

## **Information sheet on the prohibition of the acceptance of gratification or gifts by employees of the Free State of Bavaria**

### **I. Legal situation regarding public servants**

Public servants must avoid giving any impression of being susceptible to taking personal advantages while carrying out their official duties. According to Section 42 of the Public Servants Status Act (*Beamtenstatusgesetz*, BeamStG) public servants may only accept gratification or gifts in connection with their office with the approval of the competent authority.

An infringement of this provision by public servants constitutes a breach of duty [Section 47 (1) BeamStG]. According to Section 47 (2)(1) BeamStG, it is considered a breach of duty if retired public servants or former public servants with pension income disobey the prohibition of accepting gratification or gifts with regard to their former office.

### **II. Legal consequences**

#### **1. Imprisonment or fine**

Public servants who accept, demand or accept the promise of an advantage in connection with acts related to their office and not contrary to duty, become liable to persecution due to the acceptance of benefits by a public official, which according to Section 331 of the German Penal Code (*Strafgesetzbuch*, StGB) is punishable by a fine or imprisonment of up to three years. If the act for which the public servant accepts, demands, or accepts the promise of an advantage is in some way contrary to duty, this constitutes corruption, for which Section 332 StGB stipulates imprisonment of between six months and five years; any attempt is also punishable.

#### **2. Further legal consequences**

Further legal consequences are stipulated in addition to fining or imprisonment, such as, for example, the objects obtained through the illegal act becoming the property of the state (confiscation, Sections 73 et seq. StGB). If a public servant is sentenced to imprisonment of one year or longer due to accepting benefits or due to corruption, then by act of law the status as a public servant is revoked when the verdict comes into effect (Section 24 BeamStG). This also applies if the public servant is sentenced to imprisonment of at least six months for corruption, insofar as the act was performed in connection with the duties of the public servant's main office. If public servants have retired after committing the act, they lose their rights as retired public servants with the verdict coming into effect (Section 59 of the Bavarian Public Servants Pension Act [*Beamtenversorgungsgesetz*, BeamtVG] in the version of the declaration of 16 March 1999, BGB I I p.322, 847, 2033, last amended by Section 6 of the law of 3 April 2009, BGB I I p.700). If a lesser penalty is imposed, disciplinary proceedings are usually carried out, potentially leading to removal from office for public servants and to the denial of pension payments for retired public servants. Furthermore, public servants are held liable for the damages incurred due to their illegal and culpable act (Section 48 BeamStG).

### **III. Explanations**

The following is to explain Section 42 in more detail:

#### **1. 'Gratification' or 'gifts' within the meaning of Section 42 BeamStG are all non-paid benefits public servants are not lawfully entitled to and that objectively improve their material or immaterial situation (advantage).**

A benefit is also deemed to be non-paid if services or goods are offered in return but are disproportionate in relation to the value of the service or goods offered to the public servant.

Such an advantage can lie in

- money payments,
- the provision of vouchers or objects (e.g. construction machines, vehicles) for private use,
- special discounts in private business interactions,
- the concession of rebates not generally granted to all members of the public service or general professional group that the public servant in question belongs to,
- the payment of disproportionately high compensation for private secondary employment – including approved-of employment (e.g. expert reports, compiling accounting records),
- provision of free means of travel (holidays),
- gastronomy services,
- provision of accommodation,
- inclusion in a will and
- any other benefits of any kind.

It does not matter whether the benefit was granted directly or by a third party commissioned by the granter. It has no bearing on the applicability of Section 42 BeamStG whether the public servant benefits directly or indirectly, for example through benefits granted to the public servant's family. The passing on of benefits to third parties, e.g. relatives, acquaintances, other employees or social institutions, does not 'justify' their acceptance; these cases, too, are subject to the approval of the responsible authority.

- #### **2. A benefit is deemed to be granted 'with regard to their office' within the meaning of Section 42 BeamStG if the granter is guided in their actions by the fact that public servants hold or have held a certain office. There need be no relation to any specific official act. The 'office' also includes all additional offices and any additional duties carried out at the supervisor's request, suggestion or instigation, or in connection with any secondary activities in connection with the official duties of the public servant. Benefits granted exclusively with regard to relations of the public servants within the private sphere are not deemed to be granted 'with regard to their office'. However, such relations may not be associated with expectations regarding the official duties of the public servants. Public servants who become aware of such expectations being associated with personal relations may no longer accept benefits in this context. The obligation to inform the supervisor of attempts to exert influence on the public servant's official duties detailed in Number 3 also applies here.**
- #### **3. Benefits subject to approval according to Section 42 BeamStG that are not to be deemed as tacitly approved according to Number 5 may only be accepted by the public servant after obtaining the approval of the responsible authority. If approval cannot be obtained on time, public servants may temporarily accept the benefit by way of exception but must seek approval without delay. If public servants are in doubt whether Section 42 BeamStG applies to the acceptance of a benefit or whether there is tacit approval, they must apply for approval according to Section 42 BeamStG. Furthermore, they are obligated to inform their supervisor of any attempts to exert influence on their official duties through offering gifts or gratification.**
- #### **4. Approval for the acceptance of a benefit may only be given if the circumstances of the case do not raise concerns**

that the acceptance could impede the public servant's objectivity in carrying out their duties or could create the impression of bias in third parties who learn of the benefit. Approval may not be given particularly in situations in which an intention on the granter's part to influence the official duties becomes apparent or if there are doubts in this respect. Approval can be given on the condition that the benefit be passed on to social facilities, the employer, or another body, institution or foundation under public law; as a rule it will be advisable to inform the granter that the benefit is being passed on. Approval should be given in writing.

Approval by the relevant authority does not, however, rule out a possible criminal nature of the act if the benefit was demanded by the public servant or if it constitutes a compensation for past or future acts contrary to duty.

5. The acceptance of gifts of low value as well as gifts from the public servant's colleagues (e.g. on the occasion of an anniversary) within the normal scope of such gifts may generally be regarded as having tacit approval.
6. Subject to the provisions in Number 8, the same applies to the usual and appropriate gastronomic services at events of a general nature that public servants participate in as part of their official duties, on behalf of the employer, or which they participate in as a result of the social obligations imposed on them in the course of their official duties, e.g. inaugurations or discharges of officials, official receptions, social events that serve the cultivation of official interests, anniversaries, cornerstone ceremonies, roofing ceremonies, dedications, exhibition openings, factory tours, and meetings of bodies of economic ventures that the public authorities are involved in.
7. Social representation of a public authority is limited to the authority's administration and the employees whom it tasks with such duties.
8. Partaking in gastronomic services as part of or on the occasion of official acts, meetings, viewings, or similar, that serve the preparation or execution of certain measures on the part of the administration may also be regarded as being tacitly approved if they are based on rules of social conduct and politeness and which public servants cannot abstain from without committing a breach of etiquette. This also includes the acceptance of benefits that facilitate or expedite the execution of official business (e.g. picking up a public servant at the railway station with a car).

#### **IV. Legal position regarding employees and trainees**

Employees of the public service (as opposed to public servants with the status of 'Beamte') may also only accept gratification or gifts with regard to their official duties with the approval of their employer;

offers to that effect must be reported to the employer without delay and unrequested [cf. Section 3 (3) TV-L].

The same applies to persons in training, for whom it is prohibited by collective bargaining laws to accept gratification and gifts. Breaches of these duties can constitute important reasons for instant dismissal of the employee. Inasmuch as the official duties of employees of the public service are concerned with public administration tasks, employees of the public service have the same status with regard to penal law as public servants. If they accept, demand or accept the promise of benefits in exchange for official acts, they are therefore punished according to Sections 331 and 332 StGB like public servants.

The same status with regard to penal law also applies to employees of the public service employed according to Section 1 of the obligation law or granted the same status according to Section 2 of the Act on Obligations of Public Servants (VerpflG); cf. Declaration of the Bavarian Ministry of Finance of 19 February 1975 Regarding the Implementation of the Obligation Law (StAnz No. 9 FMBl p.110 in the version of FMBek of 29 December 1980 StAnz 1981 No. 1/2 FMBl 1981 p.56).

The information under Point II (2) on confiscation and liability also applies to employees and trainees.

The provisions of Point III apply accordingly in all matters governed by Section 3 (3) TV-L and related provisions.

#### **V. Duties of the supervisor**

The public servants, employees, and trainees of the Free State of Bavaria are to be informed of their duties resulting from Section 42 BeamStG or the relevant provisions from collective agreements. It is the responsibility of the supervisors to ensure that employees are informed of these duties at regular intervals.

The supervisors are to attempt to prevent any violations of Section 42 BeamStG and Sections 331 and 334 StGB by employing appropriate organisation and personnel policies (e.g. personnel rotation, "two-person rule", unannounced checks). Employees whose financial situation is not stable are not to be employed in procurement or in posts in which they are in particular danger of exposure to undue influence from third parties.

#### **VI. Supplementary provisions**

In coordination with the State Ministry of Finances, the highest administrative authorities may make supplementary provisions, especially in order to provide for special circumstances in their sectors or in individual administrative branches.

The highest administrative authorities are advised to order employees in certain areas of responsibility which are thought to be subject to particular dangers (e.g. allocation, procurement) to report benefits received from the persons with whose matters they are concerned in writing.

## **Declaration**

I hereby confirm that I have received a copy of and have knowledge of the above information sheet.

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Place, date

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Signature