

ADVISORY OPINION

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REFERENCES: RCW 42.52.050, RCW 42.52.070,
RCW 42.52.160, WAC 292-110-010

SUMMARY OF CHANGES: None.

Paid Time for Certifications

QUESTIONS

1. Is the use of state resources by a state employee to complete an educational program a potential violation of RCW 42.52.160?
2. Is a state employee's use of non-public information to complete an educational program a potential violation of RCW 42.52.070?
3. Is sharing confidential information with other educational program participants a potential violation of RCW 42.52.050?

ANSWER

1. Yes. It would be a violation of RCW 42.52.160 for a state employee to use state resources to complete an educational program, unless there was a sufficient nexus between the employee's official job duties and the objectives of the educational program, or the use was *de minimis* in nature.
2. Yes. The use of non-public information that a state employee only has access to because of their position to complete an educational program may violate RCW 42.52.070.
3. Yes. Sharing confidential information with program participants would violate RCW 42.52.050 if the participant was not otherwise entitled to receive that information.

ANALYSIS

The Board has been asked to provide guidance on the participation of state employees in educational programs that offer participants the opportunity to receive college credits. Such programs are more

comprehensive than conferences or Continued Legal Education (CLE) seminars. For the purposes of this guidance, the Board relies on the following facts:

A large agency has entered into an agreement with a university to allow state employees to participate in a graduate certificate program focused on public sector innovation. The intent, according to the agreement, is based on the “collective interest in supporting public innovation and institutional reforms that address the historic legacy of racism and enable the delivery of more effective and equitable public services.”

Although the agency identifies state employees to be sponsored for the program, all individuals seeking the certificate must apply to the program and meet the university’s graduate program’s requirements to be able to participate. State employees identified by the agency are not guaranteed acceptance into the program. The agreement with the university establishes a data sharing agreement between the agency and the university for any confidential information shared as part of the program.

The program is eight months long and includes at least six in-person all day seminars focused on core instruction, as well as elective classroom instruction, some classes via Zoom/Teams, required reading, homework, and group work. The classes and events are scheduled primarily during the week and during work hours. The program costs approximately \$13,388 per state employee for the tuition and other related fees and is fully covered by the agency.

The elective courses are not tailored for state employees or for a state employee that works for a particular agency and are selected solely at the state employee’s discretion. For example, a course in redesigning public services explores how public, nonprofit, and philanthropic structures create unique operational realities and cultures that must be navigated to lead change across institutional boundaries. The course is designed to equip students with analytical frameworks and methods, including implementation analysis and strategic management, human-centered design, and racial equity analysis to support redesign processes.

Once a participant completes the program, the participant can apply 10 credits received as part of the program towards an executive MBA at the university.

The agency plans on sponsoring 10 state employees each time to complete the certificate program. The state employees would be allowed to attend classes and complete coursework on state time. The program is not intended to add to the workload of the state employee and state employees participating would not be expected to complete their assigned duties while in the program. To facilitate this, state employees are allowed to use exchange time, overtime, or shift responsibilities to participate in the program.

State employees would be allowed to use state vehicles to attend in-person classes and events and state computers (and other technology such as Teams or Zoom) as well as state conference rooms to complete the virtual classes and course work.

The agency views the program similarly to a conference that it would send state employees to as part of professional development. There is no requirement that once the state employee completes the program, they will commit to work for the agency for a time certain. The agency has had at least one person leave the agency shortly after completing the graduate certificate program.

The agency does not intend to limit who can apply for sponsorship by the agency to participate in the certificate program, which may result in a broad range of state employee classifications being considered for the program. As stated above; however, the state employee still must be accepted into the program based on the university's requirements, and not all state employees that are interested meet those requirements.

All participants will be required to complete a project as part of the certificate program, which includes group work as well as a presentation of the project at the conclusion of the program. State employees will be encouraged to use examples from their state work to complete the project. Each project team has four people on the team, which may include state employees from the agency, state employees from other agencies, and non-state employees.

The agency will require state employees participating in the program to state how the training will be applied in their agency work. The agency intends to ask employees to include this training in their annual performance and development plan evaluation.

The agency has a process for research and data requests which states that university students, whether or not they are also agency employees, cannot use agency data, records, or associated client, provider, or employee-related information, or access individuals for analytic pursuits related to research classes or thesis due to both the potential conflict of interest for the employee students and the level of support required to assure correct data use by employee and non-employee students. However, the agency intends to allow participating state employees to utilize agency information and data as part of the state employee participation in the educational program.

The program ends with a "capstone project" and state employees participating in capstone projects for the certification program will be able to use any publicly available data without restriction, non-public databases will be considered on a case-by-case basis. If non-public databases are necessary, state employees will be expected to ensure client confidentiality is maintained.

Some examples of data that may be used by state employees for the projects include:

- personal knowledge gained through their normal duties;
- confidential listening sessions between an agency staff member and the clientele they serve;
- feedback gained from staff training evaluations;
- databases, articles, and reports available on the agency's externally facing website; and
- interviews and listening sessions.

The agency does not plan on providing any guidance on or limit the state employees as to which electives to take or project they should participate in based on their assigned duties at the agency. In fact, based on information provided, there has been one state employee who intended to participate in a project that had no overlap with state government or their assigned duties at the agency.

The projects prepared for the certification program result in presentations and papers. For example, one state employee, while participating in the program, wrote a leadership paper that described how the project impacted their learning, professional goals, understanding of public

policy, and cross sector collaboration. The state employee gave examples of how they were showing up to work with a different mindset that supports the agency's anti-racism dictates.

According to the agency some projects are intended to be "pitched" to the agency leadership and expected to be either implemented immediately by the agency or appropriate next steps to be taken.

The State Resources Used for a Graduate Degree Certificate is Potentially a Misuse of State Resources

The Ethics in Public Service Act prohibits the use of state resources for private benefit or gain, except in the course of official duties, and allows the Board to adopt de minimis use rules. RCW 42.52.160 provides in relevant part:

- (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...
- (2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.
- (3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

RCW 42.52.160(1) prohibits using state resources for private gain. For example, it would be improper for a state officer or employee to use his or her computer, the e-mail system, and time to conduct outside employment. And a state agency could not permit such private use. Under RCW 42.52.160(2) the limitation in RCW 42.52.160(1) does not apply if the use is part of an officer's or employee's official duties. *Advisory Opinion 00-10*.

Under WAC 292-110-010(2)(a) "Official state purpose" includes use of state resources to conduct official duties, activities reasonably related to the conduct of official state duties, activities related to state employment, and activities otherwise allowed by statute. Examples of official state purposes include:

- (i) Training and career development approved by the employing agency under RCW 41.06.410

RCW 41.06.410 states that "[e]ach agency subject to the provisions of this chapter shall:

- (1) Prepare an employee training and career development plan which shall at least meet minimum standards established by the department of enterprise services;
- (2) Provide for training and career development for its employees in accordance with the agency plan;

(3) Budget for training and career development in accordance with procedures of the office of financial management.”

Official duty, as defined by RCW 42.52.010(13), means those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state Constitution.

While an agency has broad discretion to define tasks as official duties, when evaluating whether a use of state resources is for official duties or private gain, the Board examines whether there is a nexus to the official duties of the state employee and the use contemplated. Nexus includes activities having a reasonably objective connection to the official duties. When analyzing a nexus, the Board may consider, among other things:

- whether the program will provide skills that can be applied to the day-to-day work of the state employee;
- whether the state employee can utilize the learned skills or information to further the state agency's mission;
- whether the skills learned can be utilized directly in their position within the agency;
- whether the state employee can affect change within their agency using the information or skills from the training;
- whether the training only benefits the state employee personally;
- whether this training meets a goal in the state employee's professional development plan; and
- whether the information learned is directly related to the duties proscribed by the agency.

The intent of the Board analysis is to ensure the agency is not using its broad discretion to circumvent the Ethics in Public Service Act and that state employees conduct themselves with “the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public's interest.” RCW 42.52.900.

Participating in an external graduate level program of this magnitude does not appear to fall squarely within official duties for all the participants. The program courses are determined by an outside entity and are not tailored specifically for the work of state employees or more specifically for the state employees participating in the program; there are also instances where the state employee might participate in projects that have no apparent nexus to their state duties. That the program covers a wide range of employees, public and private sector as well as non-profit, indicates the program will not specifically address issues that are unique to state service or even public service in general.

Further, this is not a program that *any* agency employee can be sent to, unlike a series of courses for leadership, for example. While the agency may nominate people to go, this is an external program administered by an external entity that chooses who gets into the program and what to teach. This is not an agency provided training, contracted class, or CLE. This is also not a conference where the agency is sending state employees for general information about the space they work in or to further

professional development. This makes the program operate more similarly to a state employee seeking a degree to further their education generally and would be something that the state employee would be expected to complete on their own time and not using state resources.

There is also the large amount of state resource use to support participation in the program, including use of computers, platforms, conference rooms, state vehicles, and time. State resources use is anticipated for participating state employees to not only participate in classes but also for the employees to do homework and participate in group projects. All this allowance is in furtherance of an educational program that may or may not have applicability to the participating state employee's official duties. For at least some of the state employees, the amount of state resources utilized may exceed the amount that is permissible when examining the nexus to the state employee's duties at the agency. Each course within a training program should be analyzed for a nexus to the official duties of the state employee. Courses that do not have applicability to the state employee's duties will be subject to heightened scrutiny by the Board. The Board notes that any analysis is dependent on the facts presented, and a showing of how the particular educational program is in fact applicable to the employee's day-to-day work and that a nexus is present.

The Board notes that completion of the program affords the state employee credits that they can apply towards another degree. This could result in credits earned using state resources used for the private benefit of avoiding the personal costs of credits to apply towards education the state employee could complete for their individual educational goals.

Instead, for example, the agency could support their employees by providing tuition reimbursement to complete an educational program that does not have a sufficient nexus to their official duties or professional development; however, it should be through a written training plan, included in the state employee's professional development plan, or similar, and have specific uses delineated. For example, an agency could authorize a ten-hour allowance per month for course work or attendance of classes and include the allowance of state resources in the state employee's professional development plan. The Board would also encourage agencies to consider a mechanism to encourage a state employee to maintain employment at that agency for a time certain upon completion of an educational program or training where the use of state resources is significant.

Participating State Employees Should Not Use Information They Have Access to Solely Because of Their State Positions to Participate in the Program

The Ethics in Public Service Act prohibits state officers and employees from using their state position to provide special benefits or exemptions. RCW 42.52.070 provides that:

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.

For the program described above, participating state employees are allowed to access and use non-public information from databases, interviews, and listening sessions that they have access to or gathered because of their position with the agency and as part of state duties. They only have

access to this particular information because of what they do as state employees and information is intended to be used for them to perform their state duties. RCW 42.52.070 prohibits state employees participating in an outside program from using this information. Additionally, the use for the graduate certificate program would be denied under the agency's own internal processes for reviewing when individuals may use internal information.

Program Projects Could Require Disclosure of Information to Participants Not Authorized to Receive the Information

RCW 42.52.050 governs the disclosure of confidential information and provides:

- (1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the official or employee by reason of the official's or employee's official position.
- (2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information.
- (3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.

Under RCW 42.52.010(5) "Confidential information" means (a) specific information, rather than generalized knowledge, that is not available to the general public on request or (b) information made confidential by law.

Program projects could not only utilize public information but could also utilize information that is not publicly available, such as information from confidential listening sessions and agency employee interviews. The state employee only has access to this information because they gathered it or have access to it as part of their official state duties. While the agency has a data sharing agreement with the university, that alone would not permit the participating state employees to share this information with other participants in the program whether state employee or non-state employee. The program participants are not authorized to receive this information and as a result, a state employee providing confidential information to other program participants likely violates RCW 42.52.050(3).

The Board notes that a nexus to the state employee's official duties under a use of state resources analysis does not automatically permit disclosure of information. There needs to be an independent analysis of the information the state employee has access to as part of their official duties and whether that information can be used and/or disclosed for the educational purposes of the state employee.

The advisory opinion is based on the facts provided. Modification of the facts, or knowledge of more specific facts or circumstances, might lead to different conclusions. In addition, this advisory opinion does not address whether the proposed action is prudent, good public policy, or effective management practice.