ADVISORY OPINION NO. 2010-18

Issued On November 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Council** asks whether it may use public funds to purchase Sam's Club cards for the personal use of its employees or their family members.

FACTS RELIED UPON BY THE COMMISSION

Sam's Club is a national chain of retail warehouse stores. In order to shop at Sam's Club, individuals must pay an annual membership fee of forty ($40) dollars. This type of membership (known as an "Advantage Membership") includes two (2) membership cards: one for the individual and another for a household member. The Advantage Membership does not allow for any additional persons to be added to the membership.

Sam's Club also offers a "Business Membership" for individuals who own or operate their own business. It extends the definition of "business" to include churches, civic groups, and governmental entities. In addition to a reduced annual membership fee of thirty-five ($35.00) dollars, a business membership includes three (3) membership cards: a personal card, a household member card, and a company card (for business purchases with a business check only). Unlike the individual Advantage membership, Business Members are eligible to sponsor up to eight (8) people under their business membership. Each add-on card costs thirty-five ($35) dollars a year, and includes a free card for a household member.

As a governmental entity, the Requester purchased a business membership with Sam's Club. It uses the membership for City related business. The City inquires whether it may provide the additional cards provided to the City as part of its business membership to its public officials or employees for their personal use. It further inquires whether it may purchase add-on cards to provide to public officials or employees as a perk of employment.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain[.]

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In establishing the Ethics Act, the West Virginia Legislature expressly held that "public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government." For this reason, the Commission has zealously upheld the express prohibitions of using public funds and resources for the private gain of public servants. W.Va. Code§ 6B-2-5(b).

The Requester has a Sam's Club membership which it uses to purchase supplies for the City. It maintains that Sam's Club offers items in bulk at lower rates than may be found locally, and thus constitutes an overall savings to the City.

While the Requester has not specifically asked whether it may use public funds to purchase a Sam' Club for City business, the Commission takes this opportunity to opine that there is nothing in the Ethics Act which prohibits purchasing this membership or similar memberships for City use. There is a rational basis for the purchase of a membership if it provides a cost savings to the public agency. Therefore, the Commission hereby finds that the Requester may purchase a single Sam's Club Business Membership for itself, under the City's name, in order to make purchases at Sam's Club.

Next, the Commission must consider whether the City may use public funds to purchase Sam's Club cards for the personal use of its employees as an add-on to the City's Business Membership. The Commission has occasionally been called upon to opine about the appropriateness of certain expenditures by a governmental body as an inducement or perk of employment. [1]

In considering whether a fringe benefit would create an impermissible use of public office for private gain, the Commission has looked to the benefit conferred on the employee, whether there is a rational basis for the decision, and the cost to be borne by the governmental entity in providing the benefit. See A.O. 2007-05. The Commission must also consider whether it is an authorized expenditure. In determining whether an expenditure violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued

[1] Over the last several years, the Commission has been asked to opine about the permissibility of certain employee perks (aka fringe benefits). *See* e.g. A.O. 2010-02 (employees may accept government discount for personal cell phone); A.O. 2009-03 (allowing reimbursement for government related calls made on personal cell phones); A.O. 2008-09 (a University may provide a discount to faculty members at the University bookstore); A.O. 2008-07 (allowing employees free use of Town swimming pool); A.O. 2008-05 (allowing employees free limited recreational use of public facility).

by the Auditor's Office to determine whether there is express or implied authority for an expenditure.

The Commission is unable to find express or implied authority to use public funds for this purpose. The Commission hereby finds that, absent statutory or legal authority for this expenditure, the purchase of Sam's Club memberships for the personal use of public officials or employees constitutes an impermissible use of public office for private gain.

The Commission further finds that the City may not give its elected officials, employees or their household members the additional cards provided to the City as part of its membership package. Even if there is no additional charge to the City for these cards, still, there is a private benefit to the public servants and their families because a membership, purchased at taxpayer expense, is the source of the free cards. In the absence of express or implied authority, the Commission finds that it constitutes an impermissible use of public office for private gain to use these cards for the personal benefit of employees.

Accordingly, the Commission hereby finds that a governmental entity may purchase a membership for itself, but may not purchase or accept add-on memberships for the personal use of its elected officials, employees or members of their household. Additionally, the Commission recommends that the City decline acceptance of the two personal cards that are provided as part of the Business Membership. Instead, if there is a need for more than one City card, the City should inquire as to whether it may acquire multiple business cards in lieu of the personal cards. If not, then the City shall implement procedures to ensure that any employees who are provided cards for City business only use them for official, not personal, purchases.

Finally, the Commission reminds public officials and employees that they may not use the City's card to gain admission to the Sam's Club and/or to make personal purchases.[2] This would additionally constitute an impermissible use of public office for private gain.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman

[2] In particular, in regard to elected officials, they may not increase their own salaries. A.O. 2009-02