ADVISORY OPINION NO. 2010-02

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Attorney** asks whether it is permissible for: (1) the City to participate in a program, offered by a vendor, which provides a discount to all city employees for their personal (non-public) cell phones; and (2) City employees to accept such a discount for their personal cell phones.

FACTS RELIED UPON BY THE COMMISSION

On October 22, 2009, a City executed a contract with a wireless telephone company ("Company") to provide cellular telephone service and hardware for select city positions, departments and employees. The Company was selected pursuant to the City's competitive bid and purchasing rules, and a written agreement was executed between the City and the Company.

As a result of the contract with the City, the Company is now offering an "exclusive" employee discount to **all** City employees on any new or existing personal cell phone plans the employee has with the Company. According to the Requester, the discount would be an estimated 15% off the cost of select voice plans. The discount is available to all City employees regardless of position or title, and would apply to an employee's private, non-work cell phone plan with the Company.

The Requester states that the discount program was not part of the bid specifications, nor was it considered in awarding the contract to the Company. The Requester additionally states that the discount was not solicited nor negotiated by the City. Instead, the discount is a commercial business incentive offered by the Company to its business account customers (private and public), at no additional cost to the City.

In order for City employees to participate in the employee personal cell phone discount program, the City must elect to offer the program to its employees. According to the Requester, no formal action or amendment of the contract is necessary. Rather, the City, as the business account customer, would need to advise the Company that the City agrees to have its employees eligible to participate in the discount program.

The City has been approached by several employees seeking to participate in the discount program. The City has not yet agreed to the discount program, and seeks an opinion whether it is permissible under the West Virginia Ethics Act.

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.

Further, W. Va. Code § 6B-2-5(c)(1) states in relevant part:

> A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family[.]
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> * * *
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> No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:
>
> (A) Is doing or seeking to do business of any kind with his or her agency;
> (B) Is engaged in activities which are regulated or controlled by his or her agency; or
> (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

ADVISORY OPINION

The permissibility of the proposed discount program requires evaluation under several aspects of the West Virginia Ethics Act. In particular, the Commission must analyze whether the proposed discount program constitutes use of public office for private gain and/or a prohibited gift (W.Va Code § 6B-2-5(b) & (c)).

Private Gain

The West Virginia Ethics Act prohibits public employees from using their public office or the prestige of their office for their own private gain. W.Va. Code § 6B-2-5(b). However, the statute contains the following proviso:

> 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 under this subsection.

W.Va. Code § 6B-2-5(b).

While the Commission has not previously addressed personal cell phone plan discounts, the Commission has historically allowed a public employee to receive discounts on other types of services if it is offered to public employees as a whole.

In Advisory Opinion 91-32, the Commission held that it would not be a violation of W.Va. Code § 6B-2-5(b)(1) for City employees to accept a 20% discount on the purchase of prescription drugs from a local pharmacy. In particular, the Commission stated:

> [T]he requestor has stated that the discount plan is available to all individuals who participate in the City's insurance program, regardless of their specific public employment position, whether he is the City's mayor or a maintenance employee.

In Advisory Opinion 96-47, the Commission allowed certain public employees to receive a 15% discount from a retail store. In finding that the discount did not violate W.Va. Code § 6B-2-5(b), the Commission held:

> Under the facts given, there is no evidence of any use of public position by anyone subject to the Ethics Act to obtain the discount. Rather, it appears that the discount is a marketing device used by the company to promote sales.

Aside from discounts, the Commission and Legislature has also allowed public employers to offer certain "fringe" benefits to their employees as a result of their public employment.

In Advisory Opinion 2008-09, the Commission overruled Advisory Opinion 2001-21, and allowed a 10% discount to be provided to a Public University's employees for use at a University owned bookstore. Finding this to be a permissible under W.Va. Code § 6B-2-5(b), the Commission stated that, in part:

> "[T]here is a rational basis for offering this discount as a fringe benefit. First, it appears that it is a commonly accepted practice at other higher education institutions. In attempting to recruit and retain qualified faculty and staff, a public university should not be restricted from offering incentives which promote employee morale, particularly when there is no resulting cost to the University.

See also Advisory Opinion 2008-07 ("Conferring this fringe benefit upon Town employees would only be prohibited if there is no rational basis for this management decision."); and Advisory Opinion 2008-05 ("Allowing limited [recreational] facility use in a manner that does not detract or diminish the service PRC provides to its paying customers provides benefits to its employees and boosts morale at no additional cost to the County."

More recently, in Advisory Opinion 2009-12, the Commission authorized the State employees to have interest-free payroll deductions for the purchase of certain consumer products from a particular vendor. In finding that the interest-free deductions were permissible, the Commission noted that the interest-free deduction constituted a fringe benefit created by the Legislature.

Accordingly, in light of precedent, the Commission hereby finds that it is not a violation of W.Va. Code § 6B-2-5(b) to participate in and/or accept the proposed discount which is offered to all City public employees, regardless of position or title. In so finding, the Commission notes that similar "exclusive" discount programs are also similarly offered to private businesses, and is not a unique discount offered solely to a government official or entity. Rather, the Company is using this discount program to attract customers from its business accounts into personal telephone plans. The discount program does not appear to be an intent to influence governmental operations or officials, but instead appears to be a commercial business plan to increase more customers to its Company.

Gifts

W.Va. Code § 6B-2-5(c)(1)(A) forbids public officials or employees from accepting any gift, directly or indirectly, from any person "doing or seeking to business of any kind with" their agency. Although not expressly stated in the statute, the intent of the language is to prohibit "quid pro quo" deals or kickbacks to the public officials. The Commission has been zealous in interpreting this statute to prevent situations where there may be appearance of impropriety.

Indeed, the Commission's historical advisory opinions on acceptance of gifts has generally tended toward prohibition. The Commission views its mandate to be preservation of the integrity of the governmental system and process, and allowance of public employees to accept a gift from a vendor, albeit a potentially *de mininis* amount, needs to treated with caution.

In Advisory Opinion 91-58, the Commission held that a 75% discount offered by a tire company to all City employees violated W.Va. Code § 6B-2-5(c)(1). In prohibiting the acceptance of the discount, the Commission concluded that the gift was more than nominal value and that the Company was "seeking to do business" with the City.

More recently, in Advisory Opinion 2009-09, the Commission concluded that it would be a violation of the Ethics Act for a State Agency's employees to accept a lower lodging rate from an entity that it regulates. In finding the discounted rate impermissible, the Commission opined that "weighing the potential benefit to the State with the potential public perception of inappropriate intermingling between the regulator and licensee warrants denial of the special rate in order to uphold the public confidence in the impartiality of the State Agency."

With respect to this offered discount program, the Commission would first note that there was no solicitation by any public official or employee. The discount program was not a bargained for nor contracted benefit for employees. Instead, the Company proposed the program to the City employees subsequent to the execution of the contract. The intent of W.Va. Code § 6B-2-5(c)(1) is to prohibit any "quid pro quo" deals, and a public official's or employee's solicitation of a discount from a company doing business or seeking to do business would violate the Ethics Act.

The Commission next notes that the discount program does not appear to be intended by the Company to influence governmental operations or specific public employees. Instead, the discount program is a commercial business incentive offered to all public employees, regardless of position or title. The same discount program is offered to private businesses, and is not a unique discount offered solely to a government official or entity.

The Commission further finds that the "gift" is not the type of gift that would give rise to an appearance of influence with a public employee. It is available to all City employees and not just those in positions of influence or control. Hence, the "gift" is better treated as fringe benefit.

Additionally, the value of the "gift" does not raise the appearance of an impropriety. While the Commission does not find that the discount is of "nominal" value, it is does believe it is of such insignificant value that the public will view this as special treatment by, or influence upon, the City.

Lastly, the Commission finds that public policy and legislative intent would not prohibit a public employees acceptance of the discount program. In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W.Va. Code § 6B-1-2(a).

The proposed discount program does not undermine the integrity of the public employees, nor create an appearance of a *quid pro quo*. Rather, these type of discount programs are common in the marketplace. Many businesses provide similar discount opportunities to its employees, and private citizens receive them through their associations with private companies or private organizations. Thus, this type of discount program has become generally accepted as an employment fringe benefit, and is not unique to "public" employment.

Further, the public policy of allowing acceptance of a commercial discount by public employees is not uncommon in other jurisdictions. While this is still an emerging issue, other jurisdictions with similar ethics prohibitions have also concluded that acceptance of cell phone discounts by public employees derived solely as a result of their public

employment is permissible.[1]

Accordingly, based upon the foregoing, the Commission hereby finds it would not be a violation of W.Va. Code § 6B-2-5(c) to participate in and/or accept the proposed discount which is offered to all City public employees, regardless of position or title.

CONCLUSION

In answer to the questions presented, the Commission hereby concludes that, under the Ethics Act: (1) the City **may** participate in a program, offered by a vendor, which provides a discount to all city employees for their personal (non-public) cell phones; and (2) City employees **may** accept such a discount for their personal cell phones.

The Commission cautions that this opinion does not necessarily allow all types of discounts to be accepted by public employees. Rather, this advisory opinion authorizes governing bodies to offer, and public employees to accept, discounts which meet the criteria established herein. Specifically, the proposed discount must: be available to all employees; not be solicited; not be offered as an inducement for the award and/or renewal by a governing body of a contract with a particular vendor; and, be a commercial business incentive offered by a company to its business account customers (private and public alike), at no additional cost to the governing body. In all other circumstances, governing bodies should consult the Ethics Commission for staff advice prior to accepting any other discounts or gifts

Finally, 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
R. Kemp Morton, Chairman

[1] *See* Boise Ethics Commission Advisory Opinion 06-03 ("These type of offers are available to all employees of any state or local government and, in some cases, to employees in the private sector as well. It is unreasonable to conclude that a government employee would be unduly influenced by such an offer."); Oregon Government Ethics Commission Advisory Opinion No. 09A-1003 (permissible under Ethics laws to accept 15% discount from a phone vendor).