

## ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030

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

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### **Spouse Contracting with State Agency**

#### **QUESTIONS**

1. Under RCW 42.52.020, does a conflict of interest exist when a state employee/officer is the direct supervisor over the person who selects and administers a contract in which the state employee/officer has a financial interest?
2. How does the Board interpret the phrase "under the supervision of the officer or employee" as used in RCW 42.52.030?

#### **ANSWERS**

1. It depends upon the actions taken by the state employee/officer supervisor to recuse themselves from selecting or administering the contract or making any discretionary decisions regarding the terms/conditions of the contract and what steps they have taken to screen themselves from day-to-day issues regarding vendor performance.
2. A generic answer is difficult as each situation must be analyzed, but in most cases, "under the supervision of the officer or employee" means direct supervision of the contract itself, not supervision of the person administering the contract or merely being in the chain of command of the employee managing the contractor.

#### **ANALYSIS**

The Washington Department of Veterans Affairs (WDVA), was seeking to award a contract for the provision of medical oxygen and associated storage and delivery devices for three state veterans' homes. The homes are located in Port Orchard, Orting and Spokane. Despite sending out notifications of the Request for Quote (RFQ) to 111 vendors, they received responsive bids

from only two vendors: one proposing to provide services in western Washington and one proposing to provide services in eastern Washington.

Med-Core Services, Inc., the vendor proposing to service the western Washington locations, was owned and operated by the spouse of an exempt employee on WDVA's executive team, who was the Chief of Veterans Homes Operations ("the Chief"). In this capacity, he oversaw the operations of all three homes while a licensed Nursing Home Administrator at the facility and managed the day to day operations. The Chief was not involved in this procurement and did not manage contracts for the facilities.

RCW 42.52.020, Activities incompatible with public duties, which states:

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

RCW 42.52.030, Financial interest in a transaction, which states in pertinent part:

(1) No state officer or state employee, except as provided in subsection (2) of this section, 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...

The Chief does not have managerial control over contractors doing business with WDVA veterans' homes, as a licensed Nursing Home Administrator manages the day-to-day operations.

Conflict of interest. RCW 42.52 does not restrict the ability of spouses of state officers and state employees from conducting their own businesses, or from contracting with persons who do business with state agencies that employ their state-employee spouses. However, there are provisions under RCW 42.52 that may limit a spouse's business activities when the business creates a conflict of interest for the state officer or state employee.

Advisory Opinion (AO) 97-13 discussed conflicts of interest regarding board and commission members. Under this AO, the Board opined that members who disclosed their interests and abstained from voting on certain matters would sufficiently address any ethical issues. The Board further opined that while recusal may not sufficiently resolve a conflict of interest where a state officer or state employee exercises supervisory responsibility in a state action, when

participation is limited to non-supervisory participation, recusal is sufficient to preclude conflicts of interest under RCW 42.52.030.

The Board also opined in AO 97-12 that RCW 42.52 does not prohibit a state officer or employee from holding a financial interest, unless such interests create a conflict, which occurs when the state officer or employee participates in an official state action involving a person in which the member holds an interest. The conflict may be removed by recusal and delegation of responsibilities to a supervisory state employee who does not hold a conflicting financial interest.

In Advisory Opinion 04-03 the Board further opined that the Ethics Act does not generally address conflicts between official duties and that agencies can resolve conflicts by ensuring that the employee does not exercise ongoing fiscal oversight of the project.

In the current case, both the Chief and his spouse signed an affidavit stating that only the spouse participates in the management of Med-Core and that the Chief relinquished management control over his community property interest in Med-Core. Further, the spouse signed a certificate of assurances that she was not assisted in any way in responding to the state's RFP.

The Chief does not have managerial control over contractors doing business with WDVA homes, as a licensed Nursing Home Administrator manages the day-to-day operations. The Chief did not participate in the selection of vendors for VA homes, did not negotiate or make any discretionary decisions regarding the terms or conditions of the contract. The Chief does not supervise vendor performance; however he does supervise the person who manages the Med-Core contract. The question that remains is then: Is this the type of "supervision" prohibited under RCW 42.52.030(1)?

Financial interest in transactions. The Board has not previously specifically interpreted the phrase, "under the supervision of the officer or employee." There are two ways the Board could interpret the term "under the supervision of the officer or employee:"

- A. The supervision is over the *transaction* and not the person managing the transaction; or
- B. The supervision is over the *person* managing the transaction.

In the case at hand, a licensed Nursing Home Administrator manages the day-to-day operations at the homes; the Chief does not have managerial control over contractors nor does he manage vendor performance. Once the contract is established, vendor performance is based upon the terms and conditions as set forth in the contract. The Chief does not make supervisory or discretionary decisions regarding the terms or conditions of the contract or how well the contractor performs.

The WDVA and the Chief took appropriate action to screen him from any participation regarding the selection of the medical oxygen vendor for the veterans homes. There is clear separation of the Chief's duties from management or supervision of the contract that resolves any perceived conflict of interest.

The term “under the supervision of the officer or employee” means supervision of the *transaction*, not the person managing the contract. As long as a state employee does not participate in the selection of or supervise the contract itself (the transaction), but has someone else supervise the contract, there would not be a beneficial interest that conflicted with the Ethics Act. Any state employee with a perceived beneficial interest in a contract with the state must disclose this interest in depth and erect screens that would remove them from any supervision of the transaction or any way to influence the transaction between the contractor and the state.

Since the Chief was prohibited from selecting the vendor for medical oxygen at all of the DVA veterans home locations or providing any input regarding who was selected as the vendor, and if the Chief was prohibited from taking any part in administering the contract or making any discretionary decisions regarding the terms/conditions of the contract or supervising vendor performance, then an impartial group may select Med-Core, owned and operated by the spouse, to fulfill the oxygen needs at the Western Washington veterans homes without violating the Act.