

ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.080

SUMMARY OF CHANGES: No changes.

Conflicts of Interest Regarding Post-State Employment

QUESTIONS

1. Is it a violation of RCW 42.52.020 for a state officer or state employee, whose duties involve reviewing fuel tax returns, to send out a questionnaire to businesses that file fuel tax returns to see if there is a market for a post-state employment business assisting businesses in completing fuel tax returns?
2. Do the prohibitions on post-state employment in RCW 42.52.080 apply to self-employment after the termination of state service?
3. Do the limitations on post-state employment in RCW 42.52.080 prohibit a state employee, whose duties involve review of fuel tax returns, from setting up a business filling out fuel tax returns after terminating state service?

ANSWERS

1. No, RCW 42.52.020 prohibits state officers or state employees from engaging in activities that are in conflict with the performance of their official duties. The act of seeking post-state employment does not, by itself, create such a conflict. However, officers and employees seeking post-state employment must take care that their solicitation does not create the potential for divided loyalties which could result in a violation.
2. Yes, the prohibitions on post-state employment do apply to self-employment.
3. No, assuming that persons who hired the former state officer or state employee did not do so to reward or induce the performance or nonperformance of the officer's or employee's official duties, nor would not require the disclosure of confidential information by the state officer or employee, the new business would not violate RCW 42.52.080.

ANALYSIS

This opinion concerns an employee of the Department of Licensing (DOL) who works in the fuel tax section. The employee's job involves reviewing fuel tax returns for completeness and accuracy. Correct returns are keyed into a computer and filed. Incomplete or inaccurate returns are sent back to the taxpayer. The employee is considering leaving state employment and setting up a business assisting persons in filing fuel tax returns. Before making a decision, the employee wants to know if there is a demand for this service. To find out, the employee proposes to send out a survey to persons who may have a need for this service.

The first question is whether the survey would violate 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.

The Board has issued one opinion interpreting RCW 42.52.020—Advisory Opinion 97-03. In that opinion, the Board concluded that conducting an outside business in an area that a state officer or state employee regulates conflicts with the performance of the officer's or employee's official duties. For example, an employee who reviews fuel tax returns could not simultaneously have an outside business preparing fuel tax returns. In Advisory Opinion 97-03, the Board concluded that there was a conflict under RCW 42.52.020 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”.

The issue raised by Question 1 is whether the same potential for divided loyalty exists when a state officer or state employee seeks post-state employment. The answer is no. The ethics law clearly contemplates that officers and employees will have post-state employment since RCW 42.52.080 places certain limits on that employment. In our view it is not reasonable that an officer or employee must leave public service prior to seeking post-state employment.

While seeking post-state employment does not generally violate RCW 42.52.020, officers and employees could create such a conflict depending on how they go about it. For example, a letter to prospective employers stating that the officer or employee could demonstrate his or her ability by being of assistance to the potential employer while still in state service would likely create the kind of conflict we found in Advisory Opinion 97-03.

Questions 2 and 3 pertain to RCW 42.52.080 which provides:

(1) 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.

(2) 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.

(3) No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the officer or employee knows or has reason to believe that the offer of employment or compensation was intended, in whole or in part, directly or indirectly, to influence the officer or employee or as compensation or reward for the performance or nonperformance of a duty by the officer or employee during the course of state employment.

(4) No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the circumstances would lead a reasonable person to believe the offer has been made, or compensation given, for the purpose of influencing the performance or nonperformance of duties by the officer or employee during the course of state employment.

(5) 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.

(6) As used in this section, "employer" means a person as defined RCW 42.52.010 or any other entity or business that the person owns or in which the person has a controlling interest. For purposes of subsection (1) of this section, the term "employer" does not include a successor organization to the rural development council under chapter 43.31 RCW.

The five substantive provisions of RCW 42.52.080 state that a state officer or state employee may not “accept an offer of employment or receive compensation from an employer.” Question 2 asks whether self-employment falls within this provision. In our opinion the answer is yes. Even in the self-employment situation, a former state employee receives compensation from an "employer". RCW 42.52.080(6) defines “employer” to include “a person as defined RCW 42.52.010.” RCW 42.52.010(14) defines “person” to mean:

[A]ny individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit.

Clearly, a former state officer or state employee who is self-employed receives compensation from a person.

Question 3 asks whether this proposal would violate RCW 42.52.080. RCW 42.52.080(1) and (2) do not apply because the limitations apply to contracts and grants. Here the state employee is not involved with DOL contracts or grants but reviews fuel tax returns.

RCW 42.52.080(3) and (4) deal with prohibiting post-state employment if it affects the performance or nonperformance of an officer's or employee's official duties. As we explained in Advisory Opinion 97-07, this is largely a factual question that depends on the circumstances of an individual case. In our opinion, the act of seeking post-state employment does not, by itself, cause an officer or employee or a reasonable person to believe that the employment was offered to influence the performance or nonperformance of the officer's or employee's official duties. As with our answer to Question 1, this conclusion depends on the nature of the solicitation. If a state employee wrote to a prospective employer and offered to do something for the employer, while in state service, in return for a job, it would be a violation of RCW 42.52.080(3) and (4).

RCW 42.52.080(5) prohibits an officer or employee from assisting another person in a transaction involving the state in which the officer or employee participated. RCW 42.52.010(21)(a) defines “transaction involving the state” as:

[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.

Filing a fuel tax return meets the definition because it is a submission that will be subject to state action. Thus, a former state officer or state employee would be prohibited from assisting a client with a fuel tax return that the officer or employee had reviewed while in state service. However, it is our understanding that subsequent returns are not based on prior returns. In that respect they constitute separate transactions. Thus, it would not violate RCW 42.52.080(5) to have a business completing new fuel tax returns.