

ADVISORY OPINION

APPROVAL DATE: 1997

NUMBER: 97-13

STATUS: **Current**

REVIEWED ON: March 2, 2016

NEXT REVIEW: March 2021

REFERENCES: RCW 42.52.010, RCW 42.52.020.

RCW 42.52.030, RCW 42.52.903

SUMMARY OF CHANGES: Updated format only.

Financial Interests/Board Membership

The Washington State Investment Board (SIB) is composed of fourteen members, including five non-voting members. Pursuant to RCW 43.33A.020 and RCW 43.33A.030, the non-voting members are required to be experienced and qualified in the field of investments, and advise the voting members on matters of investment policy and practices. Non-voting members may vote in the SIB committees upon which they serve on the question of whether the committee will, or will not, recommend a course of action by the SIB. The SIB has asked the Executive Ethics Board for an opinion on two questions:

QUESTIONS

1. Whether a non-voting member of the SIB would violate any provision of Chapter 42.52 RCW under the following circumstances:

(a) The SIB adopts a rule incorporating the model rules proposed by the Executive Ethics Board in Advisory Opinion 96-09;

(b) The non-voting member is a principal in a consulting firm which contracts to provide advice and recommendations to a major tenant in a building owned by the SIB for the investment of state retirement funds. The building is owned by the SIB through a holding entity and is managed by a property manager with discretion to negotiate lease terms;

(c) The board member is a principal person who actually performs services for the tenant under a consulting agreement. These services include assisting the tenant in developing and considering alternative space options, to solicit proposals from owners or managers of other buildings, to evaluate the proposals, and possibly to help negotiate the terms and conditions of a new or renewed lease;

(d) The non-voting member will share in the revenues to the consulting firm from the contract; and,

(e) The non-voting member recuses himself or herself from any vote, and from

any discussion, about or directly relating to the subject building, and does not attempt to influence any other Board member upon any such vote.

2. Would the Executive Ethics Board's opinion be different if the non-voting board member:

(a) is either a principal in or employee of, and active participant in planning or negotiating for, the tenant instead of a consultant to the tenant, or;

(b) is the principal of the tenant, but does not participate in the planning or negotiating for office space?

ANSWER

RCW 42.52.903 provides that no provision in RCW 42.52 shall prevent persons from serving on state boards and commissions. 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.

ANALYSIS

RCW 42.52.903 provides that no provision in RCW 42.52 shall prevent persons from serving on state boards and commissions. In Advisory Opinion 96-09, the Board acknowledged that although board and commission members were still required to comply with the ethical prohibitions in the law as a result of their appointment to a public position, state boards and commissions 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. The proposed draft rule submitted by the SIB complies with the Board's advice under Advisory Opinion 96-09.

In evaluating whether a member of the SIB could have a conflict if the member (1) serves as a consultant to the tenant; or, (2) is either a principal of or employee of the tenant; or, (3) is a principal of the tenant, but does not participate in the planning or negotiating of office space, the Board considers that although the board member in this case is a non-voting member of the SIB, he or she would be considered a participant in transactions involving the state through the authority of the SIB. Pursuant to RCW 43.33A.030, non-voting members of the SIB "advise the voting members on matters of investment policy and practices"; however, trusteeship of the funds under the authority of the SIB is vested in its voting members. RCW 42.52.010(13)

provides that:

“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*, or otherwise but does not include preparation, consideration, or enactment of legislation or the performance of legislative duties. [Emphasis added]

The distinction between the official responsibilities of the voting and non-voting members of the SIB under RCW 43.33A.030 is determinative to our interpretation of whether RCW 42.52.030(1) might apply to this case. This subsection provides that:

No state officer or state employee, except as provided in subsections (2) and (3) of this section 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.

Although non-voting members participate in transactions involving the state through the SIB by rendering advice to voting members, non-voting members do not exercise supervisory responsibility over contracts, sales, leases, or other transactions entered into by the SIB. Supervisory responsibility for these transactions adheres instead to the SIB’s voting members.

Pursuant to RCW 42.52.010(16), “responsibility” is defined in conjunction with a transaction involving the state as:

...the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or through subordinates, effectively to approve, disapprove, or otherwise direct state action in respect of such transaction.

The fact that the non-voting member does not exercise supervisory responsibility for the tenant’s lease in a building owned by the SIB would preclude a violation of 42.52.030(1).

The Board also considers that the board member will recuse himself or herself in those situations where issues relating to the building may come before the SIB or its staff. While recusal may not sufficiently resolve a conflict of interest in situations where a state officer or state employee exercises supervisory responsibility in a state action, when participation is limited to non-supervisory participation, recusal is sufficient to preclude conflicts of interest under RCW 42.52.030(2) and (3). Recusal also serves to prevent a violation of RCW 42.52.040 which prohibits state officers and employees from assisting others in transactions involving the state, because the employee has agreed not to participate as a non-voting member of the SIB in any matter relating to the building where he or she has a business relationship with the tenant.

The only other subsection of RCW 42.52 that appears to be relevant to the questions posed in this request is RCW 42.52.020 which provides that:

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

If a state board or commission has promulgated rules under the advice provided in Advisory Opinions 96-09 and 96-09A, and is subject to RCW 42.52.903, RCW 42.52.020 will not be violated.