

ADVISORY OPINION

APPROVAL DATE: July 13, 2001

NUMBER: 01-04

STATUS: **Current**

REVIEWED: June 21, 2016

NEXT REVIEW: June 2021

REFERENCES: RCW 42.52.030, RCW 42.52.040,
RCW 42.52.120

SUMMARY OF CHANGES: Updated statutory references.

State Officer's Outside Business Relationship with an Agency that They Oversee

QUESTIONS

1. May the Washington State School Directors Association (WSSDA) issue personal service contracts to officers of the Association or members of its board of directors to provide training services to school boards and school board members?
2. If WSSDA may issue personal services contracts to its officers and members of its board of directors for training services, what provisions should the Association take to handle the execution and administration of those contracts?
3. If a consultant with a current contract becomes an officer or member of the board of directors in November, may that person continue to serve under their contract, which they had no role in approving, until the end of the contract's term in summer of the next year?

ANSWERS

1. Generally no, compensated Association officers may not financially benefit or otherwise perform work on projects funded by a contract that the Association Officer approved. Such an outside business relationship is prohibited under RCW 42.52.120. Certain uncompensated Association officers, however, may perform work on projects that were not approved by that Association officer.
2. The Association should establish policies and procedures that prevent Association officers, who participated in the execution or administration of a training services contract, from also performing work on those contracts.

3. Yes, so long as the Association officer does not participate in the administration of the contract or supervise those who will administer the contract.

ANALYSIS

The Association is a state agency authorized by chapter 28A.345 RCW. All publicly elected school board members are automatically members of the Association. The Association is governed, pursuant to RCW 28A.345.030 (1) and the WSSDA bylaws, by a constitution that creates officers (president, president-elect and vice-president) and a board of directors. Pursuant to RCW 28A.345.030 (3) and Association policy, officers of the Association may be paid up to \$50.00 per day. By Association Policy 1425, Compensation, the president and president-elect are limited to \$7,000.00 in compensation per year and the vice-president to \$5,000. By custom, the President is directly involved in the WSSDA operations and administration and regularly confers with the WSSDA Executive Director. The president-elect and vice-president serve as at-large ambassadors to the Association's various constituent groups.

The Association board of directors has the following duties:

- Implementing the purposes of the Association,
- Exercising general supervision over its affairs,
- Interpreting the constitution and bylaws,
- Effecting policies and programs,
- Serving as an appeal body regarding employment actions involving WSSDA staff, and
- Exercising such power normally exercised by such governing bodies to provide for the effective and efficient operations of an association.

Regular activities of the board of directors include adoption of the annual budget, approval of all employment and consultant contracts, and drafting performance evaluations for the Association's Executive Director.

The Association's enabling act directs it to provide advice and assistance to local boards to promote their primary duty of representing the public interest. In addition, upon request by a local school district the Association will make available on a cost reimbursable contract basis: specialized services, research information, and consultants to advise and assist district boards in particular problem areas.

As part of its services to school board members, the Association offers an extensive training program to individual school board members and school boards. The training covers everything from effective boardsmanship to basic school law and finance. The training is offered both by paid staff of the Association and consultants on personal services contracts. Training occurs either at meetings sponsored by the Association or in school districts that have requested training.

The WSSDA staff selects consultants used by the Association for its training program. Initially, selection is through a request for proposal process. Later people with specific skills who meet Association needs are identified through a process of reviewing qualifications. WSSDA staff recommends approval of all the consultant contracts annually to the board of directors. WSSDA staff is solely responsible for the assignment of training consultants to specific school districts or WSSDA meetings, and decisions are based on the needs identified in the assignment, the skills of the consultants and geographic efficiency. Consultants are paid on a per assignment basis, pursuant to their annual contracts. Personal service contracts for training services are usually approved by the WSSDA board of directors at its summer meeting and are good for a twelve-month term. New officers and board members normally take office in November.

The Association has found that the training offered to school boards and school board members is most effective when it reflects the experience, knowledge and wisdom of respected and practicing school board members. Wise, experienced, respected and practicing school board members also make effective officers and board members within the Association. Therefore, the Association asks if WSSDA may issue personal service contracts to officers of the Association or members of its board of directors to provide training services to school boards and school board members.

Compensated Association Officers may not financially benefit or otherwise perform work on projects funded by a contract that the Association Officer approved.

In EEB Advisory Opinion 99-01, the Board advised that WSSDA was a state agency, therefore, its officers and employees are subject to the Ethics in Public Service Act. The Ethics Act provides that uncompensated officers and employees of state agencies are not subject to the outside certain compensation provisions of chapter 42.52 RCW. RCW 42.52.120(5) provides that:

As used in this section, "officer" and "employee" do not include officers and employees who, in accordance with the terms of their employment or appointment, are serving without compensation from the state of Washington or are receiving from the state only reimbursement of expenses incurred or a predetermined allowance for such expenses.

As noted above, Association officers receive daily state compensation in the amount of \$50.00 per day. The Board understands that regular Association members are not compensated and some Association officers waive compensation. Nevertheless, WSSDA currently withholds payroll taxes for officers' compensation and the Board finds that compensated Association officers are subject to RCW 42.52.120.

In EEB Advisory Opinion 00-02, the Board advised that state officers and employees may not financially benefit or otherwise perform work on projects funded by a grant program the employee administers. As stated in that opinion, the question involves several issues. The first is whether a state employee can have a beneficial interest in, or financially benefit from, grants awarded through a program the employee administers. This issue is governed by RCW 42.52.030, which provides in relevant part:

(1) No state officer or state employee, . . . 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.

(2) 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, or in which the officer or employee owns a beneficial interest[.]

As noted above, the regular activities of Association officers include adoption of the annual budget and approval of all employment and consultant contracts. Under subsection (1), the Association officer could not receive compensation for work that was related to a contract that was approved by the officer. In addition, subsection (2) prohibits an Association officer from participating in the award or administration of an Association contract with any person in whom the state employee may serve as an "officer, agent, employee, or member." This subsection also prohibits an Association officer from forming his own business and participating in the award of a contract under the WSSDA school board assistance program.

The second issue relates to outside employment, which is primarily, though not exclusively, governed under RCW 42.52.120. RCW 42.52.120 provides conditions under which compensation may be received for the performance of contracts or grants outside of official duties. A state employee may receive outside compensation for services performed outside official duties only if each of these conditions under RCW 42.52.120(1) are met:

(a) The contract or grant is bona fide and actually performed;

(b) The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;

(c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;

(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;

(e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity;

(f) The contract or grant would not require unauthorized disclosure of confidential information.

Based on the facts presented above, the Board finds that the receipt of compensation from persons who receive WSSDA contracts would not meet the conditions under RCW 42.52.120(1)(b), (c), and (e).

The condition under RCW 42.52.120(1)(b) cannot be satisfied because an Association officer has official duties that include the approval of WSSDA contracts. RCW 42.52.120(1)(b) prohibits acceptance of outside compensation when that compensation results from performance under a grant within the supervision of the employee.

The condition under RCW 42.52.120(1)(c) cannot be satisfied because the Association officer's outside employment cannot be prohibited under RCW 42.52.040, which provides:

(1) Except in the course of official duties or incident to official duties, no state officer or state employee may assist another person, directly or indirectly, whether or not for compensation, in a transaction involving the state:

(a) In which the state officer or state employee has at any time participated; or

(b) If the transaction involving the state is or has been under the official responsibility of the state officer or state employee within a period of two years preceding such assistance.

(2) No state officer or state employee may share in compensation received by another for assistance that the officer or employee is prohibited from providing under subsection (1) or (3) of this section.

(3) A business entity of which a state officer or state employee is a partner, managing officer, or employee shall not assist another person in a transaction involving the state if the state officer or state employee is prohibited from doing so by subsection (1) of this section.

Based on the facts presented above, the Board finds that RCW 42.52.040 would prohibit a Compensated Association officer from doing two things. First, under subsection (1) and (2), the Association officer could not work for a person, or share in compensation received under a WSSDA contract created under the authority or supervision of the Association officer. Second, under subsection (3), an Association officer could not create a business entity or work for a business entity for the purpose of completing a WSSDA contract if the Association officer participated in the approval of the WSSDA contract.

Finally, the condition under RCW 42.52.120(1)(e) cannot be satisfied because the Association officers expressly authorize the WSSDA personnel service contracts in their official capacity.

Uncompensated Association officers must recuse themselves from voting on, or approving, projects and contracts that they will perform work on or may result in a financial benefit.

As noted above, the Board understands that regular Association members and most Board members are not compensated and some Association officers waive compensation by the state. Since these Association members are uncompensated by the State, they are not subject to RCW 42.52.120. Therefore, the Board addresses the participation of "Uncompensated Association Officers" under RCW 42.52.030 and RCW 42.52.040.

RCW 42.52.030 and RCW 42.52.040 prohibit contracts that are not related to a state employee's official duties. Nevertheless, it is possible to avoid a violation of the Ethics in Public Service Act if WSSDA officers recuse themselves from official duties related to WSSDA training contracts. In EEB Advisory Opinion 97-13, the Board addressed recusal policies and advised that:

However, if these persons are appointed to state boards and commissions where conflicts of interest are likely to occur, the board or commission could adopt rules to require members to disclose their interests and abstain from voting on certain matters as a means of effectively addressing those ethical prohibitions.

In circumstances where a board or commission has adopted such rules pursuant to Advisory Opinions 96-09 and 96-09A, and its members agree to abide by such rules, a conflict of interest under RCW 42.52.030 or RCW 42.52.040 will not occur. The adoption of rules relating to disclosure and recusal also precludes a violation of RCW 42.52.020 by members of state boards and commissions in those circumstances where members are required or permitted by statute to be appointed by an identified group or interest.

Accordingly, WSSDA could adopt rules that require members, including those who hold or will bid on Association personal service contracts, to disclose their interests and abstain from voting or attempting to influence votes on certain matters. Such matters include: (1) Association decisions that involve a direct benefit to the school district for which they serve; (2) advising on development of training programs that may result in a personal service contract for association members; (3) renewal or approval of a WSSDA contract already held by the Association officer; (4) supervising or reviewing the job performance of the WSSDA Executive Director or those employees involved in the provision of training services to local school districts; and (5) serving as a member of an appeal body that reviews the Executive Director's personnel decisions regarding those employees involved in the provision of training services to local school districts.

In allowing WSSDA to draft rules that may allow Uncompensated Association Officers to participate in WSSDA contracts, the Board understands these rules will impact WSSDA operations. In EEB Advisory Opinion 98-08, the Board advised that Washington Technology Center (WTC) members may recuse themselves from discussing and voting on matters on which there is no existing conflict of interest in order to preserve potential future business opportunities. The Board further advised, however, that the recusal could only occur without effect on the performance of official duties as a WTC board member. Otherwise, refusal may be incompatible with the performance of official duties.

As noted above, most Association Board members and officers serve in an advisory or limited capacity. The Association President, however, is closely associated with daily Association operations and works closely with the WSSDA Executive Director. Therefore, if the President recuses himself or herself from evaluating the WSSDA Executive Director and approving training services contracts, it will impair an important Association oversight function. The Board believes that the Association President can resolve such issues by suspending any work on training services contracts during the term of his or her Presidency.

The Board's advisory opinion is based on the general facts as stated above. The Board does not investigate the facts. Please be aware that modification of the facts, or knowledge of more specific facts or circumstances, might cause the Board to reach a different conclusion. In addition, Board advisory opinions are narrowly drawn to interpret the Ethics in Public Service Act. They do not address whether the proposed action is prudent, good public policy or effective management practice.