

## ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030

SUMMARY OF CHANGES: No changes.

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### **Membership in Non-State Organizations that are Affected by State Agency Decisions**

#### **QUESTIONS**

1. Is it a violation of the Ethics in Public Service Act for state agency permit decision makers to also be members, i.e., pay dues and receive newsletters, of an environmental organization that periodically sues the agency over decisions made by the decision makers?
2. What is the meaning of "member" under RCW 42.52.030(2)?
3. Which organizations, in which state employees hold memberships, are considered persons who participate in transactions with the state under RCW 42.52.030(2)?

#### **ANSWERS**

1. Generally, no. Limited membership, i.e., paying dues and receiving an annual newsletter, is not an interest in the organization that clearly conflicts with the discharge of a state officer's or state employee's official duties as a state agency decision maker, which is prohibited under RCW 42.52.020. In addition, the rights and obligations that are created by the agency decision maker's limited membership in the organization are not clearly distinguishable from non-members or customers of the organization.

RCW 42.52.030(2) does not prohibit state officers and employees who are limited members of an organization from participating in state transactions with the organization. Also, the agency decision maker is not a member of an organization that has applied for a permit or has a direct competing interest in the permit application, i.e., an interest that by law must be considered by the agency when making a permitting decision.

2. Under RCW 42.52.030(2), a "member" is a state officer or employee who holds a membership interest in an organization that is clearly distinguishable from non-members. A "member" is a state officer or employee whose membership in an organization includes two or

more of the following characteristics:

- (a) the ongoing assessment of periodic dues, the payment of which, is required for membership or the receipt of a periodic newsletter;
- (b) voting or board member selection rights in the organization or meaningful input into business decisions;
- (c) attendance, not in an official state capacity, at periodic meetings;
- (d) participation in the profit sharing of the organization or the receipt of benefits that is distinguishable from non-members;
- (e) shared responsibility for the maintenance or legal obligations of the organization; or
- (f) solicitation, fundraising, or grant writing on behalf of the organization.

3. Organizations that apply for a permit or who hold an existing and competing right which must be considered by the agency when making a permit decision and are considered persons who participate in the "transaction with the state" under RCW 42.52.030(2). This group does not necessarily include organizations that may have legal standing to later contest agency permit decisions in court.

## **ANALYSIS**

The Department of Ecology ("DOE") has several officers or employees who are involved in various agency permit decisions and also hold memberships in outside organizations. Many of the DOE employees are either members of groups that lobby or challenge DOE actions or attend fund-raisers sponsored by those organizations.

For most of the DOE employees, membership in an organization consists of paying dues and receiving a newsletter. A few of the DOE employees involved in the environmental or community organizations are active on the board of directors for the organizations. Some DOE employees, however, are members of an irrigation district, which involves more active participation in the business of the organization and ownership of "shares" in a common water right.

In its request for advice, DOE provided several "real life scenarios" under which outside organizations, of which the DOE decision-makers are members, periodically sue the agency over permitting and rule making decisions made by the DOE employees or through the DOE employees advice.

The Ethics in Public Service Act ("Ethics Act") prohibits state employees from having an interest, or engaging in a professional activity, that is in conflict with the proper discharge of his or her official duty. RCW 42.52.020, provides that:

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.

The Ethics Act also prohibits state officers and employees from participating in transactions between the state and an outside organization of which the state officer or employee is a member. RCW 42.52.030(2) provides in relevant part:

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, ... (emphasis added)

The Ethics Act provides a definition of "transaction involving the state." RCW 42.52.010(21)(a) provides that a:

"Transaction involving the state" means a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter that the state officer, state employee, or former state officer or state employee in question believes, or has reason to believe:

- (i) Is, or will be, the subject of state action; or
- (ii) Is one to which the state is or will be a party; or
- (iii) Is one in which the state has a direct and substantial proprietary interest.

(b) "Transaction involving the state" does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee; or a claim, case, lawsuit, or similar matter if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit.

In EEB Advisory Opinion 97-06, the Board found that an application for a water rights permit was a "transaction involving the state." In this opinion the Board also found that the permit process was a "single transaction that begins with the application and ends when the permit is finally granted or denied."

In EEB Advisory Opinion 00-14, the Board advised that membership on the board of an organization is an interest in the organization that conflicts with the discharge of a state officer's or state employee's official duties as a state agency decision maker regarding the organization or its direct competitors. Accordingly, the Board found that RCW 42.52.020 prohibited a state employee from participating in state agency decisions that affect organizations in which they hold board membership. In the DOE scenarios, however, the state employees are not board members in the environmental or community organizations. Accordingly, the first question before the Board is the meaning of "member" in RCW 42.52.030(2). This is an issue of first impression to the Board.

In establishing positions which clearly conflict with official duties, RCW 42.52.030(2) includes officer, agent, and employee. These positions normally involve an established financial interest

in an organization, either through the receipt of a salary or the payment for services that is clearly distinguishable from the general public.

Similarly, some forms of membership in an organization involve a financial or beneficial stake in the ongoing interests of the organization that are distinguishable from other less involved memberships. For example, a member of a condominium development must own property in the building, or complex, and must pay or share in the maintenance of the building or complex. In addition, condominium members are collectively responsible for legal obligations of the organization. Accordingly, a state employee who is a member of the condominium development will have an interest in the organization that is clearly distinguishable from non-members.

Conversely, some "memberships" do not involve a financial interest in the organization that is distinguishable for the general public. For example, a contribution of \$50.00 entitles a contributor to "membership" in a local non-profit public television station. Other than receiving a monthly newsletter, however, the "membership" does not entitle a contributor to vote on or make decisions that effect the operation of the television station in the same manner as an officer, agent, or employee of the station. In addition, a "member" of the television station is not responsible for the station's contracts or financial obligations.

The Board believes that "member", as used in RCW 42.52.030(2), should be narrowly interpreted to include only those memberships that create a distinguishable beneficial or financial interest in the organization. Characteristics of such memberships include:

- (1) the ongoing assessment of periodic dues, the payment of which, is required for membership or the receipt of a periodic newsletter;
- (2) voting or board member selection rights in the organization or meaningful input into business decisions;
- (3) attendance, not in an official state capacity, at periodic meetings;
- (4) participation in the profit sharing of the organization or the receipt of benefits that is distinguishable from non-members;
- (5) shared responsibility for the maintenance or legal obligations of the organization; or
- (6) engaging in solicitation, fundraising, or grant writing on behalf of the organization.

Accordingly, if a state employee's membership in an organization includes two or more of the characteristics noted above, they are members of the organization for the purposes of RCW 42.52.030(2). Based on this finding, DOE employees may not participate in a permit application requested by an organization in which they hold a membership, as defined above, while DOE is investigating or considering the application. In the first three examples, however, the DOE employees are not members of an organization that has applied for the permit in question.

Under RCW 90.03.290, DOE is required to investigate, as part of its water permit decisions, the amount of water available for use, including potential public uses, and any conflicts with existing water rights. At issue is whether an organization that may contest a DOE decision during the agency review process is considered a person involved in the transaction with the state.

As noted above, DOE is required to investigate and consider existing water rights during the

agency review. Since the DOE must consider an existing water right holder in the same manner as the permit applicant, a DOE employee's membership such an organization presents the same conflicting interest as one who is a member of the applicant's organization. Accordingly, the Board finds that under RCW 42.52.030(2), a DOE officer or employee may not participate in a water permit application that involves an organization, in which he or she is a member and which holds a competing water right to the permit applicant.

An additional question before the Board is whether an organization that advocates certain DOE permit decisions or rulings or is likely to contest a DOE officer or employee's decision in court, is a person that is involved in the transaction with the state. In EEB Advisory Opinion 98-05, the Board advised that an Administrative Law Judge may participate in a case involving an employer in which he owned a stock interest because they had not participated in the initial agency decision that generated the appeal, i.e., the underlying transaction involving the state.

While in this instance the DOE employees may have participated in the underlying transaction involving the state, i.e., the agency permit decision, the organization in which they hold a membership interest did not. Accordingly, the Board finds that the "person of which" a state employee may not be a member, under RCW 42.52.030(2), should include only those persons who have applied for a water right, or who hold a competing interest in a water right that must be considered by the agency in its decision. This group does not necessarily include persons who may have legal standing to contest DOE water permit decisions in court.

While the Board has adopted a narrow meaning of "member" as used in RCW 42.52.030(2), there exist many relationships under which a state employee's participation in an agency permit decision may result in a violation of RCW 42.52.020 or RCW 42.52.030. In such instances, the state employee may resolve any conflicts by disclosing any interest that may be in conflict and abstaining from participation in any agency discussions or acting on any issue where the interest may be affected.