

ADVISORY OPINION NO. 2008-05

Issued on July 10, 2008 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Attorney for a County Parks and Recreation Commission (PRC) asks if it is a violation of the Ethics Act for employees to enjoy free use of the Commission's recreational facilities.

FACTS RELIED UPON BY THE COMMISSION

For years, the PRC has allowed all its employees to use all PRC recreational facilities, including golf courses, without charge. This practice appears to be generally consistent with the practice of other public recreation providers in West Virginia. Other public recreation providers, however, expressly limit their employees' free use of recreational facilities during times that their use does not interfere with use by paying customers.

Private recreation providers in West Virginia allow their employees either free use or discounted rates for use of their recreational facilities. As for private golf courses, employees are only allowed to golf during slow times (generally not on mornings or weekends).

According to its website, PRC operates four public golf courses and employs PGA golf professionals. In their capacity as such, these golf professionals provide golf lessons to paying customers. Almost every lesson is conducted on a driving range. Any member of the public may use the driving range for personal use or to offer golf lessons, according to the requester. In the rare event that the pro provides a playing lesson, the customer pays for the green fee. The requester has not indicated whether PRC's golf professionals clock out to conduct private golf lessons for which they are directly paid, or whether they remain on the clock.

At other government operated golf courses in West Virginia, golf professionals also provide golf lessons to paying customers. Since the government itself does not offer golf lessons, the golf professional clocks out to conduct a lesson, and accepts private payment from the customer. As with PRC, most lessons are conducted on the driving range at no additional cost to the customer, but if the golf professional conducts a playing lesson, the customer must pay for the green fee.

At privately run golf courses in West Virginia, golf professionals provide golf lessons as part of their employment duties. As with public courses, most lessons are conducted on the driving range at no additional cost to the customer. For playing lessons, the practice varies as to whether a customer must pay for the green fee, and if so, how much.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads:

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....

W. Va. Code§ 6B-2-5(m) states in pertinent part that...no public employee shall knowingly request or accept from any governmental entity compensation or reimbursement for any expenses actually paid by ... any other person.

ADVISORY OPINION

Free Use of Recreational Facilities

Here, a Parks and Recreation Commission asks whether its policy of providing free use of its recreational facilities to its employees violates the Ethics Act. The Commission recognizes that it is common practice for recreation providers, both public and private, to allow their employees free use of recreational facilities, with limitation. Allowing limited 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. Further, any benefit to employees is outweighed by the overall benefit to the County in that it is in a better position to compete with other recreation providers that provide the same benefit.

Thus, Parks and Recreation employees are entitled to the use of County recreational facilities without charge, so long as the use thereof does not interfere with the public's use and enjoyment of the recreational facilities. This use must be confined to periods when such use does not interfere with the paying customer. Further, PRC shall monitor its employees' use of PRC's recreational facilities to ensure that such use does not interfere with the public's use and enjoyment of the recreational facilities. The Commission advises PRC to consult with its attorney to determine whether the free use of County recreational facilities is a taxable fringe benefit.

PRIVATE GOLF LESSONS

Having established that PRC employees may enjoy free use of County recreational facilities, the Commission must decide if PRC's golf professionals may

offer golf lessons to paying customers at PRC recreational facilities. Further, if the Commission authorizes such lessons, may golf professionals accept private payment for providing those lessons while still on the government clock?

The requester has stated that having PRC's golf professionals provide golf lessons is good for PRC. "By providing lessons, [PRC] benefits because individuals who play well tend to utilize the courses more often. This, in turn, generates income and has the effect of creating long-term relationships with patrons." The Commission accepts this proposition as legitimate, and a good use of its professionally trained employees.

Unless, however, the golf professionals clock out to conduct golf lessons, they are using their public positions for private gain.

In Advisory Opinion 2004-09, a State University asked for guidance on participating in a wellness program, and whether the program coordinator could receive a free annual membership to the YMCA. The YMCA asked the University to designate an employee to serve as coordinator, responsible for publicizing the discount program in an effort to obtain the required level of participation. The YMCA offered a free annual membership, valued at over \$400, to the coordinator.

In the Opinion, the Commission authorized University employees to participate in the wellness program, and for an employee to serve as coordinator, either on the employer's time or on the employee's own time because the agency employer is the primary beneficiary of significant participation in this wellness program. The Commission concluded, however, that the Ethics Act's prohibition against the use of public office for private gain precludes an employee authorized or assigned to perform the coordinator duties on her/his employer's time prohibits the employee/coordinator from accepting a free YMCA membership.

Here, but for their public positions, PRC's golf professionals would not have access to PRC recreational facilities to conduct golf lessons. Accepting payment from private, paying customers for performing work arguably within the scope of their employment, while on their employer's time, constitutes the use of office for private gain.

Additionally, the Ethics Act contains a ban against "double dipping." This provision prohibits public servants from accepting compensation from any governmental entity if they are already paid for that same work by another person. Here, PRC employs the golf professional at a set salary to work certain hours. Thus, accepting private payment for conducting golf lessons while on the government's clock constitutes double dipping in violation of W. Va. Code § 6B-2-5(m).

If, however, PRC's golf professionals clock out to conduct their private golf lessons, they do not violate either provision of the Ethics Act cited above. Park employed golf professionals may conduct golf lessons for paying customers so long as they clock out to do so. PRC shall maintain written records to ensure that each golf professional who conducts private golf lessons does so on the employee's own

time. Further, in the event that any such golf lesson is conducted on the course, rather than on a driving range or putting green, the customer/student must remit a green fee to the County in addition to any fee paid to the golf professional for the private lesson. Otherwise, the golf professional is in a position to enhance the private services offered at the expense of the County, which would otherwise collect a green fee.

The Commission notes that governmental entities are free to impose stricter standards on employees than those contained in the Ethics Act.

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, rules or agency policies. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ Larry L. Rowe, Acting Chair
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