

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, .050, .070, .140,
.150, .160, WAC 292-110-010

SUMMARY OF CHANGES: Non-substantive scrivener's errors.

Nonprofit Entities

QUESTION

Can a state employee operate a non-profit corporation within a state agency for the purposes of overseeing fund-raising activities and ensuring compliance with the state's ethics laws?¹

ANSWER

No. While Chapter 42.52 RCW does not prohibit state officers and state employees from organizing a non-profit corporation, there are provisions under RCW 42.52 that limit the activities of the corporation and those of state officers or state employees affiliated with the corporation. A corporation, whether or not operated for profit, may not operate out of a state agency without violating RCW 42.52.070, because in so doing the corporation is securing special privileges and benefits that are not available to other persons.

ANALYSIS

The Board has been asked to determine whether the establishment of non-profit corporations to oversee fund-raising activities within state agencies would violate the state's ethics laws. The request comes to the Board from the Division of Medical Assistance Administration (MAA), Department of Social and Health Services. MAA seeks to establish a non-profit mutual aid corporation (the corporation) for the purposes of "overseeing employee fundraising efforts in

¹ The Board offers no opinion on whether the nature and purpose of the non-profit corporation may conflict or compete with the goals of the state-sponsored Washington State Employees Combined Fund Drive (CFD). Executive Order 84-13 and WAC 240-10. The purposes of the CFD are to establish a uniform policy toward charitable fund raising efforts among state employees, and to encourage generosity in voluntary financial support for qualified organizations. The CFD intends to minimize disruptions to the state work place and the costs to taxpayers that multiple charitable fund drives caused. WAC 240-10-020(2)(c).

order to comply with the state's ethics laws." The non-profit will advise employee groups within MAA who intend to raise money for distribution to: (1) employees of MAA facing personal crisis such as illness; (2) needy families throughout the community; and, (3) community social service organizations that aid the poor and troubled.

To facilitate fund-raising, the 8-15 board members will hold one meeting per month on state time, and will distribute newsletters, brochures, and flyers throughout the workplace. Board members will also make presentations and hold fund-raising activities during lunch hours and break times.

Chapter 42.52 RCW does not prohibit state officers and state employees from creating a non-profit corporation. However, there are provisions under RCW 42.52 that limit the activities of the corporation and those of state officers and state employees affiliated with the corporation. For purposes of the state's ethics law, a non-profit corporation falls within the definition of "person" under RCW 42.52.010(14):

Person means any individual, partnership, association, corporation, firm, institution, or other entity, whether or not operated for profit. [Emphasis added]

Because the corporation is a "person", state officers and state employees affiliated with the corporation, or who receive assistance from the corporation, may incur conflicts of interest under one or more provisions of RCW 42.52, including but not limited to, RCW 42.52.050, Confidential information; RCW 42.52.070, Special Privileges; RCW 42.52.140, Gifts; RCW 42.52.150, Limitations on gifts; and, RCW 42.52.160, Use of persons, money, or property for private gain. This advisory opinion does not address all potential conflicts under the state's ethics law, but rather those that could arise when a non-profit corporation is organized within a state agency and actively seeks to conduct its activities from within state government.

Confidential Information

Under RCW 42.52.050, a conflict of interest may occur if state employees affiliated with the corporation have access to confidential information relating to either agency employees or to recipients of aid from MAA, and this information is subsequently used to either disseminate information about the corporation, or to determine which persons or community social service organizations meet the corporation's criteria for receiving aid. RCW 42.52.050 prohibits the improper use of confidential information:

- (1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonable 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 to receive the information.

Because the corporation has an interest in soliciting donations, the use of an agency mailing list that includes the residential addresses and phone numbers of agency employees, for example, would be a violation of RCW 42.52.050. Likewise, a state employee could not use agency lists of aid recipients to determine the allocation of monies received by the corporation, unless such lists are publicly available. In the event that a member of the corporation also occupies a state position with the authority to waive the confidentiality of agency information by virtue of official duties, that state employee could not enter into a contract with the corporation to disclose such information.

Special Privileges

Under RCW 42.52.070, state officers or state employees may not use their official state positions to secure or grant special privileges or exemptions under RCW 42.52.070:

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.

By establishing the corporation within a state agency, the corporation is securing a special privilege and exemption. In using the agency and its employees to raise funds for disbursement to community social service groups and other agency clients, the corporation secures a special privilege. The ability to gain direct access to a state agency for the purpose of fund-raising, aside from the Combined Fund Drive, is an advantage not accorded to other persons, whether or not operated for profit.² More troubling is the suggestion that a non-profit corporation is somehow required to ensure compliance with the state's ethics laws. The very creation of a non-profit corporation within a state agency does not diminish, but rather increases the potential for ethics violations. Responsibility for compliance with the state's ethics laws rests with individual state officers and state employees. Membership in, or affiliation with, the corporation does not

² The Board previously expressed its concern about such practices when asked whether insurance companies could make printed materials available, use an agency office or break room to discuss services, and allow presentations during breaks and lunch hours. Although the Board decided such questions were issues of management policy, it cautioned that this practice might violate RCW 42.52.070 if only one company were allowed access. However, if all companies were allowed access, the practice could violate WAC 292-110 because of potential disruptions to the workplace. Letter to Lyle Quasim, DSHS Secretary, January 9, 1997. In 2014, the legislature amended RCW 42.52.160 to allow for de minimis use of facilities to provide employees information about, among other things, life/accident/health disability insurance. RCW 42.52.160(3).

and will not exempt state employees from this obligation.

Acceptance of Gifts and Things of Economic Value

Under its bylaws, the corporation intends to receive contributions and payroll deductions for the purposes of “awarding gifts, grants, or interest-free loans.” The corporation contends that any gift, grant, or interest-free loan it may give to a state employee is subject to RCW 42.52.150(1)(c)(i) which excludes the following from the definition of “gift”:

Items from family members or friends where it is clear beyond a reasonable doubt that the gift was not made as part of any design to gain or maintain influence in the agency of which the recipient is an officer or employee...

While it seems unlikely, though not impossible, that any assistance the corporation might provide to state employees would violate either RCW 42.52.140 or RCW 42.52.150, the Board cautions the corporation that this exclusion under the state’s ethics law was not intended for the purposes of allowing receipt of gifts from a non-profit merely because the non-profit is created by persons who are known to, or who work with, a state officer or state employee. To conclude otherwise would defeat the purposes of having gift limitations in the state’s ethics law. Therefore, the corporation cannot rely on this exclusion.

It is possible that circumstances might arise where receipt of a gift or other thing of economic value from the corporation may be questioned under either RCW 42.52.140 or RCW 42.52.150. While RCW 42.52.150 limits the value and types of gifts that may be accepted by state officers and state employees, the corporation is reminded that state officers and state employees may not accept any thing of economic value that could violate RCW 42.52.140:

No state officer or state employee may receive, accept, take, seek, or solicit, directly or indirectly, any thing of economic value as a gift, gratuity, or favor from a person if it could be reasonably expected that the gift, gratuity, or favor would influence the vote, action, or judgment of the officer or employee, or be considered as part of a reward for action or inaction.

This provision applies to receipt from any person, including a non-profit corporation that is composed of state employees. While serving and performing duties as members of the corporation, state employees may not also act in their official capacities as state employees. To do otherwise would create a conflict of interest under RCW 42.52.020.

Use of State Resources

RCW 42.52.160 prohibits the use of state resources for private benefit or gain and allows the Board to adopt de minimis use rules:

- (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....

- (4) 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. [Emphasis added]

The corporation assures the board that with the exception of one meeting of approximately one hour's duration per month, which could be conducted without interference with the performance of official duties during scheduled working hours, no state resources will be used to conduct the business of the corporation. Pursuant to WAC 292-110-010(2)(b), agency heads or their designees may authorize a limited use of state resources for such purposes. However, the Board is concerned that the corporation's intended scope of activities makes it unlikely that it will be able to restrict its use within the agreed upon limitation of one hour per month. In exceeding this limit, the corporation increases the likelihood that its activities may interfere with the performance of public duties, in violation of RCW 42.52.160(4) and WAC 292-110-010.

The Board's final concern is also related to the use of state resources. The very name of the corporation, "Department of Social and Health Services Medical Assistance Administration's Mutual Aid," conveys an impression that the activities of the corporation are somehow "official state activities" and therefore the use of state resources to support the corporation is appropriate. In addition, outside recipients of aid from the corporation may conclude that aid offered by the corporation is state aid, and may seek to contact the corporation and conduct business through MAA in violation of both RCW 42.52.160 and WAC 292-110-010.