ADVISORY OPINION NO. 2012-52

Issued On February 7 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipal Public Servant** asks under what circumstances, if any, a municipality may permit its officials and/or employees to use public equipment for personal purposes.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a municipal police chief and has been employed in that capacity for many years. According to the Requester, during his tenure, the City had an unwritten practice of allowing employees to use City equipment for personal purposes, without charge. The practice evidently did not, however, permit the use of City equipment for commercial purposes.

In addition to the unwritten practice, the City has had in place a written rule concerning the use of City resources. The Requester states that he and members of the City's governing body were unaware of the existence of the Ordinance until recently. Specifically, the Ordinance reads, in pertinent part:

> [N]o municipal officer or employee shall use or authorize the use of municipal time, facilities, equipment or supplies for private gain or advantage to himself [sic] or any other person or group; provided however, that this prohibition shall not apply where Council has authorized the use of such time, facilities, equipment or supplies and the Municipality is paid at such rates as are normally charged by private sources for comparable items.

As a supplement to the Ordinance, the City has adopted a price list setting forth the hourly rate for the use of the City's equipment. Those rates are significantly lower than private commercial rates. For example, the City charges an hourly rate for the use of equipment and an additional $12/hour charge for a City employee to operate the equipment. By contrast, the nearest private businesses charge a minimum daily rate to rent equipment.

CODE PROVISIONS AND LEGISLATIVE RULE 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.

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.

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public service. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W. Va. Code§ 6B-1-2(d).

The Ethics Commission takes administrative notice that there appears to be a common misconception among local governments officials and employees. They believe that they are permitted to use public equipment for personal purposes as long as: they use it for purely personal, not commercial reasons; and their use of such equipment does not interfere with the government's need to use such equipment, e.g. on weekends.

The private gain provision of the Ethics Act, however, is not limited to commercial use. Instead, if an individual derives a benefit from the use of public equipment, that constitutes private gain. Even if an individual's use does not result in a cost to the government, still the individual benefited from the use of public equipment. Absent access to the use of public equipment, the individual would have incurred the expense of renting or purchasing the equipment. *See* Advisory Opinion 2010-18. (Municipal public servants' private use of Sam's card obtained as a complement to the City's Sam's Club membership prohibited even when no additional cost to City).

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. For example, in Advisory Opinion 2008-07, the Commission ruled that municipal employees (but not elected or appointed officials) were permitted limited free use of municipal pool, so long as they did not interfere with the public's use and enjoyment, or cause the municipality to lose money. Similarly, in a companion ruling, Advisory Opinion 2008-05, the Ethics Commission authorized County Parks Commission employees (but not appointed members of the board thereof) limited free or discounted use of the golf course and recreational facilities under certain conditions.

The Commission must determine whether a municipality may permissibly extend the use of public equipment as a fringe benefit. 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. The analysis herein is limited to the use of public equipment, not hand tools. The Commission recognizes the difference in value between the use of a backhoe and a hammer or screwdriver.

After discussion, the Ethics Commission tabled this opinion at its February 7, 2013 meeting. Thereafter, staff sought comments from various governing bodies to determine their thoughts on the questions posed, and to ascertain their present practices. In response, the Commission received numerous comments with a variety of opinions. For example, many expressed concerns about liability, while others mentioned wear and tear on the equipment and questioned who would be responsible for the cost of repairs if damage resulted from a non-public use of equipment. Others were concerned about the different treatment between use by employees when the general public is prohibited from using the equipment. Another commenter pointed out that employee use of the equipment may constitute a taxable fringe benefit. The commenters were unanimous, however, in opposing the adoption of any policy permitting use of public equipment for any non-public purpose. 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.

The City's Ordinance provides for employees' use of equipment for personal - not commercial - purposes at competitive rates. This provides a convenience to employees permitting them to obtain the use of equipment without having to travel. Nonetheless, the Commission hereby finds that any benefit to public employees is far outweighed by the cost to the governing body. Therefore a governing body may **not** permit the use of public equipment by public employees except for public purposes.[1]

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

[1] Additionally, elected or appointed members of a governing body are similarly prohibited from using public equipment. To permit their use of public equipment would unlawfully confer additional compensation to them. *See,* e.g. Advisory Opinion 2009-02 (may not extend County wellness program to elected officials); Advisory Opinion 2010-08 (may not extend current term of office); and Contract Exemption 2009-01 (Mayor may not be employed as Police Chief, Head of the Street Department, and/or Assistant Fire Chief).