

May 9, 2005

Dianne Hunt
Human Resources Director
City of Keizer
P.O. Box 21000
Keizer, Oregon 97307

Dear Ms. Hunt:

This is in response to your correspondence dated April 7, 2005 regarding a current city policy on employees' personal use of city telephones and proposed policy changes.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 05S-007

STATED FACTS: A city has several policies regarding employee use of city desk and wireless telephones. All of the policies affirm that city telephones are for official business. Exceptions to the official use restriction are provided in three current policies. There is one general policy, a policy for the police department and another for the public works department. The city is considering a new policy for all departments related to the use of wireless telephones that would be integrated into the existing policies.

The substance of each of the three existing policies is as follows:

1. GENERAL POLICY

This policy allows personal calls with desk and wireless telephones. The policy on desk telephones requires personal calls to be brief and kept to a minimum. The policy on personal wireless calls only specifies that they be kept to a minimum but does not address duration. Except for emergencies, employees are prohibited from charging the cost of personal long distance telephone calls to the city. In the case of an emergency call, the employee must reimburse the city for the cost. On a monthly basis, employees are required to reimburse the city for the cost of all personal wireless and long distance calls.

2. POLICE DEPARTMENT

The current policy addresses two types of use. One is for employees in patrol units that are provided a wireless telephone while on duty. The other level of use is for employees who are designated to carry a wireless telephone at all times.

Employees in patrol units are allowed personal wireless calls and are encouraged to keep call duration to less than five minutes. Frequency of personal wireless calls is not addressed. Employees who are assigned wireless telephones are not given specific limitations on personal calls.

Under the police department service plan, each wireless telephone is allocated 500 minutes each month. Employees must reimburse the department each month according to the following criteria:

Employees must reimburse the department for any personal long distance calls.

If the minutes of use do not exceed the allotted 500 minutes, no reimbursement for personal use is required.

If the minutes of use do exceed the allotted 500 minutes, the responsible employee must reimburse the department for personal calls at 35 cents per minute.

When the total minutes for personal calls is greater than the sum of minutes over 500, the responsible employee must reimburse the department for all minutes exceeding the allotted 500 at 35 cents per minute.

3. PUBLIC WORKS DEPARTMENT

The city policy on the personal use of wireless telephones by employees in the public works department was dictated by the terms of a collective bargaining agreement. The wireless telephone service plan for the public works department allocates each telephone with 500 minutes per month. The employee must reimburse the department each month according to the following criteria:

Employees are allowed to make personal calls and are encouraged to keep such calls to a minimum.

The employees are required to reimburse the public works department for personal calls as follows:

Personal use occurring within the allotted 500 minutes is reimbursed at a rate of 10 cents per minute.

If the employee's total use exceeds the 500 minutes, personal calls are reimbursed at 40 cents per minute.

PROPOSED POLICY REVISION:

The city intends to consolidate the three policies into a single city-wide policy. These would be the elements of the proposed policy:

The city will select a wireless service provider, service plan and brands of wireless telephones to be used by city employees. The city may act as the service provider.

Selected city employees will be provided a monthly allowance of \$50 to obtain a wireless telephone for personal and official use.

The \$50 allowance will be a taxable portion of the employee's compensation package.

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 NO. 1: Would city employees violate Government Standards and Practices law if their personal use of city telephones was limited to that allowed under the current general policy?

OPINION: ORS 244.040(1)(a) prohibits public officials from using or attempting to use an official position or public office to obtain financial gain or avoid a financial detriment, the opportunity for which would not otherwise be available but for the public official's holding the official position or office. The only exceptions to the prohibition are, official salary, honoraria, reimbursement of expenses and an unsolicited award for professional achievement.

Previous GSPC advisory and staff opinions have allowed for public officials' personal telephone calls using agency telephones to be infrequent and brief. GSPC Advisory Opinion 98A-1003 gives examples of the types of personal telephone calls that would be permitted. Such calls are to be for the purpose of managing personal matters that can only be accomplished during regular working hours, such as calls to medical care providers, service technicians or to a child's school.

The subject city's current general policy provides for a monthly review of telephone billing statements and imposes a requirement for employees to reimburse the city for personal wireless and/or long distance calls. While this requirement may allow the city to recover the cost for the personal use, it does not shield public officials from the possibility of violating ORS 244.040(1)(a). There is often a misconception of how this provision of ORS Chapter 244 applies. It is a public official's responsibility to not accept the financial benefits prohibited by ORS 244.040(1)(a). By using the city's telephones for personal calls, a public official could realize a financial gain or the avoidance of a financial detriment in different ways. These include the agency's payment of long distance tolls, wireless minutes, which could include long distance calls, monthly service fees and the telephone itself. This would apply even if public officials reimburse the agency for the cost of personal minutes used.

QUESTION NO. 2: Would police department employees violate Government Standards and Practices law if their personal use of department wireless telephones was limited to that allowed under the current police department policy?

OPINION: The application of ORS 244.040(1)(a) and the guidance of GSPC opinions (Advisory Opinions 98A-1003 and 02A-1008) would be the same for employees of the police department as those governed by the city's general policy. Brief and infrequent personal telephone calls would be permitted under the circumstances discussed for Question No. 1.

The police department's policy exposes employees to a greater risk of violating ORS 244.040(1)(a) than employees abiding by the general city policy. For example, employees in patrol units are encouraged to keep personal wireless calls to less than five minutes in duration, but there is no restriction on the frequency of personal calls. Police department employees with assigned wireless telephones are also given no restrictions as to frequency or duration of personal wireless calls.

As noted previously, the cost of wireless minutes is not the only financial benefit involved. For example, if a public official is permitted to use an agency wireless telephone for personal calls and reimburses the agency for the cost for those calls, the official would still avoid the personal expenses of purchasing a personal wireless telephone and subscribing to a service plan.

QUESTION NO. 3: Would public works department employees violate Government Standards and Practices law if their personal use of department wireless telephones was limited to that allowed under the current public works department policy?

OPINION: The primary distinction between the public works department policy on the personal use of wireless telephones and other city policies is that it is based on the terms of a collective bargaining agreement.

If public works employees restrict personal use of wireless telephones to the specific terms of the collective bargaining agreement, they would not violate Government Standards and Practices law because such usage would constitute "official salary" which is permitted financial gain under ORS 244.040(1)(a). Any personal usage not specified by the collective bargaining agreement could cause employees to violate ORS 244.040(1)(a).

QUESTION NO. 4: Would city employees violate Government Standards and Practices law if their personal use of department wireless telephones was limited to that allowed under the proposed revisions to the city's general policy?

OPINION: No. While ORS 244.040(1)(a) prohibits a public official from attempting to use or from using his/her public position for financial gain, it also provides some exceptions. Official salary is one of those exceptions. In previous

opinions the GSPC has said that official salary includes all components of the compensation received by a public official (Advisory Opinion No. 02A-1012 and Staff Opinion No. 02S-015). This would include, but not be limited to, salary, insurance, vacation or various allowances.

The proposed monthly allowance for a personal wireless telephone would be considered a portion of the city employee's official salary. Accordingly, it appears that making personal calls on a personally owned wireless telephone under this proposed policy would not violate Government Standards and Practices law.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 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 STANDARDS AND PRACTICES COMMISSION.

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

Sincerely,

L. Patrick Hearn
Executive Director