

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, RCW 42.52.080

SUMMARY OF CHANGES: No changes.

Former Employee Assisting on State Contract

QUESTIONS

1. Whether a former employee may assist a non-state employer on a state contract in which the former employee participated, to perform the same duties s/he performed as a state employee; and

2. Whether a former state employee may assist a non-state employer on a state contract in which the former employee participated, to perform new duties, even if those duties were in the contract's scope of work without violating the Ethics in Public Service Act (the Act), RCW 42.52.

ANSWER

There is no generic answer that would apply to all situations as the answer depends upon the actual facts of each situation. Based on the facts below, the former state employee would not violate the Act if they worked for the Concession Contractor as an Account Executive.

ANALYSIS

A former WSDOT employee (former employee) worked as the Operations Department Manager for approximately five years, leaving state service on July 4, 2008. During the former employee's tenure at WSDOT, s/he were part of a panel of six WSDOT employees who evaluated proposals submitted by companies vying for the New Advertising Media Concession Contract. This panel reviewed responses received from four companies and assigned points based upon selection criteria. The company receiving the highest points was recommended by the panel and ultimately selected by the Executive Director of the Ferries Division as the Concession Contractor.

The Concession Contractor entered into a 10-year contract with WSDOT, effective September 15, 2007. As of January 21, 2010, the contract had not been modified. This contract generates revenue for WSDOT; the state does not pay the contractor, but gets a percentage or portion of the advertising sales made by the Concession Contractor. WSDOT has the ability to allow the Concession Contractor to subcontract some of the work performed under this contract and the authority to approve the subcontractor under Section XVII, paragraph B of the contract.

The former employee (while working for WSDOT) was not involved in negotiating the terms of the contract, but did work with the Concession Contractor to insure that the advertisements and promotional events did not interfere with the daily operations of the ferries. The former employee's duties at WSDOT included:

- Facilitating approval by Ferries' employees of the ad media prior to its procurement and installation.
- Coordinating installation and removal of ad media and promotional events with contractor.
- Coordinating logistical requirements for kiosk/booth, i.e., power needs and location.
- Coordinating security for contractor staff, i.e., obtaining security badges and parking.
- Generally insuring that the ads did not interfere with day-to-day ferry operations.

The former employee did not approve the ads, but gathered the paperwork so that the WSDOT Director of Communications could approve them.

The former employee now desires to work as a subcontractor for the Concession Contractor as an Account Executive. The purpose of this position is to plan, coordinate and carry out new business sales and marketing activities leading to the development of new revenue. Key responsibilities include assisting in strategic planning, development of sales and marketing presentations, providing lead generation through market research, participating in company presentations and developing an electronic customer data base.

RCW 42.52.080(1) states:

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 of such a contract or contracts or include the supervision or control of actions taken to fulfill or implement, in whole or in part, the provisions of such a contract 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(5) states:

No former 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.

In Advisory Opinion 97-06 the Board opined that it would violate RCW 42.52.080(5) if a former Department of Ecology (DOE) employee helped appeal a water rights application because the former employee “participated in that transaction” while they were a state employee. The facts before the Board in that case were:

- Former DOE employee’s duties included making decisions about applications for water rights to include:
 - Investigating applications
 - Drafting reports of examinations that summarize all aspects of the water right investigation and providing conclusions and recommendations for a supervisor to make the final decision on approving or denying the application.
- Former DOE employee worked on an application for water rights and prepared three draft reports of examination.
- No permit was issued for this particular application, which was put on hold pending litigation.
- After the former DOE employee left state service, DOE denied the application.
- Applicant appealed denial.
- Former DOE employee wanted to help applicant appeal the denial.

The issues raised in this opinion were whether a water rights permit was a “transaction involving the state,” and whether the former DOE employee participated in that transaction.

RCW 42.52.010(21) defines “transaction involving the state”:

- (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.

The second issue was whether the employee's involvement during one stage of the permit process constitutes participation. RCW 42.52.010(13) provides that “participate” means:

“Participate” means to participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties. (Emphasis added.)

The Board opined that the question of participation was primarily factual. RCW 42.52.010(13) requires that participation be personal and substantial. While it was clear that the employee was personally involved with the permit application, the question was whether that personal involvement was substantial.

After considering information submitted by both the Department of Ecology and the employee, the Board concluded that the employee's involvement was substantial and met the definition of “participate” because the employee was the primary author of three draft reports of examination which summarized all aspects of the water rights investigation and provided conclusions and recommendations. The Board saw this as substantial involvement in the permit process. The fact that additional work was done on the permit after the employee left state service did not lessen the former employee’s involvement.

In Advisory Opinion 98-02, the Board analyzed the following pertinent questions:

1. How does the term “transaction involving the state” apply to multi-step processes?
2. How is “personal and substantial” involvement in a “transaction involving the state” determined?
3. May a former employee who participated in transactions involving the state assist a state agency as a contractor with regard to the same transactions?
4. Do the restrictions in RCW 42.52.080 apply to situations that do not involve transactions with the state?

The Board looked at the sediment cleanup process and determined that it could consist of multiple transactions involving the state. In this opinion, the Board held that the cleanup process contained two transactions involving the state, and a former state employee who only participated in one of the transactions could assist a person in another, subsequent or different transaction without violating

RCW 42.52.080(5) because they had not “participated” in that part of the transaction while a state employee.

Again, the Board decided that the question of participation in a transaction involving the state was primarily factual. Under RCW 42.52.010(13) participation must be both personal and substantial. Personal and substantial participation is not limited to whether the state officer or state employee, or former state officer or state employee, is or was, the final decision maker with regard to a state action. Participation includes a broad spectrum of intermediary actions that may influence a final decision, including making recommendations, rendering advice, and conducting investigations.

Providing general or informational technical assistance that explains rules or procedures is not considered personal and substantial participation in a transaction involving the state. However, technical assistance that advises, recommends or directs a person to take a certain action would constitute personal and substantial involvement.

The Board also determined that a state agency was not “another person” under RCW 42.52.080(5), and a former employee was not prohibited from assisting state agencies as an independent consultant. Because the prohibitions under RCW 42.52.080 apply generally to transactions involving the state, they do not prohibit a former employee from assisting other governmental agencies when such assistance would not involve transactions in which the employee formerly participated as a state employee, or when such transactions were not the subject of state action.

The only section of RCW 42.52 that applies to former state employees is RCW 42.52.080. Whether this section applies to former employees is a factual question and depends on what the former employee did while working for the state, and what they will be doing post-state employment. This part of the statute consists of six paragraphs, five of which describe different post-state employment situations and what, if any, restrictions would apply to those situations:

- Section (1) imposes a 1-year waiting period on former state employees before they can fulfill any part of a contract that they negotiated or administered as a state employee.
- Section (2) requires a 2-year waiting period before a former employee may have a beneficial interest in a contract that was funded by legislative or executive action that the former state employee participated in.
- Section (3) restricts a former state employee’s ability to accept an employment offer if the offer was intended to influence them while they were still employed by the state or reward them for actions taken while still employed with the state.
- Section (4) prohibits a former state employee from accepting an employment offer if the circumstances would lead a reasonable person to believe that the offer was intended to influence them while they were still employed by the state.
- Section (5) prohibits a former state employee from assisting another person in any transaction with the state if the former state employee participated in that transaction while still employed with the state.

RCW 42.52.080(1)

Since the former employee wants to work as a subcontractor to fulfill the provisions of the Concession Contract, RCW 42.52.080(1) could apply because s/he is “fulfilling or implementing, in whole or in part, the provisions of such a contract or contracts or include the supervision or control of actions taken to fulfill or implement, in whole or in part, the provisions of such a contract or contracts.” However, the former employee left state employment in July 2008 and the 1-year waiting period has passed, so RCW 42.52.080(1) would no longer apply to this situation.

RCW 42.52.080(5)

Since RCW 42.52.080(1) does not apply to the former employee, the only other section of the Act that could possibly apply is RCW 42.52.080(5). The question now becomes: did the former employee “participate” in a “transaction” with the Concession Contractor as a state employee, and if so, would they be participating in that same transaction as a Concession Contractor employee?

During the employee’s tenure with WSDOT:

- The former employee was part of an evaluation panel (one of six) that evaluated responses to a Request for Proposal for a concession contract with the Ferries Division.
- The former employee did not approve the contract award, nor negotiate any of the contract’s terms and conditions.
- The former employee did not approve the Concession Contractor’s advertising media.
- The former employee did work with the Concession Contractor as the WSDOT Operations Manager to coordinate the installation of the ad media to insure all security and logistical requirements were met and that the daily operations of the ferry system were not adversely impacted.

Based upon the Board’s analysis in Advisory Opinion 98-02, there are multiple “transactions” between the Concession Contractor and WSDOT. These transactions include:

1. Selection of the Concession Contractor. The former employee was part of a panel of six individuals who scored responses, but this person carried no more weight than any of the other panelists. The former employee did not make the final selection; the Executive Director of the Ferries Division made the final decision to award the contract to the Concession Contractor.
2. Negotiation of the contract terms. The former employee did not participate in negotiating the terms or conditions of the contract.
3. Administration of the contract. The former employee coordinated the logistical and security needs of the contractor with WSDOT to insure that the daily operations of the ferry system was not compromised or adversely impacted.

Due to the nature of the former employee’s involvement as set forth above, the former employee did not personally and substantially participate in the selection of the contractor or the

negotiation of the contract, itself. While the former employee administered the contract with regard to logistical and security requirements, it is neither the spirit nor intent of the Act to forever bar a former state employee from working for a vendor merely because they worked with that vendor while employed by the state.

Based upon the factual situation presented, the former employee would not violate the Act if they were to work for the Concession Contractor as an Account Executive.