

ADVISORY OPINION

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REFERENCES: RCW 42.52.010, RCW 42.52.080

SUMMARY OF CHANGES: Updated statutory references.

Assisting in a Transaction

QUESTION

Does RCW 42.52.080(5) prohibit a former state employee from accepting employment assisting a person seeking a water right permit when the employee worked on the same permit application while employed by the state?

ANSWER

Yes, RCW 42.52.080(5) prohibits a former state employee from assisting another person in a transaction involving the state in which the employee participated. The application for a water rights permit is a transaction involving the state, and the employee participated in that transaction while a state employee.

ANALYSIS

This request concerns employment after public service. The employee in question worked for the Department of Ecology (DOE) from 1989 to 1996. During that time the employee's duties included making decisions about applications for water rights permits. The job involved investigating water rights applications and drafting reports of examination. The report of examination summarizes all aspects of the water right investigation and provides conclusions and recommendations to a supervisor who makes the final decision on approving or denying the application.

In 1993, the employee worked on a particular application for a water right preparing three draft reports of examination. However, no permit was issued and the application was put on hold, pending litigation. The employee had no further involvement with the permit. After the employee left state service the application for the permit was denied. The applicant has appealed the denial and the employee asked the Board whether he may assist the applicant in appealing the denial.

This question involves the interpretation of RCW 42.52.080(5) which provides:

No former state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment. This subsection shall not be construed to prohibit any employee or officer of a state employee organization from rendering assistance to state officers or state employees in the course of employee organization business.

(emphasis added.)

This question raises two separate issues. First, is the application for a water rights permit a “transaction involving the state”? Second, did the employee participate in that transaction?

Turning to the first issue, RCW 42.52.010(21) defines “transaction involving the state”:

(a) “Transaction involving the state” means 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.

(b) “Transaction involving the state” does not include the following: Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee, or a claim, case, lawsuit, or similar matter if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit.

(emphasis added.)

It is clear that an application for a water rights permit is a transaction involving the state. It is an “application” that will be subject to “state action”. RCW 42.52.010(17)(a) defines “state action” to include a “decision, determination, finding, ruling, or order”. It is true that the employee was involved with the permit during only a part of the process and had left state service by the time the permit application was denied. Nevertheless, the Board concludes that the application for a permit is a single transaction that begins with the application and ends when the permit is finally granted or denied.

This is not to say that everything connected with the permit is a single transaction. After the permit

is granted there may be other transactions connected with it, such as issues about compliance with terms and conditions of the permit. However, the Board views the application for a permit as a single transaction.

Since the application for a water rights permit is a transaction involving the state, the second issue is whether the employee's involvement during one stage of the permit process constitutes participation. RCW 42.52.010(13) provides that "participate" means:

"Participate" means to participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties.

(emphasis added.)

The question of participation is primarily factual. RCW 42.52.010(13) requires that participation be personal and substantial. It is clear that the employee was personally involved with the permit application. The question is whether that personal involvement was substantial. After considering information submitted by both the Department of Ecology and the employee, the Board concludes that the employee's involvement was substantial and meets the definition of participate. The employee was the primary author of three draft reports of examination which summarize all aspects of the water right investigation and provide conclusions and recommendation. This is substantial involvement in the permit process. The fact that additional work was done on the permit after the employee left state service does not lessen the employee's involvement.

In summary, RCW 42.52.080(5) prohibits a former state officer or state employee from assisting another person in a transaction involving the state in which the officer or employee participated. The application for a water rights permit is a transaction involving the state. Since the former employee participated in the processing of the application while in state service, the employee may not assist the applicant with regard to the permit application process.