

Advisory Opinion 2021-15

Issued on August 5, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Health Department** asks whether its employees may use their agency-provided cellular phone as their personal cellular phone.

Facts Relied Upon by the Commission

A County Health Department (“agency”) provides certain employees with cellular (“cell”) phones. The agency has a cell phone plan that has unlimited talk, text, and data and costs \$39.99 per month per line. The Requester states that all agency employees who are provided cell phones are expected to keep their cell phones near them 24 hours a day, seven days a week, so that they may be notified of, and prepared to respond to, emergencies.

The Requester inquires whether the agency’s employees may use the cell phones for personal use, during and outside of their regular work hours, to avoid the inconvenience of carrying two cell phones. The Requester states that if its employees are authorized to use their agency-provided cell phones as their personal phones, the agency would not incur any additional costs. The Requester also asks if it would be permissible to allow its employees to use their agency-provided cell phones as personal cell phones if the employees pay the agency a percentage of the monthly plan fee.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) states:

(b) Use of public office for private gain. -- (1) 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 under this subsection. 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 R. § 158-6-5 states, in relevant part:

5.2. Improper Use - Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

Advisory Opinion

The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office for their own private gain. W. Va. Code § 6B-2-5(b)(1). This section excepts from the prohibition the incidental use of public equipment “for personal or business purposes resulting in de minimis private gain.” *Id.*

The Ethics Commission recognizes that since the Ethics Act’s enactment in 1989, cell phone technology has significantly advanced; many citizens now own and use cell phones as their primary telecommunications device, and many private and public employers provide cell phones to their employees for business purposes. There are also increasing options to purchase flat rate plans which provide unlimited use of the cell phone for texting, talking, and using data. The Ethics Commission further recognizes that the personal use of a government agency’s cell phones or plans may not result in additional cost to the government agency. The Commission must determine, nevertheless, whether allowing public employees to use their agency’s cell phone as their personal cell phone constitutes prohibited use of office for private gain.

In Advisory Opinion 2012-52, the Ethics Commission considered whether a city may allow its employees to use the city’s equipment for personal, but not commercial, purposes for free. The Opinion states:

The private gain provision of the Ethics Act . . . is not limited to commercial use. Instead, if an individual derives a private 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....

The Opinion further states: “Generally, when public officials and public employees avail themselves of public resources not available similarly to the general public, it constitutes prohibited private gain.” The Ethics Commission then held that the city may not allow the private use of its equipment by employees except for public purposes.¹ *Id.*

¹ For example, in Advisory Opinion 1995-39, the Ethics Commission held that a mayor may store equipment in a municipal garage while the equipment was being used for free by the city because the public benefit outweighed the private gain to the mayor.

The Ethics Commission held in Advisory Opinion 2010-18 that a municipal public servant's private use of a Sam's Club membership card obtained as part of the municipality's membership was prohibited even if there was no additional cost to the municipality. In contrast, the Ethics Commission has held that in certain instances, the use of public resources for private purposes by public employees is permissible. For example, in Advisory Opinion 2008-07, the Ethics Commission held that municipal employees may be given limited free use of a municipal pool, if it did not interfere with the public's use and enjoyment of the pool, did not cause the municipality to lose money, and there was a rational basis for providing this fringe benefit.²

Based upon the prior Opinions of the Commission, the Commission finds that a public agency may only allow free use of public equipment or property for personal use, as a permissible fringe benefit, when there is a rational basis for the decision. Advisory Opinions 2008-07 and 2008-09. The cost to the agency must also be considered. *Id.* Decisions relating to the use of public resources must also be justified by a specific public policy reason. Advisory Opinion 2020-04.

While not dispositive of the question presented, the Ethics Commission finds that policies issued by the State of West Virginia and the federal government are instructive for determining what constitutes the acceptable use of government-provided cell phones. An overview of the policies follows.

The State of West Virginia Office of Technology ("Office of Technology") Policy limits the personal use of state-issued mobile devices.³ The policy at 3.1.4 states: "Personal use of wireless devices and service is prohibited except in certain limited and occasional circumstances that meet with the supervisor's approval." Regarding internet usage, the "Office of Technology policy provides: "Excessive use of the Internet by personnel that is inconsistent with business needs is considered a misuse of resources."⁴

² In Advisory Opinion 2008-05, the Commission held that a county parks commission may give its employees limited free use of its recreational and golf facilities, and in Advisory Opinion 2008-09, the Commission held that faculty members at a public university may receive a discount at the university bookstore because there was a rational basis for offering the discount as a fringe benefit.

³ The State of West Virginia Office of Technology Policy: Acceptable Use of State-Issued Portable/Mobile Devices Policy No: WVOT-PO1002 Rev. 12/22/2020. The policy also imposes the following requirements at 3.1.4: "Personal use should only occur when it does not (1) interfere with the employee's work performance; (2) interfere with the work performance of others; (3) have undue impact on business operations; (4) incur incremental cost; or (5) violate any other provision of this policy or any other State policy, procedure, or standard. Use of wireless devices is a privilege that may be revoked at any time. (See Appendix A for more information.)"

⁴ The State of West Virginia Office of Technology Policy: Acceptable Internet Usage, Policy No: WVOT-PO1022 Rev. 12/22/2020. The policy also states: "3.1.3 Incidental personal use is permissible so long as it: 3.1.3.1 is completed on personal time (i.e., lunch time, break) 3.1.3.2 does not consume more than trivial amount of systems resources, 3.1.3.3 does not interfere with worker productivity, 3.1.3.4 does not preempt business activity, 3.1.3.5 does not violate any State, department, or agency policy and 3.1.3.6 is not used for illegal activities."

The United States Department of the Interior (DOI) telephone use policy states:

Federal employees may use Government property only as authorized. Employees may use DOI landline telephones for personal calls when they are necessary, provide a benefit to DOI, and do not result in any additional costs to the Government. Such calls are deemed to be in the interest of the Government to the extent they enable employees to remain at their work stations, thereby increasing Government efficiency. Personal phone calls may not adversely affect the performance of official duties or the employee's work performance, must be of reasonable duration and frequency, and could not reasonably have been made during non-duty hours.

DOI cell phones may be used for personal calls only to the extent that such calls would be authorized on a DOI landline telephone *and* [emphasis added] so long as no additional costs are imposed on the Government.⁵

The Commission notes that while personal use of government-provided cellular phones with a flat rate talk, text, and data plan may result in little to no additional cost to the government employer, nevertheless, the cell phone, phone number, and the text, talk, and data plan are paid for with public funds and must be used for a public purpose. The Requester states that allowing the agency's employees to use the agency's cellular phones and plans as their personal cellular phone (and plan) will eliminate the inconvenience of carrying two cellular phones.

The Ethics Commission finds that the inconvenience to the employees alone is not enough to constitute a rational basis for the agency to allow its employees to use, for free, their agency-provided cell phone as their personal cell phone device and plan.⁶ The Requester may allow its employees to use their agency-provided cell phones for incidental and de minimis personal use which does not result in an additional cost to the agency.

The Requester also asks whether it may allow its employees to use their agency-provided cell phones as their personal cell phones if the employees pay the

⁵ [Use of Government Property, U.S. Department of the Interior \(https://www.doi.gov/ethics/use-of-government-property\)](https://www.doi.gov/ethics/use-of-government-property) (last visited July 20, 2021).

⁶ The Ethics Commission recognizes that the Internal Revenue Service (IRS) has ruled that personal use of employer-provided cellular phones does not constitute a taxable fringe benefit when the cellular phone is provided for a business purpose, even if the employee uses the cell phone for personal use. I.R.S. Notice 2011-72, 2011-38 I.R.B. 407. The IRS ruling is relevant to the Ethics Commission's consideration of the issue presented but is not controlling for purposes of analyzing the private gain provision in the Ethics Act.

agency a percentage of the monthly plan fee. This type of use in most instances would be more than a de minimis use of the cell phone and plan for personal purposes.

In Advisory Opinion 2009-03, the Ethics Commission held that county employees may be reimbursed for government calls placed on their personal cell phones. **The Ethics Commission finds that it is permissible for an agency to allow its employees to use their agency-provided cellular phone and plan as their personal cell phone if the employees pay a reasonable fee to the agency for the personal use. In order to ensure the personal use of agency-issued cell phones does not cost the agency additional money or interfere with employees' work performance, the Requester should institute a policy on the acceptable use of agency-issued cell phones.**

It is further the opinion of the Commission that an agency may not allow employees to use their agency's cell phone and cell phone plan as their primary phone and plan for commercial or political campaign purposes, even if the employee is reimbursing the agency for personal use. The Commission finds that this type of use goes beyond a de minimis use of public resources and that there is no rational basis for allowing the State of West Virginia to subsidize a private business or political campaign. Nevertheless, this prohibition does not restrict *incidental* use of an agency-provided cell phone for commercial or political campaign purposes. For example, a public employee may use his or her agency cell phone and data plan to send an email to a private client to inform the client that the public employee is running late for a business appointment. On the other hand, a public employee may not use his or her agency-provided cell phone for purposes of operating a private business.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

