

ADVISORY OPINION

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SUMMARY OF CHANGES: No changes.

Employee's Beneficial Interest in a Spouse's Contract with their Employing Agency

QUESTION

Is it a violation of RCW 42.52.120(1)(e) for a state officer or state employee to have a beneficial interest in a contract that the officer's or employee's spouse has with the agency that employs the officer or employee?

ANSWER

No, so long as the contract between the spouse and the agency has been awarded by open competitive bid in which more than one bid was received, or the officer or employee has been advised by the Executive Ethics Board that the contract with the spouse does not conflict with the officer's or employee's official duties.

ANALYSIS

This question concerns the application of RCW 42.52.120(1)(e). RCW 42.52.120 prohibits state officers and state employees from receiving any thing of economic value under a contract outside their official duties, unless six conditions are satisfied. One of these requirements is set out in RCW 42.52.120(1)(e), which provides:

The 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[.]

The contract in question is not between the employee and the employee's agency. Rather, it is between the employee's spouse and the employee's agency. To use the DSHS example, the question is whether RCW 42.52.120(1)(e) would prohibit the spouse of a DSHS employee from entering into a contact with DSHS.

We conclude that RCW 42.52.120(1) does not apply to a contract between an employee's spouse

and the employee's agency. RCW 42.52.120(1) provides that state officers and state employees may not "receive any thing of economic value under any contract or grant outside of his or her official duties". The term "thing of economic value" is defined in RCW 42.52.010(20) to include, in addition to its ordinary meaning:

- (a) A loan, property interest, interest in a contract or other chose in action, and employment or another arrangement involving a right to compensation;
- (b) An option, irrespective of the conditions to the exercise of the option; and
- (c) A promise or undertaking for the present or future delivery or procurement.

The question is whether one spouse's interest in the other spouse's contract constitutes a thing of economic value. In general, one spouse would have a community property interest in the contracts of the other spouse. Salaries or wages earned by either member of a marital community become community property, and each spouse has a beneficial interest in the amount earned.¹ State v. Miller, 32 Wn.2d 149, 159, 201 P.2d 136 (1948).

The fact that the court has characterized a community property interest as a beneficial interest does not necessarily mean it falls within RCW 42.52.120(1). The ethics law draws a distinction between a thing of economic value and a beneficial interest. The terms have different definitions. RCW 42.52.010(3) provides that:

"Beneficial interest" has the meaning ascribed to it under the Washington case law. However, an ownership interest in a mutual fund or similar investment pooling fund in which the owner has no management powers does not constitute a beneficial interest in the entities in which the fund or pool invests.

Moreover, the terms are used in different places in the law. When the Legislature imposed limits on beneficial interests, it did so explicitly. For example, in the area of post-public service employment, RCW 42.52.080(2) provides:

No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest in a contract or grant that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated.

(Emphasis added.) Similarly, RCW 42.52.030(1) provides:

No state officer or state employee, except as provided in subsections (2) of

¹Spouses may enter into a separate property agreement by which the status of property is changed. However, this opinion assumes that there is no such agreement.

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.

(Emphasis added.) The Legislature also used the term “beneficial interest” in RCW 42.52.120(2) which imposes additional requirements if the contract or grant is with another state agency. RCW 42.52.120(2) provides:

In addition to satisfying the requirements of subsection (1) of this section, a state officer or state employee may have a beneficial interest in a grant or contract with a state agency only if:

- (a) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which more than one bid or grant application was received; or
- (b) The contract or grant is awarded or issued as a result of an open and competitive bidding or selection process in which the officer’s or employee’s bid or proposal was the only bid or proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer’s or employee’s official duties; or
- (c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer’s or employee’s official duties.

(Emphasis added.)

In addition to RCW 42.52.120(1), the term “thing of economic value” is only used in connection with giving or receiving gifts. RCW 42.52.140 prohibits receiving or soliciting anything of economic value if it could be reasonably be expected to influence the performance of an officer’s or employee’s official duties. RCW 42.52.170 makes it a violation to give or pay any thing of economic value if receipt of it would violate the ethics laws.

The conclusion we draw from these statutes is that when the Legislature wanted to impose limits on a beneficial interest, such as a community property interest, it used the term beneficial interest. RCW 42.52.120(1) uses the separately defined term “thing of economic value” instead of the term “beneficial interest”. Based on the structure of the statute we conclude that RCW 42.52.120(1) is narrower than RCW 42.52.120(2). A spouse who has a contract with a state agency receives a thing of economic value under that contract. The other spouse doesn’t receive anything of economic value under the contract, but has a beneficial interest in the contract.

Since the Legislature did not use the term “beneficial interest” in RCW 45.52.120(1), we conclude that the requirements in RCW 42.52.120(1), including the requirement in RCW 42.52.120(1)(e), do not apply to a contract between the spouse of an agency employee and the employee’s agency.

Although RCW 42.52.120(1) applies to a “thing of economic value”, RCW 42.52.120(2) does apply to beneficial interests. Therefore, a state officer or employee with a beneficial interest, such as a community property interest, in a contract with a state agency must comply with the requirements of RCW 42.52.120(2). To return to the DSHS example, a DSHS employee may have a beneficial interest in his or her spouse’s contract with DSHS if the contract was let by open competitive bid in which more than one bid was received, or if the DSHS employee was advised by the Executive Ethics Board that the contract is not in conflict with the DSHS employee’s official duties.