

ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030,
RCW 42.52.070, RCW 42.52.080.

SUMMARY OF CHANGES: No changes.

Conflicts Between the Regulatory and Proprietary Functions of an Agency

QUESTION

Does the Ethics in Public Service Act address conflicts between the regulatory and proprietary functions of the DNR?

ANSWER

No, the Ethics in Public Service Act does not generally address conflicts between official duties. In addition, a state officer or employee's employing agency is not a person for whom one could secure a special privilege.

ANALYSIS

The 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.

In 1996, the Washington State Legislature asked the Attorney General if they may empower the DNR and the Commissioner of Public Lands with regulatory authority regarding all forest lands in the state of Washington, including federal grant lands, as well as the responsibility to manage the federal grant lands. The Attorney General responded to this and other questions posed by the legislature in AGO 1996 No. 11. The Attorney General's short answer to this question was: "The legislature may lawfully delegate its management and regulatory authority over the state's forest

lands to the Department of Natural Resources and the Commissioner of Public Lands."

The Attorney General qualified the foregoing answer in its analysis. This qualification was: "A delegation of authority is lawful if procedural safeguards exist to control arbitrary administrative action." The Attorney General further qualified the short answer in the analysis by stating: "Accordingly, courts can interfere both when there has been a clear abuse of agency discretion or a clear failure to exercise such discretion." The only procedural safeguards referenced by the Attorney General were appeals of agency actions from a regulatory standpoint to the Forest Practices Appeals Board and from a proprietary standpoint to the courts. The Attorney General was not asked by the legislature nor did she provide an opinion related to the regulatory - proprietary conflict of interest within the context of chapter 42.52 RCW.

In practice DNR separates its regulatory and forest management functions at the regional manager level. DNR has seven separate regions in which the regional manager holds both state forest management authority/duties and line supervisory authority over the DNR forest practice staff who administers and enforces the Forest Practices Act on DNR owned state forestland in the same region.

1. The Ethics in Public Service Act does not generally address conflicts between official duties.

The Ethics in Public Service Act ("Ethics Act") prohibits state employees from having interests, or engaging in professional activities, that are in conflict with the proper discharge of their official duties. 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.

It appears from the facts that DNR officers at the regional manager level and above have potential competing interests first as a regulator of forest practices within their region and second as a proprietary manager of forest lands interested in achieving the highest forest yield at the least expense to the state and the agency. While not stated in the request for this opinion, it also appears from the facts, however, that no DNR officer holds a direct or indirect personal beneficial interest in the state forestlands that he or she manages.

The Board has never addressed the issue of whether competing interests between official duties owed the employing state agency can give rise to a prohibited conflict of interest, when there is no private beneficial or financial interest.¹ The State of Washington Commission on Ethics in Government and Campaign Practices (Ethics Commission), however, indirectly addressed this

¹ In EEB Advisory Opinion 98-04, the Board advised that "in situations where a state employee administers a program that involves a local jurisdiction, a conflict of interest could occur if the state officer or employee, while acting as a representative of the local jurisdiction, participated in actions affecting the administration or implementation of a state program that was under his or her responsibility as a state employee."

issue when it proposed adoption of a comprehensive conflict of interest provision, i.e., RCW 42.52.020. In its January 1994 final report the Ethics Commission noted that:

No conflict of interest statute can anticipate and address each and every private activity of a public officer or employee that would be incompatible with his or her official duties. A general prohibition against activities incompatible with the performance of public duties in the public interest will help ensure that the ethics code is appropriately comprehensive in this respect. (emphasis added)

Based on this report, it is clear that the Ethics Commission did not believe that the Ethics in Public Service Act should address conflicts between two or more official or public duties within the employing state agency. Rather, the Ethics Commission intended RCW 42.52.020 to address private or non-state interests, financial or otherwise, that impair the objectivity and integrity of state decisions made by officials with regard to the duties of their state employment. Accordingly, a DNR regional manager's interests in managing state forest land would not prohibit that DNR regional manager from participating in DNR forest practice decisions directly related to the forest land he or she manages.

2. A state officer or employee's employing agency is not a person for whom you could secure a special privilege.

While not addressed directly in the facts, the advisory opinion request raises several hypothetical scenarios which appear to result in a regional manager providing special handling or exemptions from the forest practices regulations to the state forest lands that he or she manages for DNR. The Forest Practices Act (chapter 76.09 RCW) and State Environmental Policy Act (chapter 43.21 RCW) apply to DNR owned forest lands and both laws generally prohibit exceptions based on state ownership. The issue here is if a DNR regional manager would also violate RCW 42.52.070 by exempting state forestland under his or her management from these laws.

The Ethics Act prohibits state officers and employees from improperly using their official positions to benefit outside parties. RCW 42.52.070 provides in relevant part:

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons. (Emphasis added)

The Ethics Act provides a definition of "person." RCW 42.52.010(14) states that a person means any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

The term "Agency" is separately defined under RCW 42.52.010(1) as:

any state board, commission, bureau, committee, department, institution, division, or tribunal in the legislative, executive, or judicial branch of state government. "Agency" includes all elective offices, the state legislature, those institutions of

higher education created and supported by the state government, and those courts that are part of the state government.

In EEB Advisory Opinion 98-02, the Board advised that based on these definitions, a state agency would not be considered “another person” under RCW 42.52.080(5), and a former employee would not be prohibited from assisting state agencies as an independent consultant.

The state agency for which a state officer or employee works would not be considered “other persons” under 42.52.070. Therefore, if a regional manager exempted DNR-owned state forestlands under his or her management from the Forest Practices Act or from the State Environmental Policy Act, the conduct would not violate RCW 42.52.070.