling on a ticket paid for with public funds. Being able to redeem the mileage for personal travel seems to confer an indirect monetary benefit to the state employee, in addition to authorized salary or wages, since he/she will not be required to pay the cost of the award certificate and resulting ticket. In such a case, retention and use of frequent flier miles may well amount to a perquisite, as such would result from services being rendered to the state.

This Office has no way of knowing how the many state agencies handle making airline reservations for employees who participate in frequent flier programs. Our Office does not provide airline reservation offices with individuals' account information when reservations are made, so that the issue of using mileage accrued on official trips for subsequent personal travel does not arise later for employees in our Office. Perhaps the General Assembly or the Budget and Control Board would consider studying the practice, to have the situation handled uniformly by all state agencies; or the General Assembly may wish to clarify the proviso or otherwise provide legislative guidance.

In response to your first question, use of frequent flier mileage by state employees, earned while traveling on official state business, might amount to a perquisite, depending on the subsequent use made of the mileage so accumulated. In response to your second question, state employees who accumulate mileage from travel on official state business, who subsequently redeem the mileage for personal travel, may be deemed not to be

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complying with proviso 129.35. (Ultimate resolution of your questions will depend on the facts of each situation, of course.)

In response to your third question, it is observed that proviso 129.35 continues:

... but such perquisites, commodities, services or other benefits shall be charged for at the prevailing local value and without the purpose or effect of increasing the compensation of said officer or employee. The charge for these items may be payroll deducted at the discretion of the Comptroller General or the chief financial officer at each agency maintaining its own payroll system. This shall not apply to [various residential and institutional facilities and personnel as listed therein]

...

The state employees listed in the proviso are apparently exempted from having perquisites, commodities, services, or other benefits, which would ordinarily be charged at the prevailing local rate, payroll-deducted from the employees' pay. For example, certain officials and employees are permitted to occupy residences owned by state agencies or departments, without charge; guards at the state's penal institutions are provided meals while on duty and other services, without charge; and the like. Whether these individuals would be exempt from the coverage of proviso 129.35 relative to retention of frequent flier mileage earned on official trips but used for personal purposes is, at best, uncertain; it could be argued that unless such benefits would have been charged for as provided in the proviso, such exemption would not apply. Again, analysis of each agency's policy and the use to which an employee puts mileage earned on official trips might be necessary. Legislative clarification would be advisable, to ensure that legislative intent is being effectuated.

This Office is aware of an ethics advisory opinion, SEC A092-212, issued September 16, 1992 by the State Ethics Commission. Construing the provisions of the ethics statutes, the Ethics Commission concluded that "Personal use of bonus points for lodging or frequent flyer points obtained through the State travel is not an ipso facto violation of the Ethics Reform Act;" the Ethics Commission also suggested that the issue involves a policy decision which should be addressed by the General Assembly or the applicable governmental agency. That opinion did not construe the proviso of the appropriations act as discussed in our opinion; nor does this Office offer additional

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comments as to applicable ethics laws. We concur with the suggestion that guidance by the adoption of a policy or other guidance by the General Assembly would be beneficial.

We hope that the foregoing has been responsive as is possible under the circumstances. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

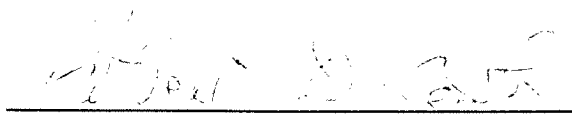
Sincerely,



Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



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