

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, RCW 42.52.020,
RCW 42.52.030, RCW 42.52.120, RCW 42.52.160

SUMMARY OF CHANGES: No changes.

Expert Witness/Expert Testimony

QUESTIONS

1. Can a state officer or employee with specialized knowledge accept employment as an expert witness?
2. Can a state employee who serves as a Food Program Technical Expert accept outside compensation to provide expert advice and testimony in an out-of-state case involving food borne illness?

ANSWERS

1. Yes. RCW 42.52.120 governs outside employment of state officers and employees. Such employment is permissible if it meets the requirements of RCW 42.52.120(1)(a)-(f). This includes the requirement in RCW 42.52.120(1)(c) that outside employment does not violate applicable agency rules. Agencies may impose restrictions beyond those imposed in RCW 42.52.120(1)(a)-(f). While outside employment may be permissible, a state officer or employee may not use state resources to conduct the outside business.
2. Yes. RCW 42.52.120 governs the receipt of outside compensation by state officers and state employees. The receipt of compensation for work related to a state employee's area of expertise does not violate the state's ethics law provided receipt meets the conditions under RCW 42.52.120(1)(a)-(f), and the outside work does not conflict with the proper discharge of official duties under RCW 42.52.020. In addition, state resources may not be used to perform work under a contract or grant outside of official duties.

ANALYSIS

These questions concern state officers and employees who develop specialized knowledge while working for the state. The questions are whether such officers and employees may make use of this knowledge by accepting outside employment as an expert witness. This questions call for the Board to interpret RCW 42.52.120(1) 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 each of the following conditions are met[.]

RCW 42.52.120(1)(a)-(f) sets out six conditions under which outside employment is permissible. To be permissible, each condition must be satisfied.

RCW 42.52.120(1)(a) requires that “[t]he contract or grant is bona fide and actually performed”. This requirement does not appear to be a problem. The Board assumes that the questions refer to an actual contract that is performed by the officer or employee.

RCW 42.52.120(1)(b) requires that “[t]he performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision”. This may be a significant limitation on outside employment depending on the officer or employee's duties. For example, if the officer's or employee's duties included hiring expert witnesses for the agency or acting as an expert witness for the agency, the officer or employee could not enter into a contract for outside employment to be an expert for the agency. Under this example, the outside employment is prohibited because it falls within the officer's or employee's official duties.

The question is how much further could RCW 42.52.120(1)(b) apply. It might be argued that “official duties” is a generic concept. For example, if official duties include being an expert witness for the agency, then being an expert witness for anyone would fall within those official duties. The Board does not adopt this interpretation of the law. For example, if an employee performed janitorial services for the state, it would be unreasonable to say that the employee could not have a private contract to clean a private building on the weekend. The employee's official duties are cleaning state offices, and cleaning other offices is not within those official duties. The same reasoning applies to being an expert witness.

RCW 42.52.120(1)(c) provides “[t]he performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee”. RCW 42.52.120(1)(c) involves two separate requirements. The first is the reference to RCW 42.52.040 which provides:

(1) Except in the course of official duties or incident to official duties, no state officer or state employee may assist another person, directly or indirectly, whether or not for compensation, in a transaction involving the state:

- (a) In which the state officer or state employee has at any time participated; or
- (b) If the transaction involving the state is or has been under the official responsibility of the state officer or state employee within a period of two years preceding such assistance.

RCW 42.52.010(21)(a) defines transaction involving the state to mean

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.

RCW 42.52.010(2) defines "assist" to include an

act, or offer or agree to act, in such a way to help, aid, advise, furnish information to, or otherwise provide assistance to another person, believing that the action is of help, aid, advice, or assistance to the person and with intent to so assist such person.

RCW 42.52.010(13) provides that "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.

RCW 42.52.040 prohibits a state officer or employee from assisting a person in a transaction in which the officer or employee participated. In the context of this question, this limitation would prohibit an officer or employee from being an expert witness for a private party in any transaction involving the state in which the officer or employee participated. In the context of RCW 42.52.120(1)(c), the limitation in RCW 42.52.040 would not prohibit an officer or employee from being an expert witness in general. However, it would prohibit outside employment by certain parties on certain cases.

The second requirement in RCW 42.52.120(1)(c) is that the performance of the contract does not violate applicable laws or rules governing outside employment. This provision recognizes the ability of individual agencies to have specific rules on outside employment. For example, any agency could make the policy decision that certain employees may not accept outside employment as expert witnesses. If an agency made that policy determination, outside employment as an expert

witness would be prohibited by RCW 42.52.120(1)(c).

RCW 42.52.120(2)(d) provides “[t]he contract or grant is neither performed for nor compensated by any person from who such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift.” RCW 42.52.150(4) provides in part:

Notwithstanding subsections (2) and (5) of this section, a state officer or state employee of a regulatory agency or of an agency that seeks to acquire goods or services who participates in those regulatory or contractual matters may receive, accept, take, or seek, directly or indirectly, only the following items from a person regulated by the agency or from a person who seeks to provide goods or services to the agency[.]

RCW 42.52.120(1)(e) provides “[t]he contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity or by his or her agency”. Under this provision, an officer or employee may not enter into a contract to be an expert witness if he or she created or authorized the contract or if it was created or authorized by the officer's or employee's agency.

RCW 42.52.120(1)(f) provides that “[t]he contract or grant would not require unauthorized disclosure of confidential information”. RCW 42.52.010(5) provides that confidential information

means (a) specific information, rather than generalized knowledge, that is not available to the general public or (b) information made confidential by law.

The limitation in RCW 42.52.120(f) does not prohibit an officer or employee from accepting outside employment as an expert witness. However, it would prohibit the officer or employee from being an expert witness if the officer or employee was employed to testify about confidential information.

RCW 42.52.120 does not prohibit an officer or employee from generally accepting outside employment as an expert witness (unless the officer's or employee's agency prohibits such employment under RCW 42.52.120(1)(c)). However, RCW 42.52.120(1)(a)-(f) would prohibit such employment by certain persons on certain cases with regard to certain information.

Although outside employment as an expert is generally permissible, the Board emphasizes that such employment must be conducted in accordance with RCW 42.52.160 which provides:

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

Thus, an officer or employee who accepts outside employment as an expert witness may not use state resources to conduct his or her outside business. This includes persons, money, or property under the officer's or employee's official control. In this context, the Board does not consider

general knowledge and experience gained while a person is a state officer or employee to be a state resource. RCW 42.52.160(1) prohibits private use of “any person, money, or property”. By the plain meaning of RCW 42.52.160(1), this ban does not apply to an officer's or employee's knowledge and experience.