

November 22, 2002

Jim Bruce
Douglas County Human Resources Department
Human Resources Director
Courthouse, Room 322
Roseburg, Oregon 97470

Dear Mr. Bruce:

At its November 22, 2002 meeting the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
ADVISORY OPINON NO. 02A-1011**

STATED FACTS: An Oregon county has had an Employee Benefit Committee (EBC) since 1988. The EBC was established by order of the board of commissioners. The committee is made up of general county employees and members from both county bargaining units. It is their responsibility to meet on a monthly basis with a benefits consultant and recommend changes to county employee medical plans within the insurance cap limits set by the board of commissioners.

The EBC made recommendations to the county board of commissioners in a memo titled "Wellness Subcommittee Recommendations." The county counsel felt it appropriate that the EBC obtain an advisory opinion on items #1 and #4 of this memo.

Item #1 of the Wellness Subcommittee Recommendations is as follows:

1. Contract with a provider for a comprehensive wellness program.

A Request For Proposal (RFP) would include requirements for offering classes for employee and spouse (nutrition, stress reduction, specialized exercise techniques, stop smoking), provide health screenings for employee and spouse (blood pressure, cholesterol, blood sugar, body fat analysis, flexibility analysis, health status questionnaire), provide a

newsletter and other written health information. A budget would be based on the responses to the RFP.

Item #4 of the memo is as follows:

4. Arrange corporate memberships with various health clubs. Different health clubs offer corporate memberships to any company. The EBC would only ask for the corporate discount given to any other business. The EBC is not asking for the county to pay for individual employee memberships, but that our employees are offered the standard corporate membership rate. This normally involves waiver of an enrollment fee, but may also involve a slightly reduced monthly rate. We have been advised by county counsel that participation will probably result in the reporting of taxable income to the employee based on the waiver of initiation fees.

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

244.020(1) "Actual conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (7) of this section."

244.020(2) "Business' means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity."

244.020(3) "Business with which the person is associated' means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1000 or more at any point in the preceding calendar year."

244.020(7) "Potential conflict of interest' means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is

associated, unless the pecuniary benefit or detriment arises out of the following:"

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."

244.120 **'Methods of handling conflicts; generally; application to elected officials or members of boards.** (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:"

244.120(2)(a) "When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or"

244.120(2)(b) "When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:"

244.120(2)(b)(A) "Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue."

244.120(2)(b)(B) "If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises."

QUESTION #1: Would it be a violation of Oregon Government Standards and Practices laws for the EBC to make recommendations to the county board of commissioners regarding contracting with a provider for a comprehensive program as set forth in item #1 of the EBC memo?

OPINION: ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, their official position or office to obtain a financial gain or the avoidance of a financial detriment, for the public official or a relative of the public official, that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, the reimbursement of expenses or an unsolicited award for professional achievement for the public official.

In this situation, the employees' actions with respect to making recommendations to obtain contracted "wellness" services would appear to be included in the exception for "official salary" and thus not prohibited under ORS 244.040(1)(a).

There appears to be one element in the stated facts where an EBC member could possibly violate Oregon Government Standards and Practices laws. If an EBC member, or a relative of the member, was associated with any of the businesses that could provide the services identified in the recommendations submitted to the board of commissioners, a violation of conflict of interest statutes could occur. If the member, or a relative of the member, were associated with any businesses that could provide these services the member would be required to adhere to the guidelines set forth in the appropriate conflict of interest disclosure statutes contained in ORS 244.120, as well as comply with ORS 244.040(1)(a).

QUESTION #2: Would it be a violation of Oregon Government Standards and Practices laws for the EBC to make recommendations to the county board of supervisors regarding arranging for corporate membership with various health clubs as set forth in item #4 of the EBC memo?

OPINION: The issues pertaining to use of office and conflict of interest disclosures outlined in question #1 also apply to this question.

QUESTION #3: Would it be a violation of Oregon Government Standards and Practices laws for county employees to accept a corporate discount rate if that same rate were given to other businesses?

OPINION: The Supreme Court, in Davidson v Oregon Government Ethics Commission, 300 OR 414, 712p. 2d 87 (1985), identified the broad policy of Oregon's ethics laws as ensuring that government employees do not gain personal financial advantage through their access to the assets and other attributes of government. In that case, the

Supreme Court held that a public official could not use his official position to obtain financial gain for himself where, through access to his governmental body's buying power, he purchased an automobile at a discount price. The Court emphasized that the term "use" in ORS 244.040(1)(a) includes availing oneself of a benefit not available to the general public. The Court applied a **but for** test, i.e., but for his position, the public official would have been unable to purchase the car at the discount price and, thus, obtain a personal gain. 712 p 2d 92.

The GSPC believes there may be limited circumstances when public officials may take advantage of group discounts or other marketing incentives. Those would include instances when the benefit is unsolicited by the public official and is available to others who are not public officials. Accordingly, if the EBC were recommending certain health clubs where county employees could receive discounts and the health clubs were offering the same discounts to a substantial segment of the population who were not public officials, participation by a public official would not appear to violate Oregon Government Standards and Practices laws. If the discount were available only to public officials, participation by public officials would place them in violation of ORS 244.040(1)(a).

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.

Issued by Order of the Oregon Government Standards and Practices Commission at Salem, Oregon on the 22nd day of November 2002.

Alice Schlenker, Chairperson

Lynn Rosik
Assistant Attorney General

Date

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