

ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030, RCW 42.52.040, RCW 42.52.080, RCW 42.52.120

SUMMARY OF CHANGES: No changes.

Working on Programs Funded by a Grant the Employee Administrators

QUESTIONS

1. Are there any circumstances under which a state employee may financially benefit or otherwise perform work, whether or not for compensation, on projects funded by a grant program the employee administers?
2. Can a state employee work or volunteer on projects that are funded from sources other than the state, or that are state-funded, but not within the official responsibilities of the employee?
3. Can a state employee form his or her own business and offer services to state agencies or other persons that are related to the work the employee performed in a previous state position, but unrelated to the employee's current state position?

ANSWERS

1. No, RCW 42.52.030 prohibits state officers and state employees from financially benefiting as a result of grant programs under the officer's or employee's supervision. RCW 42.52.040 prohibits state officers or state employees from assisting others, whether or not for compensation, in a transaction involving the state, and therefore prohibits a state employee from volunteering for an organization that is a recipient of grant funds or a contractor under a program administered by the state employee.
2. Yes, provided the state employee meets the conditions under RCW 42.52.120(1) and (2), if applicable, the employee may work or volunteer on other state-funded projects, or on projects that are funded by other sources. The employee must also comply with RCW 42.52.160(1) and may not use state resources to support outside employment or volunteer work.

3. Yes, a state employee may form his or her own business and offer services to state agencies and other persons, provided the services offered to state agencies comply with RCW 42.52.120 and RCW 42.52.160(1), and the services offered to other persons do not involve assistance in transactions the employee participated in during the course of state employment.

ANALYSIS

1. Are there any circumstances under which a state employee may financially benefit or otherwise perform work, whether or not for compensation, on projects funded by a grant program the employee administers?

In 1993 the state legislature created the Jobs for the Environment (JFE) Program within the Department of Natural Resources. JFE awards grants to local organizations that perform salmon restoration projects. In 1999 the Salmon Recovery Board (SRB) passed a resolution to award \$3.0 million to JFE, which JFE will allocate through a competitive grant application process during the spring of 2000.

The state employee requesting this opinion is interested in working with organizations that perform salmon restoration at the local level, including non-profit organizations, local governments, conservation districts, tribes, or private entities, on either a compensated or volunteer basis. The state employee's official duties include: (1) administering JFE grant awards; (2) contracting with organizations that receive JFE grant awards; (3) completing special projects as assigned by the program manager; (4) leading activities that evaluate JFE outcomes; and, (5) assisting in forming competitive grant applications for JFE and assembling rating committees.

The first question actually involves several issues. The first is whether a state employee can have a beneficial interest in, or financially benefit from, grants awarded through a program the employee administers. This issue is governed by RCW 42.52.030 and the prohibitions are clear:

(1) No state officer or state employee, . . . may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the officer or employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase or grant.

(2) No state officer or state employee may participate in a transaction involving the state in his or her official capacity with a person of which the officer or employee is an officer, agent, employee, or member, or in which the officer or employee owns a beneficial interest...

Under subsection (1), the state employee could not receive compensation for work that was related to a JFE grant administered by the employee, while subsection (2) prohibits the employee from participating in the award or administration of a JFE grant with any person in which the state employee may serve as an "officer, agent, employee, or member." This subsection also

prohibits the employee from forming his own business and participating in the award of a grant under the JFE program.

The second issue in this question relates to outside employment, which is primarily, though not exclusively, governed under RCW 42.52.120. RCW 42.52.120 provides conditions under which compensation may be received for the performance of contracts or grants outside of official duties. A state employee may receive outside compensation for services performed outside official duties only if each of these conditions under RCW 42.52.120(1) is met:

- (a) The contract or grant is bona fide and actually performed;
- (b) The 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;
- (c) The 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;
- (d) The 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;
- (e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity;
- (f) The contract or grant would not require unauthorized disclosure of confidential information.

Based on the facts presented to the Board, receipt of compensation from persons who receive JFE grants would not meet the conditions under RCW 42.52.120(1)(b), (c) and (d). The condition under RCW 42.52.120(1)(b) cannot be satisfied because the employee has official duties that include the administration of JFE grants. RCW 42.52.120(1)(b) prohibits acceptance of outside compensation when compensation results from performance under a grant within the supervision of the employee.

RCW 42.52.120(1)(c) contains two separate requirements. The first is that the outside employment cannot be prohibited under RCW 42.52.040 which provides:

- (1) Except in the course of official duties or incident to official duties, no state officer or state employee may assist another person, directly or indirectly, whether or not for compensation, in a transaction involving the state:
 - (a) In which the state officer or state employee has at any time participated; or

- (b) If the transaction involving the state is or has been under the official responsibility of the state officer or state employee within a period of two years preceding such assistance.
- (2) No state officer or state employee may share in compensation received by another for assistance that the officer or employee is prohibited from providing under subsection (1) or (3) of this section.
- (3) A business entity of which a state officer or state employee is a partner, managing officer, or employee shall not assist another person in a transaction involving the state if the state officer or state employee is prohibited from doing so by subsection (1) of this section.

The meaning of a "transaction involving the state" as used in chapter 42.52. RCW is a contract or similar matter that is the subject of state action; a matter to which the state is a party; or, a matter in which the state has a direct and substantial proprietary interest. RCW 42.52.010(21)(a).

In the context of the question before the Board, RCW 42.52.040 would prohibit the state employee from doing two things. First, the state employee could not work, volunteer, or share in compensation received from any matter relating to a JFE grant or contract under the authority or supervision of the state employee. Second, under subsection (3), the state employee could not create a business entity or work for a business entity for the purpose of assisting a JFE grant recipient or contractor if the state employee participated in the JFE grant or contract.

The second requirement in RCW 42.52.120(1)(c) is that the performance of the contract does not violate applicable laws or rules governing outside employment. This provision recognizes the ability of individual agencies to have specific rules on outside employment, and that employees must comply with those rules.

This question also creates conflict of interest concerns under RCW 42.52.120(1)(d) which provides that a state employee cannot receive compensation from any person from whom the employee would be prohibited from receiving a gift under RCW 42.52.150(4). RCW 42.52.150(4) provides in pertinent 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[.]

In general, a state officer or employee participates in contractual matters if his or her job includes the authority to participate in such matters—even if there is no actual contractual transaction taking

place. Under RCW 42.52.150(4) a state officer or employee who participates in regulatory or contractual matters is not prevented from receiving gifts from persons who contract with the agency, but is limited in the items that may be received from such sources. RCW 42.52.150(4) prohibits the receipt of compensation from a person who contracts with the agency if the officer or employee participates in contractual matters.

In this case, the state employee may also be prohibited from volunteering for outside organizations under RCW 42.52.020 because the employee has official duties relating to the evaluation of JFE outcomes. RCW 42.52.020 restricts state officers and state employees from having interests that may conflict with the performance 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.

A conflict could arise between the state employee's obligations to impartially evaluate the success or failure of a grant recipient's efforts, and the need to have a recipient favorably evaluated to ensure continued funding and maintain the legitimacy of the program.

A conflict of interest under the state's ethics law may not be removed simply by reassignment to another state position or through the termination of state employment. For example, even if an employee is reassigned to another position, the prohibitions against assisting persons in transactions involving the state under RCW 42.52.040 still apply. Further, if state employment is terminated, former state officers and state employees are subject to post-state employment restrictions under RCW 42.52.080.

The two most significant restrictions that apply to the question of whether there is any circumstance under which the state employee can financially benefit from grants funded by the program he administers are RCW 42.52.080(1) and RCW 42.52.080(5). These provide:

- (1) No former state officer or state employee may, within a period of one year from the date of termination of state employment, accept employment or receive compensation from an employer if:
 - (a) The officer or employee, during the two years immediately preceding termination of state employment, was engaged in the negotiation or administration on behalf of the state or agency of one or more contracts with that employer and was in a position to make discretionary decisions affecting the outcome of such negotiation or the nature of such administration;
 - (b) Such a contract or contracts have a total value of more than ten thousand dollars; and

(c) The duties of the employment with the employer or the activities for which the compensation would be received include fulfilling or implementing, in whole or in part, the provisions such a contact or contracts. This subsection shall not be construed to prohibit a state officer or state employee from accepting employment with a state employee organization.

RCW 42.52.080(1) does not prohibit a former state officer or employee from working for an employer, but it does limit the kind of work that can be performed. Thus, the fact that a prospective employer entered into contracts with the employee's or former officer's agency does not prohibit employment with a post-state employer. However, RCW 42.52.080(1)(c) would not permit a former state officer or employee to perform duties for the new employer that would involve fulfilling or implementing the contracts with his or her former agency, or supervising or controlling actions taken to fulfill or implement those contracts, e.g., JFE grants or contracts.

RCW 42.52.080(5) also limits the duties that can be performed for a post-state employer:

No state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment. This subsection shall not be construed to prohibit any employee or officer of a state employee organization from rendering assistance to state officers or state employees in the course of employee organization business.

The prohibition under this subsection is absolute and applies to any transaction involving the state in which a former employee participated while working for the state. Thus, if the employee participated in the award of a contract or grant to a person, he could not assist that person on that contract or grant. This prohibition also applies in the context of self-employment. See Advisory Opinions 97-08 and 98-02.

2. Can a state employee work or volunteer on projects that are funded from sources other than the state, or that are state-funded, but not within the official responsibilities of the employee?

Outside employment is generally governed by the conditions under RCW 42.52.120(1). Under RCW 42.52.120(1), an employee could work on projects that are funded from sources other than the state, or on state-funded programs, provided the employee complies with all conditions under subsection (1). RCW 42.52.120 also allows a state employee to have a beneficial interest in a contract with a state agency under subsection (2) provided the contract complies with certain conditions:

- (a) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which more than one bid or grant application was received; or
- (b) The contract or grant is awarded or issued as a result of an open and competitive bidding or selection process in which the officer's or employee's bid or proposal was the only bid or

proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties; or

(c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.

This provision allows a state employee to bid on a contract or grant awarded through any state agency, provided the state employee complies with all provisions of RCW 42.52.120(1), and, in the event of a non-competitive selection or award process, the state employee has received prior approval from the Executive Ethics Board that the contract or grant is not in conflict with the performance of official duties.

Outside volunteer work is governed under RCW 42.52.020, RCW 42.52.030(2), and RCW 42.52.040, which have already been discussed. Provided the state employee has no official responsibilities relating to funding of outside projects, and no state resources are used by the state employee to perform the outside work, whether or not for compensation, the Board sees no basis for concluding that a conflict of interest exists under chapter 42.52 RCW.

3. Can a state employee form his or her own business and offer services to state agencies or other persons that are related to the work the employee performed in a previous state position, but unrelated to the employee's current state position?

A state employee can form his or her own business and offer services to state agencies and other persons, provided the outside business complies with the provisions of RCW 42.52.120, and concerns matters unrelated to transactions involving the state, if the state employee participated in those transactions.