

June 26, 2002

Robert F. Blackmore
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P.O. Box 230669
Portland, Oregon 97281

Re: GSPC Staff Opinion 02S-002
Company Store Ethics Issue
Your File No. 46796/30664

Dear Mr. Blackmore:

This letter is in response to your correspondence dated June 14, 2002 concerning Oregon Government Standards and Practices Commission (GSPC) Staff Opinion 02S-002 with regard to the Tualatin Valley Fire and Rescue "company store." This opinion will combine the stated facts in 02S-002 with the new stated facts in your letter.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF
OPINION NO. 02S-017**

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, and after substantial efforts to locate and contact other potential vendors and foster competition for the contract, 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.

The battalion chief works a regularly scheduled 24-hour shift but is 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.

Actions are presently being taken to ensure that the management and operation of the company store are in strict compliance with Oregon Government Standards and Practices laws. For example, the battalion chief will no longer be permitted to use the TVF&R vehicle to transport merchandise or to transport himself for purposes of management of the store. TVF&R has also reiterated its directive and concern to the battalion chief that no department time will be used in the management of the store.

In addition, TVF&R will be, pursuant to Oregon's public contracting laws, seeking competitive store management proposals by the end of the next fiscal year.

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: 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 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. The stated facts indicate "TVF&R made substantial efforts to locate and contact other potential vendors and foster competition for the contract." The stated facts also indicate "TVF&R will be, pursuant to Oregon's public contracting laws, seeking competitive store management proposals by the end of the next fiscal year." If the original agreement between TVF&R and the battalion chief had been a contract that had been properly advertised and put out for competitive bid and the battalion chief had no involvement in developing the bid process, it appears that the battalion chief would not have been prohibited by ORS Chapter 244 from accepting the contract.

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The stated facts also indicate that the battalion chief is no longer utilizing the TVF&R vehicle assigned to him in his personal endeavors at the company store. This appears to be in compliance with Oregon Government Standards and Practices laws.

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 (GSPC) for adoption as a formal advisory opinion pursuant to ORS 244.280.

Sincerely,

L. Patrick Hearn
Executive Director
02S017-addl. to 02S002-JP