

February 12, 2002

Alec M. Jensen
Executive Officer
Tualatin Valley Fire and Rescue
20665 S.W. Blanton Street
Aloha, Oregon 97007

Dear Mr. Jensen:

This letter is in response to your correspondence dated November 16, 2001 and January 9, 2002 concerning the Tualatin Valley Fire and Rescue company store.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 02S-002**

STATED FACTS: Tualatin Valley Fire and Rescue (TVF&R) has an operation known as the company store where they operate a retail outlet selling articles of clothing emblazoned with their logo. Purchases are made from the company store's proceeds and profits are used to support the TVF&R Chaplain program.

Recently, TVF&R turned the operation of the company store over to a TVF&R battalion chief from whom they have routinely acquired much of the store's product. The battalion chief and his wife operate an embroidery business. Currently, merchandise consists of a mixture of product owned exclusively by TVF&R and product owned by the battalion chief. An accounting system is in place to distinguish between the two.

While the battalion chief works a regularly scheduled 24-hour shift, he is also required to attend meetings and other events in his off-duty time. He is also a member of the district's operations management team and is periodically required to return to work to participate in emergency operations. Because of this the battalion chief is assigned a TVF&R vehicle on a 24-hour basis.

Maintenance on the company store is performed in the battalion chief's off-duty time; however, it is not uncommon for him to complete his shift in Oregon City, travel to TVF&R headquarters in Aloha in his company vehicle to inventory and stock the company store and then return to his home in Salem. Product is commonly transported in the battalion chief's company vehicle from his home in Salem to the company store.

The company store contract between TVF&R and the battalion chief specifies that TVF&R will assign the battalion chief's company with one e-mail group box on the Intranet that will be titled "South Wind Designs" and one e-mail group box on the Intranet for the Store Group.

In exchange for use of the company store space, for all of the battalion chief's company's product sold in the store, the battalion chief's company will pay TVF&R 5.5% of the gross sales.

TVF&R and the battalion chief came to this agreement as a function of mutual convenience. TVF&R did not seek out other interested persons.

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

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(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: Does the agreement between TVF&R and the battalion chief as set out in the stated facts give rise to a violation of Oregon Government Standards and Practices laws?

OPINION: Yes. 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 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, the reimbursement of expenses or an unsolicited award for professional achievement for the public official.

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.

TVF&R and the battalion chief entered into a contract for the battalion chief to utilize the TVF&R company store for the purpose of selling a product manufactured by the battalion chief. TVF&R did not seek out other potential operators. But for the battalion chief's holding of the battalion chief's official position the battalion chief would not have had the opportunity to market his product out of the TVF&R company store. This arrangement is prohibited by ORS 244.040(1)(a).

According to the stated facts the battalion is assigned a TVF&R vehicle on a 24-hour basis. The battalion chief will routinely transport his company's product from his home in Salem in the TVF&R vehicle to his duty station. After working a 24-hour shift the battalion chief will then transport his company product in the TVF&R vehicle from Oregon City to Aloha. But for the holding of the official position the battalion chief would not have the TVF&R vehicle to transport his company product to the company store. Use of the TVF&R vehicle in this manner enables the battalion chief to avoid a financial detriment and is prohibited by ORS 244.040(1)(a).

Oregon Government Standards and Practices law, ORS Chapter 244, does not prohibit a public official from engaging in outside employment or professional activity. In previous advisory opinions of a similar nature the Oregon Government Standards and Practices Commission (GSPC) has issued guidelines related to public officials who

engage in this activity. The guidelines have been based upon Oregon law pursuant to ORS Chapter 244 and include the following:

GUIDELINES FOR OUTSIDE EMPLOYMENT OF PUBLIC OFFICIALS

1. That private business not be conducted on public time.
2. That public supplies, facilities, equipment, personnel, records or any other public resources not be used to carry out private business.
3. That no official action toward a third party be conditioned on a private business relationship with that third party.
4. That no confidential information be used to obtain financial benefit for the employee.
5. That employees will notify their appointing authority in writing of a potential or actual conflict of interest if private endeavors could or would be affected by public employment.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.

Please contact this office again if you would like this opinion submitted to the Oregon Government Standards and Practices Commission for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director
02S-002-JP