

## ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.120

SUMMARY OF CHANGES: Non-substantive scrivener's errors.

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### Outside Employment with Regulated Entity

#### QUESTIONS

1. Whether an archaeologist has a potential conflict of interest if the archaeologist holds outside employment with a private timber company regulated by the archaeologist's employing agency?
2. Does a state employee have a conflict of interest if the outside duties performed by the employee could affect whether the outside employer's interests are regulated by the agency?

#### ANSWERS

1. No, unless the archaeologist is required to participate in regulatory matters affecting the interests of the outside employer. If the archaeologist does participate in regulatory matters that may affect the interests of the outside employer, the conflict of interest must be addressed through some alternative means or the employee may be required to divest the outside employment.
2. No. The state's ethics law prohibits interests that conflict with the discharge of a state officer's or state employee's official duties and does not expressly prohibit outside employment that may create conflicts of interest with the regulatory authority of the employing state agency. However, state agencies may adopt outside employment policies that are more restrictive than the state's ethics law.

#### ANALYSIS

The Department of Natural Resources (DNR) performs a number of different functions. Two of these functions are important for this opinion. First, the DNR regulates the harvesting of timber on public and private lands. Second, the DNR engages in the proprietary function of harvesting timber from state lands. As a result the regulatory part of the DNR actually regulates the

proprietary part of the agency. The DNR has adopted policies to separate these two functions, although it is possible that an employee who works on the proprietary side of the agency could be called upon to work on the regulatory side.

As part of the agency's timber harvesting function, the DNR employs an archaeologist who serves as the proprietary expert on archaeological and cultural resources on state land. As the proprietary expert, the archaeologist is required to: (1) ensure the protection of archaeological and cultural resources in accordance with the department's policies and relevant laws; (2) coordinate with tribal entities to develop archaeological and cultural protection plans for state trust land management activities; (3) review and consult on archaeological and cultural resources sites and plans; (4) perform site inspections and surveys; and, (5) assist other regions and perform other duties as required. In general, the archaeologist performs duties that are not regulatory in nature, but the employee might be required to participate in regulatory activities based on the needs of the agency.

Because of the skills and competencies required by this position, it is possible that the archaeologist may hold outside employment with other persons, including private timber companies that are subject to agency regulation.

The agency has two concerns under RCW 42.52. First, how does an agency apply conflict of interest provisions under the state's ethics law to situations where the agency's archaeologist may be required by the agency to participate in the performance of regulatory functions that affect the interests of the employee's outside employer? Second, whether the employee could have a conflict of interest if he or she works for an outside employer that is regulated by the employee's state agency, and when the performance of outside duties could affect the exercise of regulatory authority over the outside employer?

On the question of whether a state employee can accept employment with an outside employer regulated by the employee's state agency, the Board considered two questions relevant to this question in Advisory Opinion 97-03:

May a state officer or employee of a regulatory agency conduct an outside business or accept outside employment doing work that the officer or employee would regulate as part of his or her official duties; and,

May a state officer or employee accept employment from a person regulated by the agency if the employment is unrelated to the officer's or employee's official duties and the officer or employee does not actually participate in the regulation of the employer?

The Board answered the first question in the negative, but affirmed that state employees could accept outside employment from a regulated entity provided they did not participate in the regulation of that entity. Emphasis added. However, if a state employee subsequently participates in the regulation of an outside employer, receipt of compensation from that employer would be prohibited under RCW 42.52.120(1)(d) which provides:

(1) No state officer or state employee may receive any thing of economic value under any contract or grant outside of his or her official duties. The prohibition in this subsection does not apply where the state officer or state employee has complied with RCW 42.52.030(2) or each of the following conditions are met:

...

(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.

The Board explained the prohibition against receiving compensation from an outside employer by way of example:

If the revenue auditor audited his or her outside employer, they [sic] would have to give up the outside employment because they [sic] would be receiving compensation from a person they regulate and they are participating in regulatory matters. The application of this rule may make outside employment in some areas difficult. For example, the revenue auditor may be able to have someone else do the audit of the employer. This may be more difficult in other regulatory jobs. For example, the fish and wildlife employee may not be in a position to do his or her job if there are some charter boat operators that they [sic] did not want to regulate owing to considerations of outside employment.

Using the Board's analysis in Advisory Opinion 97-03, the archaeologist could accept outside employment for a private timber company provided he or she did not participate in regulatory matters affecting the interests of the outside employer. However, if the archaeologist were called on by the agency to participate in a regulatory matter affecting the interests of the outside employer, and no alternative means were available to otherwise redress the conflict of interest, the archaeologist would have to divest the outside employment to avoid a violation of RCW 42.52.120(1)(d).

The second question concerns a much broader conflict of interest issue, and asks the Board to determine whether a state employee who does not participate in regulatory actions may receive outside compensation from a regulated entity if the performance of outside duties could affect the agency's regulatory actions. [Emphasis added]

In this case, the state employee performs duties as a project archaeologist for the state and as a consulting archaeologist for the outside employer. The duties performed in both positions are substantially similar and include: surveying of timber harvests; providing advice on compliance with state law; preparing Washington State site forms; preparing reports that conform with Association for Washington Archaeology guidelines; and, sending reports and site forms to the Office of Archaeology and Historic Preservation. As an archaeologist, the state employee is obligated to identify and record archaeological sites that may be of cultural and historic interest.

Archaeological and historical sites are regulated by the Forest Practices Division of the Department of Natural Resources. Pursuant to WAC 222-16-050:

(1) "Class IV - special." Except as provided in WAC [222-16-051](#), application to conduct forest practices involving the following circumstances requires an environmental checklist in compliance with the State Environmental Policy Act (SEPA), and SEPA guidelines, as they have been determined to have potential for a substantial impact on the environment. It may be determined that additional information or a detailed environmental statement is required before these forest practices may be approved.

...

(f) Timber harvest, construction of roads, landings, rock quarries, gravel pits, borrow pits, and spoil disposal on the following except in (f)(iv) of this section:

(i) Archaeological or historic archaeological resources as defined in RCW 27.53.030; or

(ii) Historic sites eligible for listing on the National Register of Historic Places or the Washington Heritage Register as determined by the Washington state department of archaeology and historic preservation; or

(iii) Sites containing evidence of Native American cairns, graves, or glyptic records, as provided for in chapters 27.44 and 27.53 RCW. The department of archaeology and historic preservation shall consult with the affected Indian tribes in identifying such sites.

The concern raised by the agency is that the employee's outside employment as a consulting archaeologist may conflict with the agency's authority to regulate forest practices by the outside employer. For example, as a consulting archaeologist, the employee may have divided loyalties between the obligation to identify archaeological sites, and the financial impact that such an identification could have on the outside employer's ability to harvest timber if a site became subject to a forest practices permit.

The issue here is what kind of conflicts of interest does the ethics law prohibit. RCW 45.52.020 provides:

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.

(Emphasis added.)

The focus of RCW 42.52.020 is on a conflict that interferes with the performance of the officer's or employee's official duties. In Opinion 97-03 the Board explained potential conflicts with the performance of official duties as follows:

In our opinion, there is a conflict with the proper discharge of an officer's or employee's official duties if the officer or employee works in the same area that he or she regulates. This conflict can

occur in one of two ways. The first is the conflict between applying the law as set out by agency policy which may conflict with the application of the law by the officer or employee in the outside business. For example, if a revenue auditor had an outside business preparing state tax returns, the auditor would want to correctly apply the law, but his or her perspective would be to save the client as much tax as possible. On close legal questions, this private perspective may conflict with the agency perspective, i.e., which may be to resolve close legal questions in favor of applying the tax.

The second type of conflict is the potential for selective application of the law to benefit the officer's or employee's outside business over competitors. Consider the example of a fish and wildlife employee, who regulates fishing charters and who also operates a charter business. On some days the officer or employee regulates other charter boat operators, and on other days he or she competes with other charter boat operators. Again there can be a divergence between the officer's or employee's official duties and his or her private interest. In the worst case the officer or employee could use his or her state authority to gain a competitive advantage.

These conflicts occur because of the potential for divided loyalty between the officer's or employee's official duties and their private interest in their outside business or employment. We believe that state officers and employees who have such outside employment would work hard to properly discharge their official duties and not let their private business interfere. Nevertheless, the Board believes that this is the kind of conflict the ethics law was intended to prevent.

Opinion 97-03 at pages 2-3.

The potential conflicts identified in Opinion 97-03 relate to the potential for divided loyalties that might cause an officer or employee not to perform his or her official duties. This is not the kind of conflict that concerns the agency in this case. Rather the agency is concerned with a general conflict between the employee's outside employment and the regulatory mission of the agency. This concern goes beyond the scope of the ethics law which is directed at the proper performance of an officer's or employee's official duties.

The Board understands the DNR's concern about the conflict between the outside employment and the regulatory mission of the agency. To the extent this is a significant problem for the agency it should be addressed in agency specific rules governing outside employment. RCW 42.52.120(c) recognizes that outside employment is improper when prohibited by agency rules relating to outside employment.