

ADVISORY OPINION

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SUMMARY OF CHANGES: Updated statutory references.

Employment by a Person Who Contracted with Employee's Agency

QUESTION

After terminating employment with the state, may the director of a state agency accept employment from a person who entered into contracts with the director's agency?

ANSWER

Yes, assuming that the employment was not offered to reward or induce the performance or nonperformance of the director's official duties, or would not require or induce the disclosure of confidential information, a former state agency director is not prohibited from accepting employment from an employer who entered into contracts with his or her agency. However, there are limitations on the kind of work the former director may perform for the new employer.

ANALYSIS

This question concerns outside employment of a state agency director who has left state service. The former director seeks post-state employment with a person who entered into two contracts with the former director's state agency. The first contract was entered into in 1995 and the value of the contract was in excess of \$10,000. The former director was not personally involved in the negotiation or administration of this contract. The second contract was also entered into in 1995 and had a value of less than \$10,000. The former director was involved in the negotiation of the second contract and signed it on behalf of the agency. The question is whether the former director may accept employment from this employer.

RCW 42.52.080 is the main provision governing employment after public service. It contains five prohibitions. The prohibitions, as they relate to this question, are outlined below.

RCW 42.52.080(1) provides:

from the date of termination of state employment, accept employment or receive compensation from an employer if:

(a) The officer or employee, during the two years immediately preceding termination of state employment, was engaged in the negotiation or administration on behalf of the state or agency of one or more contracts with that employer and

No former state officer or state employee may, within a period of one year was in a position to make discretionary decisions affecting the outcome of such negotiation or the nature of such administration;

(b) Such a contract or contracts have a total value of more than ten thousand dollars; and

(c) The duties of the employment with the employer or the activities for which the compensation would be received include fulfilling or implementing, in whole or in part, the provisions such a contact or contracts. This subsection shall not be construed to prohibit a state officer or state employee from accepting employment with a state employee organization.

RCW 42.52.080(1) does not prohibit a former state officer or employee from working for any particular employer, but it does limit the kind of work that can be performed. Thus, the fact that a prospective employer entered into contracts with the former director's agency does not prohibit the former director from being employed by that employer. However, RCW 42.52.080(1)(c) generally would not permit the former director to perform duties for the new employer that would involve fulfilling or implementing the contracts with his or her former agency, or supervising or controlling actions taken to fulfill or implement those contracts.

In this case, however RCW 42.52.080(1) would not prevent the former director from fulfilling or implementing either contract for the new employer because the statute does not apply to the situations described in the Question.

With regard to the first contract, the former director did not negotiate or administer the contract. Though the agency director was in a position to make discretionary decisions affecting the outcome of such negotiations or the nature of such administration, this, by itself, does not violate RCW 42.52.080(1)(a) which applies to an officer or employee who

engaged in the negotiation or administration on behalf of the state or agency of one or more contracts with that employer and was in a position to make discretionary decisions affecting the outcome of such negotiation or the nature of such administration.

(emphasis added)

The use of the word "and" indicates that RCW 42.52.080(1) applies when an officer or employee is both engaged in negotiations or administration and is in a position to make discretionary decisions. Since the former director did not engage in negotiation or administration of the first contract, RCW

42.52.080(1) does not apply.

Turning to the second contract, the former director was involved in both the negotiation of the contract and was in a position to make discretionary decisions about the contract. Since the former director was doing both, RCW 42.52.080(1)(a) applies. Although the former director meets the requirements of RCW 42.52.080(1)(a), the limitation in RCW 42.52.080(1) does not apply because the value of the contract was less than \$10,000 as required by RCW 42.52.080(1)(b).

If the value of the second contract had been in excess of \$10,000, the former director would have been subject to the prohibitions in RCW 42.52.080(1) because the requirements of both RCW 42.52.080(1)(a) and (b) would have been met and the contract occurred during the two years immediately preceding the termination of state employment.

The next limitation is set out in RCW 42.52.080(2) which provides:

No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest in a contract or grant that was expressly authorized or funded by specific legislative or executive action in which the former state officer or state employee participated.

This provision would not limit employment with a particular employer, unless we conclude that a former state officer or employee has a beneficial interest in any contract between a new employer and a state agency.

In our view, this is not a proper interpretation of RCW 42.52.080(2). The term beneficial interest is defined in RCW 42.52.010(3) which provides in part: "'Beneficial interest' has the meaning ascribed to it under the Washington case law." In Christiansen v. Department of Social Security, 15 Wn.2d 465, 467, 131 P.2d 189 (1942), the court defined beneficial interest as the "profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." In the case of a contract with the state, the profit, benefit, and advantage of the contract runs to the employer who entered into the contract. As a general matter, employees are not beneficially interested in the contracts of their employer.

Of course, this result depends on the arrangements between the former state officer or employee and the new employer. For example, if the new employer was a partnership and the officer or employee was going to become a partner rather than an employee, the result would be different. A partner would probably have at least an indirect right to profit, benefit, or advantage from a contract between the partnership and the state. There also might be a different result if the former director's compensation was directly connected to the contract. However, if the former director is simply an employee of the new employer with no special rights to receive profit, benefit, or advantage from any contract with the state, RCW 42.52.080(2) would not prohibit the employment.

The next two restrictions on employment after the termination of state service are RCW 42.52.080(3) and (4).

RCW 42.52.080(3) provides:

No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the officer or employee knows or has reason to believe that the offer of employment or compensation was intended, in whole or in part, directly or indirectly, to influence the officer or employee or as compensation or reward for the performance or nonperformance of a duty by the officer or employee during the course of state employment.

RCW 42.52.080(4) provides:

No former state officer or state employee may accept an offer of employment or receive compensation from an employer if the circumstances would lead a reasonable person to believe the offer has been made, or compensation given, for the purpose of influencing the performance or nonperformance of duties by the officer or employee during the course of state employment.

These two provisions do prohibit employment by a specific employer under specific factual circumstances. RCW 42.52.080(3) applies if the former state officer or employee knows or has reason to believe that the employment is offered to influence or reward the performance or nonperformance of his or her official duties. RCW 42.52.080(4) imposes a similar restriction, but the standard is whether the circumstances would lead a reasonable person to believe that employment is offered to reward or influence. The application of these provisions depends on the specific facts surrounding the post-state employment which cannot be resolved in an advisory opinion.

The last restriction is in 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.

RCW 42.52.080(5) does not limit employment with a particular person but, it does limit the duties that can be performed. The issue is whether a contract between a state agency and a person is a transaction involving the state. The term "transaction involving the state" is defined in RCW 42.52.010(21)(a) as follows:

"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.

(emphasis added)

This is a very broad definition which specifically includes contracts. Accordingly, we conclude that a contract between the state and a person is a transaction involving the state. The prohibition in RCW 42.52.080(5) applies if a state officer or employee participates in the transaction. RCW 42.52.010(13) defines participate as follows:

"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.

As applied to the contracts in this opinion, the former agency director participated in the second contract because the director was involved in the negotiation of the contract and signed it on behalf of the agency. On the other hand, the director did not participate in the first contract because the director was not involved with any of the decisions that were made with regard to that contract. Thus, the former director may not work for the new employer on the second contract because it is a transaction involving the state in which the former director participated. The ban does not apply to the first contract because the former director did not participate in that contract.

There is one other provision of the ethics law that limits post-state employment: RCW 42.52.050 deals with confidential information and provides in part:

(1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the official or employee by reason of the official's or employee's official position.

(2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information.

(3) No state officer or state employee may disclose confidential information to any person not entitled or authorized to receive the information.

RCW 42.52.050(1) prohibits a state officer or employee from accepting employment if it might reasonably require or induce the officer or employee to disclose confidential information. This

provision applies to post-state employment and would prohibit an officer or employee from accepting employment from a particular person. As with RCW 42.52.080(3) and (4), the application of this restriction depends on the facts of each situation and cannot be resolved in an advisory opinion.