

ADVISORY OPINION

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Expert Testimony

QUESTION:

Can a state employee who serves as a Food Program Technical Expert accept outside compensation to provide expert advice and testimony in an out-of-state case involving food borne illness?

ANSWER:

Yes. RCW 42.52.120 governs the receipt of outside compensation by state officers and state employees. The receipt of compensation for work related to a state employee's area of expertise does not violate the state's ethics law provided receipt meets the conditions under RCW 42.52.120(1)(a)-(f), and the outside work does not conflict with the proper discharge of official duties under RCW 42.52.020. In addition, state resources may not be used to perform work under a contract or grant outside of official duties.

ANALYSIS

This issue concerns a request by an out-of-state law firm to retain the services of a Food Program Technical Expert in the Department of Health. The employee is expected to provide expert advice and testimony in litigation involving the Burger King Corporation, and will be asked to evaluate both the conditions and procedures for food handling at a local restaurant, and the investigation and inspection programs of the local and state health departments. The question is whether accepting outside employment as an expert advisor or witness violates the state's ethics law.

The employee's official duties for the state include, but are not limited to, providing statewide consultation and evaluation of technical issues and concerns relating to the state's food protection program; providing technical assistance during food emergencies; interacting with local, state, and federal authorities; and providing expert testimony in legal proceedings or administrative hearings.

Under RCW 42.52.020, a state employee cannot, for example, accept outside employment if such employment is in conflict with the discharge of official duties:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties.

In the question before the Board, the state employee would be providing expert advice and testimony in litigation that is occurring outside the State of Washington, and in a case to which the state's Department of Health is not a party. Therefore, acceptance of compensation for rendering these services would not conflict with the proper discharge of the employee's official duties, and would not violate RCW 42.52.020.

In addition to RCW 42.52.020, RCW 42.52.120(1)(a)-(f) sets out six conditions under which outside employment is permissible. Each of the conditions must be met for outside employment to comply with RCW 42.52.120(1).

RCW 42.52.120(1)(a) requires that "[t]he contract or grant is bona fide and actually performed". The Board assumes this condition will be met by the employee who will provide expert advice and testimony in return for compensation.

RCW 42.52.120(1)(b) requires that "[t]he performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision. In Advisory Opinion 96-07, the Board considered whether the definition of "official duties" should be generic; that is, if a state employee worked as an expert witness for the state, then he or she could not serve as an expert witness for other persons because such service would constitute "official duties". The Board rejected this interpretation, concluding that a state employee who served as an expert witness for the state may also receive compensation as an expert witness for other persons.

RCW 42.52.120(1)(c) provides "[t]he performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee". RCW 42.52.040 prohibits a state officer or state employee from assisting a person in a transaction in which the officer or employee participated. As the Board noted in Advisory Opinion 96-07, this provision prevents a state officer or state employee from being an expert witness for a private party in any transaction involving the state of Washington if the officer or employee participated in the transaction. However, service as an expert witness is not prohibited if the matter does not involve a transaction with the state. Further, provided the employee complies with Department of Health policies governing outside employment, the conditions under RCW 42.52.120(1)(c) are fully met and receipt of compensation would not violate this provision.

RCW 42.52.120(1)(d) provides “[t]he contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift”. RCW 42.52.150(4) provides in part:

Notwithstanding subsections (2) and (5) of this section, a state officer or state employee of a regulatory agency or of an agency that seeks to acquire goods or services who participates in those regulatory or contractual matters may receive, accept, take, or seek, directly or indirectly, only the following items from a person regulated by the agency or from a person who seeks to provide goods or services to the agency[.]

This provision only would prevent the employee from accepting outside employment from the out-of-state law firm, if the firm was regulated by the state Department of Health, or if the firm sought to provide goods or services to the department and the employee participated in such matters.

RCW 42.52.120(1)(e) provides “[t]he contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity or by his or her agency.” Under this provision, the employee could not accept compensation if he created or authorized the contract in his official capacity, or if the contract was created or authorized by the Department of Health.

Finally, RCW 42.52.120(1)(f) provides that “[t]he contract or grant would not require unauthorized disclosure of confidential information”. This provision does not limit employment as an expert witness, unless the testimony concerned the disclosure of confidential information.

Any state officer or state employee who receives compensation under an outside grant or contract may not use state resources to fulfill all or part of that grant or contract pursuant to RCW 42.52.160(1):

No state officer or state employee may employ or use any person, money, or property under the officer’s or employee’s official control or direction, or in his or her official control or direction, for the private benefit or gain of the officer, employee, or another.

State resources includes the use of state time. In Advisory Opinion 96-07, the Board determined that RCW 42.52.160(1) does not apply to the specialized knowledge and experience that a state officer or state employee acquires through state service.