

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, RCW 42.52.020, RCW 42.52.120, RCW 42.52.140, RCW 42.52.150

SUMMARY OF CHANGES: No changes.

Outside Employment with a Regulated Entity

QUESTIONS

1. May a state officer or employee of a regulatory agency conduct an outside business or accept outside employment doing work that the officer or employee would regulate as part of his or her official duties?
2. May a state officer or employee accept employment from a person regulated by the agency if the employment is unrelated to the officer's or employee's official duties and the officer or employee does not actually participate in the regulation of the employer?

ANSWERS

1. No. RCW 42.52.020 prohibits a state officer or employee from engaging in an outside business or any activity that is in conflict with the proper discharge of the officer's or employee's official duties. Conducting an outside business or engaging in outside employment in an area that the officer or employee regulates raises such a conflict between the officer's or employee's official duties and his or her private interest in the business or outside employment.
2. Yes. The potential conflict between official duties and private interest is not raised when the outside employment is unrelated to the performance of the officer's or employee's official duties. RCW 42.52.120(1)(d) prohibits an officer or employee from accepting outside employment from a person from whom they could not accept a gift. This restriction will not apply so long as the officer or employee does not actually participate in the regulation of that employer.

ANALYSIS

These two questions concern outside employment of officers and employees of regulatory agencies.

The definition of regulatory agency is quite broad. It includes: "any state board, commission, department, or officer, except those in the legislative or judicial branches, authorized by law to conduct adjudicative proceedings, issue permits or licenses, or to control or affect interests of identified persons" RCW 42.52.010(15). In Advisory Opinion 96-05 we interpreted this language to mean that an agency is a regulatory agency if it is authorized by law to exercise authority over identified persons. For example, the Department of Revenue is responsible for collecting state taxes. It is a regulatory agency because it exercises authority over state taxpayers. Similarly, the Department of Fish and Wildlife is a regulatory agency because it exercises authority over individuals who fish under the authority of a license issued by Fish and Wildlife.

The two questions in this opinion raise different issues with regard to outside employment. The first is whether the officer or employee may conduct a business or accept outside employment in the area in which the officer or employee regulates. For example, could a Department of Revenue employee who audits state tax returns conduct an outside business preparing state tax returns? Similarly, could a Fish and Wildlife employee who inspects fishing licenses and enforces fish and wildlife regulations about fishing, accept outside employment on a fishing charter boat that would be subject to his or her regulation?

The second question pertains to outside employment that does not involve the area in which the officer or employee regulates, such as a revenue auditor who has outside employment selling shoes or a fish and wildlife employee who has outside employment repairing boat engines.

The first question is governed by RCW 42.52.020 which provides:

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.

In our opinion, there is a conflict with the proper discharge of an officer's or employee's official duties if the officer or employee works in the same area that he or she regulates. This conflict can occur in one of two ways. The first is the conflict between applying the law as set out by agency policy which may conflict with the application of the law by the officer or employee in the outside business. For example, if a revenue auditor had an outside business preparing state tax returns, the auditor would want to correctly apply the law, but his or her perspective would be to save the client as much tax as possible. On close legal questions, this private perspective may conflict with the agency perspective, i.e., which may be to resolve close legal questions in favor of applying the tax.

The second type of conflict is the potential for selective application of the law to benefit the officer's or employee's outside business over competitors. Consider the example of a fish and wildlife employee, who regulates fishing charters and who also operates a charter business. On some days the officer or employee regulates other charter boat operators, and on other days he or

she competes with other charter boat operators. Again there can be a divergence between the officer's or employee's official duties and his or her private interest. In the worst case the officer or employee could use his or her state authority to gain a competitive advantage.

These conflicts occur because of the potential for divided loyalty between the officer's or employee's official duties and their private interest in their outside business or employment. We believe that state officers and employees who have such outside employment would work hard to properly discharge their official duties and not let their private business interfere. Nevertheless, the Board believes that this is the kind of conflict the ethics law was intended to prevent.

The second question involves outside employment that does not fall within the officer's or employee's official duties. This would not be prohibited by RCW 42.52.020 because the outside employment is unrelated to the performance of the officer's or employee's official duties. However, any such employment must meet the requirements of RCW 42.52.120(1)(d) 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 the state officer or state employee has complied with RCW 42.52.030(2) or each of the following conditions are met:

...

(d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift;

...

RCW 42.52.120(1)(d) refers to RCW 42.52.150(4) which limits the gifts that can be accepted by officers and employees of regulatory agencies. RCW 42.52.150(4) provides:

(4) 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:

(a) Unsolicited advertising or promotional items of nominal value, such as pens and note pads;

(b) Unsolicited tokens or awards of appreciation in the form of a plaque, trophy, desk item, wall memento, or similar item;

(c) Unsolicited items received by a state officer or state employee for the purpose of evaluation or review, if the officer or employee has no personal beneficial interest in the eventual use or acquisition of the item by the officer's or employee's agency;

(d) Informational material, publications, or subscriptions related to the recipient's performance of official duties;

(e) Food and beverages consumed at hosted receptions where attendance is related to the state officer's or state employee's official duties;

(f) Admission to, and the cost of food and beverages consumed at, events sponsored by or in conjunction with a civic, charitable, governmental, or community organization; and

(g) Those items excluded from the definition of gift in RCW 42.52.010 except:

(i) Payments by a governmental or nongovernmental entity of reasonable expenses incurred in connection with a speech, presentation, appearance, or trade mission made in an official capacity;

(ii) Payments for seminars and educational programs sponsored by a bona fide nonprofit professional, educational, or trade association, or charitable institution; and

(iii) Flowers, plants, and floral arrangements.

RCW 42.52.150(4) provides that officers and employees of regulatory agencies, who participate in regulatory matters, may only receive certain gifts from those they regulate. The application of this provision to outside employment depends on the Board's interpretation of the term participate. RCW 42.52.010(13) defines this term as follows:

(13) "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.

In Advisory Opinion 96-05, we identified two potential ways to define the term "participate." The first is a transactional approach. Under this approach, a person does not participate until they are actually engaged in regulation. For example, a revenue auditor does not participate in regulation unless he or she is actually performing an audit. The second is a functional approach. Under this approach, an officer or employee participates in regulatory matters if his or her job is regulatory--even if there is no specific regulatory matter pending. Under this view a revenue auditor would participate in regulation even if he or she were conducting no audits.

In Advisory Opinion 96-05, the Board adopted the functional approach and concluded that the more restrictive gift provisions applied to officers and employees whose jobs were regulatory--even though no regulatory matter was currently pending. If the functional approach was applied to outside employment, it would mean that an officer or employee could not have outside employment with any person they might regulate. As applied to our examples, the revenue auditor could not accept outside employment from any taxpayer to perform any job, and the fish and wildlife employee could not fix engines for any charter boat operator.

Upon reflection the Board concludes that this approach should not be applied to outside employment. We reach this conclusion for two reasons. First, the reference to RCW 42.52.150(4) in RCW 42.52.120(1)(d) is somewhat ambiguous. RCW 42.52.120(1)(d) prohibits outside

employment "from any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift". The ambiguity arises because RCW 42.52.150(4) does not prohibit an officer or employee from receiving gifts from anyone. Instead, it limits the kind of gifts that can be received from persons regulated by the agency. Thus, an employee who participated in regulation can receive food and beverages consumed at a hosted reception put on by a person he or she regulates. RCW 42.52.150(4)(e). Thus, if RCW 42.52.120(1)(d) was applied literally, it would not limit outside employment at all because there is no one from whom the officer or employee would be prohibited from accepting a gift.

The second reason is that applying the functional approach in the area of outside employment results in too broad a prohibition. Under the functional approach, for example, the revenue auditor would be prohibited from accepting any outside employment, since any potential employer would be a taxpayer subject to audit, and thus regulation, by the auditor. There is nothing in RCW 42.52.120 that leads us to believe that the Legislature intended a complete ban on outside employment for a broad category of state officers and employees.

We also believe that there is a distinction between the gift situation and the employment situation. There is no particular reason for a person to give a gift to a state officer or employee. There is always the implication the purpose of the gift is to influence the performance of official duties. This implication is not so strong in the employment context, since the officer or employee is actually doing a job. The Board adopted the functional approach to the receipt of gifts in Advisory Opinion 96-05 to avoid the situation in which an officer or employee could receive gifts under the more lenient standard, and then later be called upon to regulate. In the employment context the officer or employee would have to give up the job if he or she were actually called upon to regulate an outside employer.

The Board adopts the transactional approach to the definition of "participate" as it applies to RCW 42.52.120(1)(d). An officer or employee may accept outside employment so long as it does not fall within their official responsibility and they are not actually involved in regulating the employer. For example, the revenue auditor can sell shoes so long as he or she does not audit the outside employer. The fish and wildlife employee could repair an engine for a charter boat operator so long as the employee did not actually regulate that operator.

This interpretation imposes meaningful restrictions on outside employment. If the revenue auditor audited his or her outside employer, they would have to give up the outside employment because they would be receiving compensation from a person they regulate and they are participating in regulatory matters.

The application of this rule may make outside employment in some areas difficult. For example, the revenue auditor may be able to have someone else do the audit of the employer. This may be more difficult in other regulatory jobs. For example, the fish and wildlife employee may not be in a position to do his or her job if there are some charter boat operators that they did not want to regulate owing to considerations of outside employment.

The question of outside employment raises important considerations for both state agencies and

state officers and employees. The ethics law establishes minimum standards. RCW 42.52.120(c) permits agencies to adopt their own limitations that may be more strict than those set forth in the ethics law, to meet the particular needs of the agency.