

**OPINION NO. 86-086****Syllabus:**

1. The State Lottery Commission has the implied authority to promote the state lottery and may, therefore, expend public funds for those activities which the Commission determines serve the function of promoting the lottery. The Commission may not, however, abuse its discretion in making such determinations.
2. The State Lottery Commission may expend public funds for the provision of meals for its employees and other persons at meetings of the Commission or at meetings related to the business of the Commission only where the Commission has determined that the provision of such meals is necessary to the performance of a function or duty expressly or impliedly conferred upon the Commission by statute and if its determination is not manifestly arbitrary or unreasonable.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, November 19, 1986**

I have before me your request for my opinion concerning the permissibility of various expenditures by the State Lottery Commission. Specifically you ask:

1. May the Ohio Lottery Commission lawfully expend public moneys for promotional activities including:
  - a) Dinners for millionaire winners, their spouses and/or friends, and members of the news media; and
  - b) Promotional articles such as emery boards, pins, pens, bags, and similar materials?
2. Under what, if any circumstances may the Ohio Lottery Commission expend public moneys to provide meals for employees and/or independent third parties attending meetings related to business of the Commission?

The State Lottery Commission is created by R.C. 3770.01. As a creature of statute, the Commission has only those powers which the legislature has granted either expressly or by necessary implication. See Burger Brewing Co. v. Thomas, 42 Ohio St. 2d 377, 329 N.E.2d 693 (1975); 1977 Op. Att'y Gen. No. 77-090.

In State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981), the court considered whether a county board of mental retardation (now a county board of mental retardation and developmental disabilities), see generally R.C. Chapter 5126, is empowered, in the absence of express statutory authorization for or prohibition against the expenditure of public funds for such purpose, to expend public funds to disseminate information about the board's activities. Concerning the propriety of such expenditures, the court stated: "[I]t is within the implied power of a public agency to disseminate information both to those who are directly affected by its operation and the general public. Such a function may be fairly implied where it is reasonably related to the duties of the public agency." 66 Ohio St. 2d at 470, 423 N.E.2d at 113.

The expenditures of the State Lottery Commission about which you ask in your first question are characterized in your letter as "promotional activities." Pursuant to R.C. 3770.02, the Director of the Lottery Commission is responsible for supervising and administering the state lottery. The Director is also under a duty to appoint deputy directors of marketing, operations, and administration. R.C. 3770.02. Further, pursuant to R.C. 3770.02, the Director is specifically authorized to "enter into contracts for the operation or promotion of the lottery pursuant to [R.C. Chapter 125]" (emphasis added). It is clear that the nature of the state lottery is such that the marketing or promotion of participation in the lottery is essential to the successful operation of the lottery. See generally Webster's New World Dictionary 837 (2d college ed. 1978)(defining "lottery," in

part, as: "a game of chance in which people buy numbered tickets, and prizes are given to those whose numbers are drawn by lot: sometimes sponsored by a state or organization as a means of raising funds" (emphasis added)). The promotional activities about which you ask appear to be designed primarily to increase public awareness of, and, thus, participation in, the lottery. Since, as set forth in Seminatore, a public agency has the implied authority to expend funds to disseminate information to the general public about the agency's activities, where such dissemination is reasonably related to the duties of the agency, I conclude that the Lottery Commission possesses the implied power to expend public funds for activities designed to promote the state lottery.

Your question specifically mentions expenditures for dinners for lottery winners, members of the news media, and other persons, and for other promotional articles, such as pins and bags. Concerning a public agency's choice of methods for the dissemination of information about its activities, the court in Seminatore stated:

Whether or not it is appropriate to disseminate the information, the means to be utilized therefore, including advertising in newspapers, lies in the first instance within the sound discretion of the public agency involved. Only where an abuse of discretion is shown either as to the nature of the information, the means of dissemination or the amount of money expended are the courts authorized to interfere with the exercise of such implied power.

66 Ohio St. 2d at 471, 423 N.E.2d at 113. Thus, in determining whether particular expenditures may be made by the State Lottery Commission for promotional activities, the appropriate standard for review is whether the Commission has abused its discretion in determining to make such expenditures. In the absence of any facts showing that the Commission has abused its discretion in authorizing the expenditures for the promotional activities about which you ask, I conclude that the State Lottery Commission may expend the Commission's funds for such activities.<sup>1</sup>

Your second question asks under what circumstances the State Lottery Commission may expend public funds to provide meals for its employees and other persons attending meetings related to Commission business. No statutory provision

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<sup>1</sup>In considering the permissibility of the expenditure of any public funds, it is necessary to determine that the expenditure constitutes a public purpose. As stated in 1982 Op. Att'y Gen. No. 82-006 at 2-17: "if the primary objective is to further a public purpose, it is immaterial that, incidentally, private ends may be advanced." In State ex rel. Corrigan v. Seminatore, 66 Ohio St. 2d 459, 469, 423 N.E.2d 105, 112 (1981), the court specifically states in note 8 that the expenditure of public funds by an agency for the dissemination of information serves a public purpose. Thus, in the situation about which you ask, although the dinners and other promotional articles may incidentally benefit private persons, so long as the promotion of the state lottery is primarily served, such private benefit is immaterial.

expressly authorizes such expenditures. I must, therefore, determine whether the Commission possesses the implied power to provide meals.

Part of your second question concerns the circumstances under which the State Lottery Commission may provide meals for Commission employees. As stated in 1982 Op. Att'y Gen. No. 82-006, the provision of meals by an employer for his employees may be considered a fringe benefit, a component of compensation. See also 1981 Op. Att'y Gen. No. 81-052. I will, therefore, first address the Commission's general power to compensate its employees.

Pursuant to R.C. 3770.02, the Director of the State Lottery Commission "shall appoint deputy directors of marketing, operations, and administration. The director may also appoint such professional, technical, and clerical assistants as are necessary. All such officers and employees shall be appointed and compensated pursuant to [R.C. Chapter 124]" (emphasis added). R.C. Chapter 124, however, does not authorize the provision of meals as a form of compensation for Lottery Commission employees. See also 1981 Op. Att'y Gen. No. 81-056. I must conclude, therefore, that the State Lottery Commission may not provide meals for its employees as a form of compensation.<sup>2</sup>

I must next consider whether the State Lottery Commission is otherwise authorized to expend public funds for meals for employees, as well as other persons. The extent to which creatures of statute, like the State Lottery Commission, may expend public funds for such things as meals and refreshments is discussed in Op. No. 82-006. As summarized in Op. No. 82-006, a creature of statute may make expenditures of the type about which you ask only if it "has reasonably determined that the provision of such amenities is necessary to the performance of a function or duty or to the exercise of a power expressly conferred by statute or necessarily implied therefrom." Op. No. 82-006 at 2-19.

A similar question was addressed in 1975 Op. Att'y Gen. No. 75-008, which concludes that, a board of education, also a creature of statute, may not expend public funds to provide meals for persons attending a local meeting of the board. The facts upon which that conclusion was based were that the meals were provided for the board members, who are public officers, and the meetings took place locally and involved no travel from headquarters. Op. No. 75-008 states at 2-34: "While a public purpose is served when the board meets, the public receives no benefit from expenditures for lunches or dinners which are served at such meetings, because meals are not necessary to the conduct of the meetings." Op. No. 82-006, however, limited the conclusion reached in Op. No. 75-008 to the specific facts considered in the latter opinion and noted that there may be instances in which a public agency may expend public moneys to provide meals in the local area. Op. No. 82-006 concludes that a public agency may expend public funds to provide meals and refreshments for employees or other persons "if it determines that such expenditures are necessary to perform a function or

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<sup>2</sup> I am assuming for purposes of this opinion that there exist no collective bargaining agreements covering the wages, hours, and terms and conditions of employment of the employees about whom you ask. See generally R.C. Chapter 4117; 1984 Op. Att'y Gen. No. 84-092.

to exercise a power expressly conferred upon it by statute or necessarily implied therefrom and if its determination is not manifestly arbitrary or unreasonable" (syllabus, paragraph three).

Concerning meetings of the State Lottery Commission, R.C. 3770.03 states in part: "The state lottery commission shall meet with the director of the commission at least once each month and shall convene other meetings at the request of the chairman or any five of the members." Since the Commission is directed by statute to convene meetings, the Commission has the implied power to pay the necessary expenses of conducting such meetings. Cf. 1970 Op. Att'y Gen. No. 70-061 (a county board of education is expressly authorized to conduct discussion meetings and is, therefore, impliedly authorized to expend funds necessary for the administration of such meetings). In addition, I note that Commission employees may conduct informal meetings with various persons. The State Lottery Commission has duties, e.g., the promotion of the state lottery, unlike those of a board of education, the public agency concerned in Op. No. 75-008, and may, therefore, have occasion to determine that the provision of meals at meetings related to the business of the Commission is necessary to the conduct of a function or duty of the Commission. Thus, in accordance with the analysis set forth in Op. No. 82-006, I conclude that the State Lottery Commission may expend public funds for the provision of meals for its employees and other persons at meetings of the Commission or at meetings related to the business of the Commission only where the Commission has determined that the provision of such meals is necessary to the performance of a function or duty expressly conferred by statute or necessarily implied therefrom and if its determination is not manifestly arbitrary or unreasonable.

It is, therefore, my opinion, and you are advised, that:

1. The State Lottery Commission has the implied authority to promote the state lottery and may, therefore, expend public funds for those activities which the Commission determines serve the function of promoting the lottery. The Commission may not, however, abuse its discretion in making such determinations.
2. The State Lottery Commission may expend public funds for the provision of meals for its employees and other persons at meetings of the Commission or at meetings related to the business of the Commission only where the Commission has determined that the provision of such meals is necessary to the performance of a function or duty expressly or impliedly conferred upon the Commission by statute and if its determination is not manifestly arbitrary or unreasonable.