

August 26, 2005

Bruce R. Busch
Chief Legal Counsel
National Purchasing Partners, LLC
1100 Olive Way, Suite 900
Seattle, Washington 98101

Dear Mr. Busch:

At its August 26, 2005 meeting, the Oregon Government Standards and Practices Commission (GSPC) adopted the following advisory opinion:

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
ADVISORY OPINION NO. 05A-1004**

STATED FACTS: National Purchasing Partners, LLC (NPP) is a group purchasing organization that uses the volume purchasing potential of its membership to negotiate contracts with vendors at substantially discounted rates.

NPP membership is drawn from both public and private associations. In Oregon, organizations that participate in NPP include the League of Oregon Cities (LOC), Special Districts Association of Oregon (SDAO), International Association of Fire Chiefs (IAFC), Oregon Restaurant Association, the Master Builder's Association and hotel chains. Discounts offered by a vendor to a member association are occasionally offered to employees of the member associations. This would include fire district employees through IAFC and employees of cities through LOC.

NPP management studied the provisions of Oregon Government Standards and Practices law and reasoned that employees of NPP member associations, who are defined in ORS Chapter 244 as public officials, may individually accept the discount pricing from NPP vendors without violating Government Standards and Practices law.

NPP has suggested a number of reasons that they believe would enable Oregon public officials to accept discounts without violating ORS Chapter 244. Those reasons are as follows:

1. In Oregon, member associations, whose employees are defined as public officials, are non-profit organizations. Therefore, ORS 244.040(1)(a), regarding prohibited financial gain, would not apply since the associations are not defined as a business in ORS 244.020(2).
2. The discounts are only offered to public officials who join a member association and not to those who are merely eligible for membership. Accordingly, the discounts are available only because of association membership and not the underlying employment defining the member as a public official.
3. There are some public officials who could be eligible to join NPP member associations not only because of a public official position, but because of personal pursuits. For example a fire chief, member of IAFC, may also be a homebuilder and a member of the Master Builder's Association. Discounts would be available to the fire chief in either case.
4. Discount pricing is available to a large number of employees in both public and private entities.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

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 a person, who is defined as a public official and who is eligible for the NPP discounts because of public employment, violate Government Standards and Practices law by accepting the discounts?

OPINION: ORS 244.040(1)(a) prohibits a public official from using or attempting to use an official position or office to obtain 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. The only exceptions are official salary, honoraria, reimbursement of expenses or an unsolicited award for professional achievement.

The stated facts indicate that NPP membership is offered to both public and private entities. NPP negotiates to gain discounts from vendors on behalf of their member entities. Occasionally, employees and/or members of the entities might also be offered discounts on individual purchases.

The factors presented in support of the NPP view that accepting discounts would not violate Oregon law are discussed as follows:

1. Whether or not the public official's employer is a non-profit¹ has no impact on the application of ORS 244.040(1) in this situation. The issue is not about a business or a business with which the official is associated, but about a financial benefit a public official would be prohibited from accepting.
2. The stated facts make a distinction between those public officials that are eligible for discounts through electing to join an NPP association and those public officials who are not eligible by electing not to join. NPP apparently believes that this distinction means that the discounts are available because of association membership and not public employment. We disagree. Membership in a NPP association and subsequent opportunities for discounts would not be available without the underlying public position. The NPP distinction has no impact on the application of

¹ In fact, the public official's employers are public bodies, whether cities, special districts or fire departments. Those public bodies may belong to intergovernmental entities created under ORS Chapter 190, such as the League of Oregon Cities or the Special District Association of Oregon.

ORS 244.040(1)(a). Again, the issue is the action of the individual public official by accepting a benefit that would not otherwise be available but for the public official status.

3. The stated facts point to situations where a public official might be eligible for discounts both as a public official and due to private business endeavors. The example given was a fire chief eligible for NPP discounts through IAFC and also eligible as a member of the Master Builder's Association through personal business endeavors. Again, the issue is the action of an individual public official accepting a benefit that would not otherwise be available but for the public official status. NPP eligibility gained through personal business cannot be used to justify the same benefit offered to the holder of a public position. Accordingly, the fire chief in the example may accept discounts as a private business owner, but not as a fire chief.
4. The stated facts indicate that a large number of employees from both public and private entities might be eligible for discounts through NPP memberships. Oregon Government Standards and Practices law, ORS 244.040(1)(a), prohibits a public official from accepting a financial benefit that would not be available but for the public position held. This is often referred to as the "but for" test. NPP contends that the availability of their discounts is offered to enough employees, public and private, so as to override the "but for" test.

While NPP membership includes both public and private entities, the discounted pricing through NPP membership is not offered to the general public (e.g., Costco). In addition, NPP discounts are described as an exclusive member benefit to employees of membership associations, who choose to join NPP. In this case, the Costco example is helpful in evaluating what portion of the public and private population would have to have the opportunity of NPP discounts available to mitigate the "but for" test. The discounts available from NPP are not offered to the general public, but as an exclusive benefit to members. Accordingly, it does not appear that the current rules regarding NPP membership and the potential size of the group offered discounts would reach the size necessary to override the "but for" test of the statute.

Based on the information and analysis of these issues it appears that, if a public official accepted a discount offered to NPP members, whose eligibility and

membership stemmed from the public position, it would be a 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. 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 26th day of August 2005.

John P. Kopetski, Chairperson

Lynn Rosik, Assistant Attorney General