

MEMORANDUM

State of Alaska

Department of Law

TO: State Supervisor

DATE: March 21, 1996

FILE NO.: 663-96-0360

TELEPHONE NO.: 465-3600

FROM: Craig Wm. Black
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SUBJECT: Ethics: Tips Received by
Marine Highway Employees

I. INTRODUCTION

The Marine Highway System recently issued a memorandum to its employees reminding them that, as state employees, they are prohibited under the Executive Branch Ethics Act from accepting, receiving, or soliciting tips for performing their shipboard duties. Attorney X, who works for a union that represents certain Marine Highway personnel, wrote to the attorney general in January to inquire about the prohibition. My research concludes that the ethics act prohibits these and other state employees from accepting tips.

II. DISCUSSION

Under AS 39.52.120(b)(2), a public officer may not accept, receive, or solicit compensation for the performance of official duties or responsibilities from a person other than the state. A previous opinion states that “[t]his provision was intended both to prevent bribes and to prevent employees from receiving double pay for performing their normal duties.” 1987 Inf. Op. Atty Gen. at 2 (Apr. 24; 663-87-0389).

Certain shipboard ferry employees such as bartenders and wait persons occasionally receive gratuities from customers for their services. The tips come in addition to their state salaries. Because the state already pays its employees to perform their duties, any additional sum received by the employees for performing their duties amounts to additional compensation from a person other than the state. This is just the sort of double pay that AS 39.52.120(b)(2) is meant to eliminate.

The meaning of the term "compensation" in AS 39.52.120(b)(2) has not been set by case law or regulation. However, its meaning in the area of federal income tax collection is well established and may fairly be applied in this context.

Congress has defined gross income to include compensation for services. 26 U.S.C. 61(a)(1) (1995). Numerous taxpayers have attempted to avoid paying income tax on tips by claiming that tips are not compensation. The courts have had no difficulty in rejecting these arguments. *Allen v. U.S.*, 976 F.2d 975 (5th Cir. 1992); *Killoran v. Commissioner*, 709 F.2d 31 (9th Cir. 1983); *Cracchiola v. Commissioner*, 643 F.2d 1383 (9th Cir. 1981); *Olk v. U.S.*, 536 F.2d 876 (9th Cir. 1976); *Andrews v. U.S.*, 295 F.2d 819 (Ct. Cl. 1961); *Roberts v. Commissioner*, 176 F.2d 221 (9th Cir. 1949). Given this line of authority, it appears that tips must be considered compensation.

Attorney X's letter attempts to avoid the double compensation prohibition in AS 39.52.120(b)(2) by claiming that tips are not compensation. Instead, Attorney X's letter asserts that tips are gifts, which are permitted to an extent under AS 39.52.130. That section of the ethics act bars a public officer from soliciting, accepting, or receiving a gift under circumstances that suggest that the gift is intended to influence the officer's performance of official duties, actions, or judgment. AS 39.52.130(a).

The two sections of the ethics act, AS 39.52.120 and 39.52.130, contain different prohibitions and operate independently of one another. The courts consistently reject the argument that tips are gifts, not compensation. In *Killoran*, 709 F.2d at 31, a cab driver contended that his tips were not taxable income, but non-taxable gifts. The driver claimed that his customers tipped him out of a detached and disinterested generosity because they lik(ed) and respect(ed) him, and that he accepted the tips only on the condition that they were given as gifts and not compensation for cab services performed. *Id.* Attorney X's letter makes the same argument about tips for Marine Highway employees.

The court disagreed. It found an element of compulsion in tipping, an element not found in gifts. The court also found that tips are given as compensation in return for services rendered. *Id.* See also, *Olk*, 536 F.2d at 879 (tip given to a craps dealer is compensation, not a gift); *Andrews*, 295 F.2d at 819 (tips given to taxi drivers are taxable income, not gifts); *Roberts*, 176 F.2d at 223, 234 (tipping lack[s] the essential element of a gift, -- namely, the free bestowing of a gratuity without consideration; tips are additional compensation for services).

Even if deemed a gift, a tip given to a state employee in connection with the employee's performance of official duties would likely not be acceptable under AS 39.52.130(a). That subsection requires determining whether it is reasonable to infer that the tip was intended to influence the employee's performance. Without implying any wrongdoing by the employee, it could reasonably be inferred that a passenger would tip an employee in order to receive additional service.

It might be argued that by enforcing the elimination of tips required by the ethics act, the incomes of Marine Highway personnel will be unfairly reduced. In our discussions, I learned that tipping was significantly reduced on the ships in the early 1980s when the dining halls were removed from most ships. To compensate wait persons for the anticipated loss of tips, their salaries were increased. (Note that at that time, the ethics act had not been enacted.) Furthermore, since the mid 1980s, all of the ships have carried signs stating that tipping is not required. As a result, the impact on income from enforcement of the ethics act is expected to be minimal.

III. CONCLUSION

Alaska Statute 39.52.120(b)(2) prohibits Marine Highway personnel from accepting, soliciting, or receiving tips because tips are compensation for performance of official duties that are paid for by passengers, not the state. I hope that this assists you in providing guidance to Marine Highway personnel.

CWB/bap

cc: Gary Hayden, Department of Transportation & Public Facilities
Attorney X