

ADVISORY OPINION

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REVIEWED ON: June 8, 2016

NEXT REVIEW: June 2021

REFERENCES: RCW 42.52.020, RCW 42.52.030
RCW 42.52.903

SUMMARY OF CHANGES: Updated statutory references.

Holding an Interest Beneficial or Otherwise in a Person Regulated by a Citizen Body Whose Members May be Selected from Identified Groups or Interests

QUESTION

May a member of the Fish and Wildlife Commission accept a position as an “Alternate Operator” under a commercial fishing license owned by another person?

ANSWER

Yes, Fish and Wildlife Commission members who are selected from certain interest groups may become “Alternate Operators” under commercial fishing license but must recuse themselves from participating in Fish and Wildlife transactions regarding the primary license holder.

ANALYSIS

The Washington State Fish and Wildlife Commission (Commission) is the supervising authority for the Washington State Fish and Wildlife Department (Department). The Commission’s primary role is to establish policy and direction for fish and wildlife species and their habitats in Washington and to monitor the Department’s implementation of the goals, policies and objectives established by the Commission. The Commission also classifies wildlife and establishes the basic rules and regulations governing the time, place, manner, and methods used to harvest or enjoy fish and wildlife.

Under RCW 77.04.040, the nine Commission members are appointed by the Governor who should “... seek to maintain balance reflecting all aspects of fish and wildlife, including representation recommended by organized groups representing sport fishers, commercial fishers,

hunters etc...” In the case of one Commission member addressed here, his 1997 appointment was supported or recommended by representatives of the commercial fishing industry.

The Commission member is also an “Alternate Operator” under a commercial fishing license held by another person¹. Commercial fishing licenses are issued by the Department and the agency regulates the commercial fishing industry. An Alternate Operator may operate a licensed commercial fishing vessel on behalf of the actual licensee or vessel owner. Alternate Operators can be employed by the license holder or may operate the commercial fishing vessel without compensation.

The Ethics Act generally prohibits private interests that conflict with the proper discharge of official duties. RCW 42.52.020 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 Ethics Act also prohibits state officers from participating in transactions between the state and an outside organization of which the state officer or employee is an officer or employee. 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)

Generally, these two provisions would prevent a Commission member from having any professional or financial relationship with persons, including commercial fishing license holders, who are regulated by the Department. The Ethics Act, however, recognizes that the composition of boards and commissions is unique in that state statutes often require members to be appointed from certain groups or represent certain interests. In recognition of this fact, the Legislature adopted RCW 42.52.903 which provides:

Nothing in this chapter shall be interpreted to prevent a member of a board, committee, advisory commission, or other body required or permitted by statute to be appointed from any identifiable group or interest, from serving on such body in accordance with the intent of the legislature in establishing such body. (emphasis added)

In EEB Advisory Opinion 96-09, the Board advised that that the prohibitions in chapter 42.52 RCW must be read in conjunction with the exception in RCW 42.52.903. The Board further advised that boards and commissions whose members include individuals appointed from identifiable groups or interests may adopt rules that allow members to disclose their interests and

¹ The commercial license holder is a close relative of the Commission member.

abstain from voting or attempting to influence votes on certain matters as a way of addressing the ethical restrictions in the statute.

As noted in the facts, the Commission is composed of members "...reflecting all aspects of fish and wildlife, including representation recommended by organized groups representing sport fishers, commercial fishers, hunters etc...". While prior Board opinions regarding RCW 42.52.903 involved persons who were required to be selected from identified groups, this provision also applies when the enabling ordinance permits an appointing authority to select individuals from an identifiable group or interest. Accordingly, the Commission members are also subject to the exception under RCW 42.52.903 and the Ethics Act would not prohibit them from designation as an "Alternate Operator" on a commercial fishing license held by another person². Nevertheless, the Commission member's interest, financial or otherwise, in the license holder requires that they not participate in transactions, such as licensing decisions, that affect the specific license holder.

In EEB Advisory Opinion 96-09A, the Board adopted Model Rules that could be adopted by various boards and commissions that would resolve potential conflicts such as those raised by the Commission member's designation as an Alternate Operator on a commercial fishing license. We understand that the Commission has also adopted such conflict of interest rules. Under these rules the Commission member must:

- (a) Disclose his interest in the commercial license holder;
- (b) Recuse himself from the Commission's discussion regarding the specific transaction;
- (c) Recuse himself from the Commission's vote on the specific transaction; and
- (d) Refrain from attempting to influence the remaining Commission members in their discussion and vote regarding the specific transaction.

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.

² Because the commercial license holder is a close relative of the Commission member who has often allowed the Commission member to join him on fishing trips, the "Alternate Operator" position would most likely not be prohibited under RCW 42.52.140 and RCW 42.52.150. Under RCW 42.52.010(9)(a), "gifts" means anything of economic value for which no consideration is given, but gifts from family members are exempt from the gift restrictions so long as it is clear beyond a reasonable doubt that the gift was not part of an attempt to influence the state officer or employee. The Board might analyze these facts under the sections of the Ethics Law regarding gifts, if a Commission member were to be named an alternate operator by a license holder who is not a relative or friend of the member.