

ADVISORY OPINION

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REFERENCES: RCW 42.52.070, RCW 42.52.160,
WAC 292-110-010

SUMMARY OF CHANGES: Amended to update statutory and rule references.

Use of State Facilities to Support Private Commercial Advertising Activity

QUESTION

May a state officer or employee, use state facilities, including state paid time, to participate in the creation or review of articles and other advertising materials or promote private commercial products and services?

ANSWER

Yes under certain conditions. The Ethics Act contains a strong presumption against a state officer or employee using his or her official position and public resources to promote private commercial products. When state officers or employees are seen to favor one product over another, it significantly undermines vendor confidence in the agency's or the state's contractor selection process. However, state officers and employees may use state resources for work that is reasonably related to the conduct of official duties. Where state agencies with appropriate authority have entered into contracts and other commercial relationships that provide for agency endorsement or promotion of a private product, such a use of state resources would not violate the Ethics in Public Service Act.

ANALYSIS

Department of Social and Human Services (DSHS) vendors have invited agency staff to participate in the creation or review of articles regarding vendor services and products. The articles are usually written by vendor representatives with the help of DSHS staff and highlight products or services used by various DSHS departments or divisions. The usual intent of the vendor is to publish the articles in a trade publication, national industry magazine or on a vendor's web site. Sometimes a vendor will offer a discount on products or services to DSHS employees in exchange for being able to publish their name and position in an article.

Normally, state technology contracts and purchase orders require vendors to request department approval before publishing an article related to a DSHS contract. This provision is found in all contracts and enables the department to verify statements and claims in order to prevent the appearance of endorsing a product, service, or vendor.

Board rules note that “[a]ll state employees and officers are responsible for the proper use of state resources.” The Ethics Act provisions against the improper use of position also apply to individual state officers and employees who are acting outside the scope of employment. Therefore, this opinion does not address the authority of state agencies to enter into contracts and other commercial relationships with private entities.

1. State Officers And Employees May Not Use Official Agency Titles To Privately Endorse Commercial Products, Unless It Is Part Of Their Official Duties To Do So, And May Not Accept Gifts Or Other Compensation From State Agency Vendors In Exchange For Official Endorsements.

The Ethics in Public Service Act ("Ethics Act") prohibits state officers and employees from using state position to provide special benefits or exemptions. RCW 42.52.070 provides that:

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.

State employees making decisions whether to permit a private business to use state facilities to provide information about its products must be careful not to favor some businesses over others. RCW 42.52.070 prohibits employees from using their positions to “secure special privileges” for another person. For example a violation of RCW 42.52.070 could occur if an employee permits one business to use agency facilities and not another.

Similarly, state officers and employees who privately provide commercial endorsements and use the official agency title would violate RCW 42.52.070. State officers and employees involved in vendor and contractual relationships must consider that providing product endorsements creates a significant chilling effect for other vendors who may seek to provide goods and services to state agencies or participate in an agency bidding process. A violation would occur unless the agency had approved the use of the employee’s official agency title in the endorsement as part of an existing contractual agreement with the vendor.

The Ethics Act also contains several provisions which prohibit or limit state officers and employees ability to accept gifts or compensation from current state agency vendors. In the case of state employees involved in purchasing or using agency vendor’s products or services, the receipt of gifts and compensation of any value related to the performance of official duties is strictly prohibited. Therefore, DSHS staff, including those involved in purchasing or using agency vendor’s products or services, should not accept discounts on products or services from DSHS vendors in exchange for endorsing a commercial product or allowing a vendor to publish their name and position in a promotional article. (See RCW 42.52.110, RCW 42.52.120, RCW 42.52.140, and RCW 42.52.150)

2. State Employees May Not Use Agency Facilities To Endorse Commercial Products, Unless The Use Is Related To Official Duties.

The Ethics Act generally prohibits state officers and employees from using state resources for the benefit of a private company. RCW 42.52.160 provides:

(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.

(2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

RCW 42.52.010(12) defines official duties:

"Official duty" means those duties within the specific scope of employment of the state officer or state employee as defined by the officer's or employee's agency or by statute or the state Constitution.

In EEB Advisory Opinion 99-03, the Board advised that under RCW 42.52.160 a university coach would be prohibited from entering into a private agreement with a sporting goods company to ensure that players wear the company's products or from appearing in commercials using university facilities or trademarks. As with the university coaches, an individual DSHS officer or employee may not use agency resources to promote commercial products or to assist vendors in preparing commercial endorsements.

The general restriction against using agency resources to endorse commercial products, however, would not apply to conduct that is reasonably related to the performance of official duties. (See WAC 292-110-010(2)) For example, it would not violate the Ethics Act for a state officer or employee to respond to requests for reference information about a vendor or for agency staff to review proposed vendor advertising materials to ensure that the content does not violate agency policy or a provision of the vendor's contract.

Similarly, it would not violate the Ethics Act for a state officer or employee to use state resources to promote a commercial product if his or her agency had entered into contractual agreement that required the agency to encourage use of the product or service by other state agencies. It also would not violate the Ethics Act for an agency to enter sponsorship agreement with a commercial entity that required some use of resources to promote the company or its services.

Although we conclude that using state resources to promote commercial products under an existing sponsorship or other contractual agreement may not violate RCW 42.52.070 and RCW 42.52.160, we express no opinion about the authority of agencies to enter such agreements in the first place. An administrative agency may only perform the functions for which it has the statutory authority to do. Thus, there may be a question of whether a state agency has the statutory authority to enter into agreements with commercial vendors to promote the use of the vendor's goods or services. These questions fall outside of chapter 42.52 RCW and are beyond the authority of the Executive Ethics Board.

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.