

July 12, 2002

Patti Milne
Marion County Commissioner
100 High Street, N.E.
Salem, Oregon 97301-3670

Dear Commissioner Milne:

At its July 12, 2002 meeting, the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
ADVISORY OPINION NO. 02A-1008**

STATED FACTS: Various departments of Marion County have issued cellular telephones to employees to be used for conducting county business. Currently cellular telephones are issued to approximately 600 of the county's approximately 1200 employees.

Marion County Board of Commissioners adopted "Administrative Policy – Cellular Telephone" on May 15, 2002 by Order No. 02-55. The vote was 2 to 1.

The cellular telephone policy and the order adopting the policy are attached to this opinion as part of these stated facts.

The order that adopted this policy states "it is appropriate to allow as a fringe benefit, i.e., as part of "official salary" under ORS 244.040(1)(a), the use and personal use of cellular telephones by authorized county employees." The policy states that "cellular telephones shall be assigned at the discretion of the department head." The term "department head" includes the Board of Commissioners and each elected and appointed official. The order also describes the value of the "fringe benefit" as "incidental". Accordingly, the order

states that "the county will not impute income to the employee's salary for the value of the fringe benefit."

The order notes that the airtime charges paid by the county are now usually higher than those paid for a privately owned cellular telephone. The county is currently paying \$12.95 per month for each cellular number. Charges are billed to the county for peak time and non-peak time calls at 20 cents per minute, roaming at 50 cents per minute and applicable long distance charges.

RELEVANT STATUTES: The following Oregon Revised Statutes are relevant to the issues addressed herein:

244.020(15) "'Public official' means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services."

244.040 **'Code of ethics; prohibited actions; honoraria.** The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120:"

244.040(1)(a) "No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated."

QUESTION: Would compliance with the Marion County policy relating to the personal use of cellular telephones cause a public official to violate Oregon Government Standards and Practices laws?

OPINION: Yes. For the reasons stated in this opinion, the county cellular telephone policy does not qualify the employees' use of county cellular telephones for the exception in ORS 244.040(1)(a) for "official salary". Therefore any personal use of the county cellular telephones that does not comply with

ORS 244.040(1)(a) as interpreted in GSPC advisory opinions will be a violation of law.

We note as a preliminary matter that public agencies may adopt employment policies that are more specific and restrictive than ORS Chapter 244. However, agency policy may not permit what state law prohibits.

The order adopting Marion County's policy states that "It is the intent of the board that an employee who acts within the bounds of the attached cellular telephone policy will not be found to have violated the Oregon Ethics Code." However, the Oregon Supreme Court stated, in *Davidson v. Oregon Government Ethics Commission*, 300 Or 414, 712 P2d 87 (1985), that an advisory opinion issued pursuant to ORS 244.280 "provides the exclusive statutory procedure by which a public official in doubt about the propriety of a proposed transaction can resolve the questioned action by obtaining an advisory interpretation on the issue." No consultation with GSPC staff occurred and no advisory opinion was sought before the county adopted its cellular telephone policy.

Public officials may obtain four types of financial benefit under ORS 244.040(1)(a). They are official salary, honoraria, reimbursement of expenses and unsolicited awards for professional achievement. We interpret "official salary" to mean the total compensation package, including fringe benefits, that are adopted in a formal manner by the public body's governing body.

The Marion County cellular telephone policy was an attempt to incorporate the benefit of employees' personal use of county issued cellular telephones as part of the "official salary" referred to in ORS 244.040(1)(a). The Marion County order adopting the policy describes the personal use of county cellular telephones as a "fringe benefit, i.e., as part of 'official salary' under ORS 244.040(1)(a)." The order then refers to the benefit as "incidental" in value and states that the county will not "impute" income on the "fringe benefit."

The terms of the policy are not consistent with the types of compensation that the GSPC has recognized as included in the phrase "official salary." Unlike salary and other forms of compensation that do fall within the exception, the cellular phone policy purports to set standards and limits on how employees given county cell phones may use them. For example, the policy states that the telephone number should not be given out for personal purposes. Personal calls are permitted if "occasional and infrequent" but the department head has discretion to "determine the nature and frequency of personal telephone use." A benefit that is bestowed at the discretion of the supervisor and only to an undefined, variable group of employees is not "official salary." To qualify as "official salary", the benefit must be provided uniformly and without restrictions. To be truly a

“fringe benefit”, the benefit must be unrestricted to the employee and not dependent on the individual choices of supervisors. Just as public employers do not dictate how their employees spend their salaries or how they utilize publicly provided benefits such as health insurance, providing publicly funded cell phones for personal use as a fringe benefit is only permissible under ORS 244.040(1)(a) if it is provided in the same manner as other fringe benefits. This means that the benefit is described as compensation in employee contracts or other salary plans; the persons entitled to receive the benefit are identified in a systematic manner; and the use of the benefit is unrestricted.

No apparent effort was made by the county to establish any value for the employee’s personal use of cellular telephones. The GSPC believes that the value of the benefit can be determined by identifying the instrument cost, base monthly charges and the charges for call duration. The purchase cost of a cellular telephone, the \$12.95 per month service plan and the airtime charges for employee personal calls would not be seen as incidental by the GSPC. These costs would represent the financial gain or the avoidance of a financial detriment prohibited by ORS 244.040(1)(a), unless they were “official salary”. As discussed above, to qualify as official salary the benefit must be provided without significant restrictions and oversight. It must also be handled as other elements of an employee’s “official salary,” including payment of applicable state and federal income tax liability.

Because the Marion County cellular telephone policy as presently drafted does not qualify under the exclusion for “official salary” for the reasons discussed above, we consider whether it otherwise conforms with GSPC interpretations of ORS 244.040(1)(a) on the subject of cellular telephone use.

The Marion County order questions the continued applicability of GSPC Advisory Opinion 98A-1003 in light of changes since it was issued. Changes cited were an increased use of cellular telephones and differences in rates charged private parties and public agencies. While we acknowledge that pricing and use of cellular phones has changed, the conclusions in that opinion remain valid and are reaffirmed here. Several of these conclusions were reaffirmed more recently in Advisory Opinion 01A-1004, dated June 1, 2001.

These opinions place the following restrictions on public official use of agency telephones:

- Personal telephone calls on regular (non-cellular) public agency telephones must be brief and infrequent.

- Personal long distance calling from public agency telephones (regular or cellular) is not permitted, even if reimbursed.
- Public agencies' cellular telephones may not be used for personal use, except in clearly urgent situations (such as when unexpectedly being required to work past the normal end of shift), when no other telephone is available and the call is related to the conduct of official business.
- If the public official's only agency-issued telephone is a cellular telephone, so that the official has no access to a land-line telephone, then the personal use guidelines for regular telephones applies to the use of the cellular telephone.
- The violation of ORS 244.040(1)(a) occurs when a public official uses their public position to benefit personally from public resources that would not otherwise be available but for the holding of the position. Agency cost is not a determining factor.
- Reimbursement is not sufficient to avoid the violation unless the official pays in a timely manner the full cost of the agency telephones, including monthly service charges.
- Public officials are advised to obtain and carry their own cellular telephones for personal use at their own expense.

Marion County's cellular telephone plan is inconsistent with GSPC advisory opinions in several ways. It permits use of county cellular telephones for personal use if the use is "occasional and infrequent", instead of only for work-related emergencies as the GSPC opinions allow. It then reverses that standard and gives individual department heads discretion to decide "the nature and frequency of personal telephone use." It does not address, but appears to permit, use of county cellular telephones for long distance calls. All of these elements conflict with GSPC advisory opinions. County employees or officials who follow the county policy are at risk of being found in violation of ORS Chapter 244 as interpreted by the Government Standards and Practices Commission.

In conclusion, the cellular telephone policy adopted by Marion County does not make the personal use of cellular telephones "official salary" for purposes of ORS Chapter 244. The policy also conflicts with GSPC advisory opinions on the appropriate personal use of publicly funded cellular telephones.

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THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION PURSUANT TO ORS 244.280. A PUBLIC OFFICIAL OR BUSINESS WITH WHICH A PUBLIC OFFICIAL IS ASSOCIATED SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN. OTHER LAWS OR REGULATIONS NOT WITHIN THE JURISDICTION OF THE GSPC MAY ALSO APPLY.

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 12th day of July, 2002.

Alice Schlenker, Chairperson

Lynn Rosik, Assistant Attorney General

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