ADVISORY OPINION NO. 2013-57

Originally Issued on December 12, 2013 and

Ratified on January 21, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it is permissible to exempt certain emergency services employees from reporting mileage for personal vehicle use as a taxable fringe benefit.

FACTS RELIED UPON BY THE COMMISSION

The County Commission employs, among others, a Director of Emergency Management Agency, a Fire Coordinator, and an Emergency 911 Coordinator/Deputy Director Office of Emergency Services. According to the Requester, these individuals are subject to 24-hour call. The County provides a vehicle to them in the performance of their public duties. The County does not have a written vehicle use policy.

The Internal Revenue Code generally considers the personal use of a government owned vehicle to be a taxable fringe benefit, requiring employees to report their personal use mileage to the Internal Revenue Service. There is a specific exception, however, for clearly marked emergency service vehicles. As a result, the three emergency services employees have questioned whether they should be exempted from reporting mileage for their personal use of emergency vehicles.

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.
>
> The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code§ 7-7-16a provides in part that a County official or employee may, in the discretion of the County Commission:

> ... be furnished with the use of a motor vehicle owned by the County to travel from his or her residence to his or her workplace and return: Provided, that such usage is subject to the supervision of said ... commission and is directly connected with and required by the nature and in the performance of such ... county official or employee's duties and responsibilities.

Title 158, Series 6, Section 5. Use or Removal of Government "Property" reads:

> 5.1 Removal - Public officials and public employees shall not remove government property from the work-place for their private benefit.
>
> 5.2. Improper Use - Public officials and public employees shall not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property.

26 CFR §1.132 reads, in relevant part:

> (h) Qualified nonpersonal use vehicles-(1) In general. Except as provided in paragraph (h)(2) of this section, 100 percent of the value of the use of a qualified nonpersonal use vehicle (as described in §1.274-5(k)) is excluded from gross income as a working condition fringe, provided that, in the case of a vehicle described in §1.274-5(k)(3) through (8), the use of the vehicle conforms to the requirements of paragraphs (k)(3) through (8).

26 CFR §1.274.5 reads, in relevant part:

> (k) Exceptions for qualified nonpersonal use vehicles-(1) In general. The substantiation requirements of section 274(d) and this section do not apply to any qualified nonpersonal use vehicle (as defined in paragraph (k)(2) of this section).
>
> (2) Qualified nonpersonal use vehicle **-(i)** In general. For purposes of section 274(d) and this section, the term qualified nonpersonal use vehicle means any vehicle which, by reason of its nature (that is, design), is not likely to be used more than a de minimis amount for personal purposes.
>
> (ii) List of vehicles. Vehicles which are qualified nonpersonal use vehicles include the following:

(A) Clearly marked police, fire, and public safety officer vehicles (as defined and to the extent provided in paragraph (k)(3) of this section),

(B) Ambulances used as such or hearses used as such,

* * * * *

(3) Clearly marked police, fire, or public safety officer vehicles. A police, fire, or public safety officer vehicle is a vehicle, owned or leased by a governmental unit, or any agency or instrumentality thereof, that is required to be used for commuting by a police officer, fire fighter, or public safety officer (as defined in section 402(1)(4)(C) of this chapter) who, when not on a regular shift, is on call at all times, provided that any personal use (other than commuting) of the vehicle outside the limit of the police officer's arrest powers or the fire fighter's or public safety officer's obligation to respond to an emergency is prohibited by such governmental unit. A police, fire, or public safety officer vehicle is clearly marked if, through painted insignia or words, it is readily apparent that the vehicle is a police, fire, or public safety officer vehicle. A marking on a license plate is not a clear marking for purposes of this paragraph (k).
(Emphasis supplied)

ADVISORY OPINION

Although the Ethics Commission acknowledges that a public servant's use of a public vehicle for the performance of public duties has become increasingly commonplace, there are few relevant precedential advisory opinions. Indeed, at least two county public employees were the subject of ethics complaints for their personal use of public vehicles. In each such instance, the Commission noted that neither of the counties had written vehicle use policies in place at the time the complaints were filed. The Ethics Commission takes this opportunity to encourage public employers to adopt vehicle use policies that comply with the Ethics Act and the Internal Revenue Code.

As the Ethics Commission stated in Advisory Opinion 91-86, 'The unauthorized private use of a public vehicle constitutes a use of public office for private gain." The Commission further opined that even the **authorized** private use of a public vehicle could constitute use of public office for private gain, depending on the specific facts and circumstances.

In Advisory Opinion 2002-01, a County Commission asked if it was permitted to approve an employee's private use of a county vehicle, if the employee reimbursed the County for mileage. In reliance on W. Va. Code§ 7-7-16a, the Ethics Commission denied the request, stating:

> This statute establishes the extent to which county vehicles may be used by county personnel for private travel. It clearly limits the personal use of county vehicles by county personnel to travel to and from work - and then only when"... directly connected with and required by the nature and in the performance of ..." the person's public duties.

The Commission is only authorized *to* interpret the Ethics Act, but it does not do so in a vacuum. Instead, if a practice is prohibited by some other law, then the Ethics Commission is powerless *to* permit it. For example, in Advisory Opinion 2009-02, the Ethics Commission refused *to* authorize a County to provide wellness benefits *to* its elected officials whose compensation is set by statute. W. Va. Code§ 7-7-4 (a)(1) Thus, the Commission wrote, "Since the Legislature has not authorized Counties to spend public monies on wellness programs for County elected officials, we find that it would violate W. Va. Code§ 6B-2-5(b)(1) for the County to extend the benefits of its wellness program to its elected officials."

The Internal Revenue Service authorizes government employers to provide certain of its employees with public vehicles for the performance of their public duties. Although in most such instances public employees are required to report their personal use mileage as a taxable fringe benefit, there are exceptions. Specifically, the Internal Revenue Code exempts clearly marked emergency service vehicles for workers who are on call at all times "provided that any personal use (other than commuting) of the vehicle outside the limit of the police officer's arrest powers or the fire fighter's or public safety officer's obligation *to* respond *to* an emergency is prohibited by such governmental unit." *See* 26 CFR §1.274.5(k)(3).

Thus, the three emergency services employees may **not** avail themselves of the reporting exception if the County permits them *to* drive a clearly marked emergency services vehicle for any personal purpose other than commuting. Therefore, the County Commission may not confer a benefit upon its employees that federal law prohibits; to do so violates the Ethics Act's prohibition against use of public office for private gain. Specifically, it is impermissible *to* exempt the emergency services employees from reporting mileage for personal vehicle use as a taxable fringe benefit.

The inquiry does not end here. Although the Requester did not pose the logical follow up question, the Commission would be remiss if it neglected *to* address whether the personal use of clearly marked emergency services vehicle for any personal purpose other than commuting is permissible under the Ethics Act. The Commission hereby finds that personal use of a public vehicle is not "the performance of usual and customary duties associated with the office". In Advisory Opinion 2012-52, the Commission noted:

> Generally, when public servants avail themselves of public resources not available similarly *to* the general public, this constitutes private gain. In

> some instances limited use of public resources by public employees constitutes a permissible fringe benefit.

After examining instances of permissible fringe benefits (e.g. limited free use of municipal pool for municipal employees, Advisory Opinion 2008-07, and limited free or discounted use of the golf course and recreational facilities to county parks and recreation employees, Advisory Opinion 2008-05), the Commission then addressed the question presented: whether a municipality may permissibly extend the use of public equipment as a fringe benefit. The Commission wrote:

> 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.

In conducting its cost-benefit analysis, the Commission recognized the potential liability costs to a municipality through the proposed personal use of equipment, stating: "Potentially, a governing body may bear an inordinate cost by providing such a fringe benefit if an employee using public equipment: is in an accident and injures her/himself or another person; damages the property of another; or damages the equipment beyond repair." Similarly, here the County would be exposed to significant liability if the emergency services employees were permitted to use clearly marked (and specially equipped) emergency services vehicles for personal purposes other than commuting. Additionally, should an employee's personal use of an emergency services vehicle result in damage to the vehicle to the extent that it is out of service for any length of time, the safety of the public is placed at greater risk.

Therefore, the Ethics Commission hereby finds that the Ethics Act prohibits public servants' personal use of clearly marked emergency services vehicles for any personal purpose other than commuting. This opinion is prospective.

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 similarly situated public servants unless and until it is amended or revoked, or the law is changed.

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