

ADVISORY OPINION

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REFERENCES: RCW 42.52.020, RCW 42.52.030

SUMMARY OF CHANGES: Updated statutory references.

Serving on the Board of a Non-state entity that is Seeking Funds from the State Employee's Parent Agency

QUESTIONS

1. Is it a violation of the Ethics in Public Service Act for a state agency Program Director, or Acting Program Director, who sits on an agency decision making body that awards and administers funding to participate in agency decisions that affect an organization on whose board the employee sits?

2. Is it a violation of the Ethics in Public Service Act for a state agency Program Director, or Acting Program Director, who sits on an agency board that awards and administers funding to participate in agency decisions that affect "direct competitors" of an organization on whose board the employee sits?

ANSWERS

1. Yes, the Program Director or Acting Program Director would be participating, in his or her official capacity, in a transaction involving the state and an organization of which the Program Director or Acting Program Director is an officer or member, in violation of RCW 42.52.030(2). The Program Director or Acting Program Director may resolve the violation by disclosing the relationship and declining to participate in the transaction.

2. Yes, membership on the board of an organization is an interest in the organization that or conflicts with the discharge of a state officer's or state employee's official duties as a state agency decision maker regarding the organization or its direct competitors, in violation of RCW 42.52.020. The Program Director or Acting Program Director may resolve the violation by disclosing the relationship and declining to participate in any transaction involving the organization or any organization that has an adverse interest to the organization.

ANALYSIS

The Legislature has authorized several funding programs for organizations that provide community based services. One state agency (“Department”) administers two of these programs. Under the programs, eligible organizations can apply to receive state funds for certain functions, which included providing services to certain low and very-low income groups. Organizations eligible to apply for funds under these programs include local governments, local public development authorities, and nonprofit community or neighborhood-based organizations.

Both questions concern the application of the ethics law to an employee of the Department who serves on the board of an organization that applies to receive funds from the Department. The employee is a Program Director, or Acting Program Director, who establishes the criteria by which program award decisions will be made, awards program grants, and evaluates contract compliance after grants are awarded.

1. A State Employee May Not Participate In Agency Board Decisions Which Award, Or Affect the Administration Of, State Funding To An Organization On Which The State Employee Is A Member.

The first question asks if Program Director, or Acting Program Director, who sits on a state agency board that awards and administers funding, may participate in agency funding decisions that affect the organization on whose board the employee sits. The Ethics in Public Service Act prohibits state employees from participating in agency transactions with organizations in which the state employee is an officer, agent, employee or member. RCW 42.52.030(2) provides, in relevant part:

No state officer or state employee may participate in a transaction involving the state in his or her official capacity with a person of which the officer or employee is an officer, agent, employee, or member [.] (emphasis added)

RCW 42.52.010(21)(a) defines the term “transaction involving the state” to include:

[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.

An application for grant funding and the ongoing administration of a grant clearly falls within the definition of “transaction involving the state” since both the application and administration will be the subject of state action. Accordingly, the state employee cannot sit on an agency

board that reviews an application from an organization of which he or she is board member, i.e., officer, or member. In addition, a Program Director, or Acting Program Director, may not participate in the state agency's ongoing administration of grants or contracts with that organization.

While not addressed in the request, a Program Director, or Acting Program Director may resolve a violation of RCW 42.52.030 by disclosing the relationship to the agency and declining to participate in agency transactions with an organization of which he or she is a board member.

2. A State Employee May Not Participate In Agency Board Decisions Which Award, Or Affect The Administration Of, State Funding To "Direct Competitors" Of An Organization On Which The State Employee Is A Board Member.

The second question asks if Program Director, or Acting Program Director, who sits on a state agency board that awards and administers funding, may participate in agency funding decisions that affect "direct competitors" of the organization on whose board the employee sits. "Direct Competitor" is defined as an organization which is competing for the same funds as the organization on whose board the employee sits or an organization that is not competing in the same funding round, but still has adverse interests to the organization on whose board the employee sits.

For example, Organization A provides the same kinds of services in the same geographic region as Organization B. Although they are not both competing for the same state funding, they are competing for position in the same local marketplace. Organization A, hoping for a strengthened position in the marketplace has some interest in limiting the resources of its primary competitor, Organization B. Organization B applies for state funding, and a board member of Organization A is involved in determining whether or not Organization B will receive that funding.

The Ethics in Public Service Act prohibits state employees from having an interest, or engage in a professional activity, that is in conflict with the proper discharge of his or her official duty. In proposing enactment of this provision the Commission on Ethics in Government and Campaign Practices found that:

No conflict of interest statute can anticipate and address each and every private activity of a public officer or employee that would be incompatible with his or her official duties. A general prohibition against activities incompatible with the performance of public duties in the public interest will help ensure that the ethics code is appropriately comprehensive in this respect.

Accordingly, activity that may be permitted under the narrow provisions of RCW 42.52.030 may not be permitted under RCW 42.52.020. This is true whenever the activity creates a conflict between a state employee's primary duty to render impartial judgment for the state and his or her outside interest in an organization or its direct competitors. RCW 42.52.020, provides that:

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 EEB Advisory Opinion 97-03, the Board advised that RCW 42.52.020 prohibited an employee from conducting an outside business or accepting outside employment that the employee would regulate as part of the employee's official duties. The Board concluded that such a prohibition was based on the divided loyalties that occur in two forms. In EEB Advisory Opinion 97-03, the Board noted that:

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. (emphasis added).

Membership on the board of an organization is a position of advocacy for that organization that very clearly indicates a stronger interest in the organization's continued success than that held by normal members, contributors, or the general public. Accordingly, membership on the board of an organization is in conflict with a state employee's official duties when he or she sits on a state agency decision making, or oversight, body that renders decisions regarding organizations which have an adverse interest to, i.e., are direct competitors of, the organization on which the state employee is board member. This conflict arises because the state employee may be inclined to favor his or her organization or disfavor a competing organization based on his outside board membership.

While not addressed in the request, a Program Director, or Acting Program Director may resolve any violation of RCW 42.52.020 by disclosing the relationship to the agency and declining to participate in any agency transaction with an organization of which he or she is board member or any agency transaction with direct competitors of that organization. The Board understands that declining to participate in agency transactions, which involve both an organization and its direct competitors, will undermine a Program Director's, or Acting Program Director's ability to

participate in the agency's work. Nevertheless, allowing the conduct would significantly undermine public confidence in agency decisions that affect the organization of which the state employee is a board member and those organizations that have an adverse interest to the organization.