

April 18, 1996
Advisory Opinion 1996 - No. 3

This advisory opinion is requested by Representative Frank Chopp. Representative Chopp has waived the right to confidentiality afforded to persons who request advisory opinions.

QUESTION

Representative Chopp asks whether he is required to obtain the Board's approval of contracts or grants that his employer, the Fremont Public Association (FPA), obtains from state agencies. To assist the Board in answering this question, he provides the following information:

1. The FPA is a nonprofit corporation, established in 1974 to provide services for low-income persons. The FPA directly or indirectly provides food, housing, transportation, home care, advocacy and other services to low-income persons. For 1996, the FPA projects operating revenues of approximately \$9.5 million. State contracts or grants constitute approximately \$1.3 million of that amount, or 13 percent. It is also projected that the total number of state contracts or grants will be 11, with the average being for \$115,138. The remaining amount of FPA's operating revenues come largely from contracts with or grants from local governments, private foundations, and corporations and from contributions by individuals. The FPA has an additional state contract for a capital project. This contract, which is with the Department of Community, Trade and Economic Development is for \$600,000 for the construction of a Community Resource Center.
2. As in the past, many of the FPA's contracts or grants in 1996 will be renewals or continuations of previous contracts or grants. While the FPA generally competes with other nonprofit organizations for state agency contracts or grants, some of its contracts or grants are simple renewals, without any new competitive process.
3. The FPA is headed by a board of directors composed of approximately twenty-one members. The board provides policy direction for the FPA, including policies governing the FPA's application for and administration of state agency contracts and grants. The FPA has 210.5 fulltime equivalent employees.
4. Since 1983, Representative Chopp has served as the FPA's executive director. In that role, his primary responsibilities are implementing the board's policies and supervising employees to achieve that result.
5. Since becoming a legislator, Representative Chopp has followed a policy of not negotiating with, conversing with, or having any personal contacts with state agency officials regarding potential or existing contracts or grants between their agencies and the FPA. The FPA's contacts with state agencies regarding such contracts or grants are made by other FPA

employees. He follows this practice to avoid any appearance of using his legislative position to obtain favorable treatment from state agencies. (There may have been a few state agency contracts that he has signed on a pro forma basis on the FPA board's behalf, but to avoid any appearance problem, he has discontinued even this practice.)

6. Representative Chopp exercises little direct supervision over FPA's contacts with state agencies regarding state grants or contracts. Most of these contacts are made by FPA employees who are supervised by another senior FPA employee, who in turn is supervised by Representative Chopp; some are made by this senior employee.

7. Representative Chopp's salary is set each year by the FPA's board. In setting salaries for FPA's senior staff, including him, the board considers length of service with the FPA; salary levels of comparable executives in other non-profit agencies; and overall performance based on a workplan. This workplan does not include increasing the amount or number of state contracts or grants. In setting Representative Chopp's salary, the board does not increase or reduce Representative Chopp's salary based on the amount or number of state contracts or grants. In 1995, the FPA's salary payments to him represented approximately 1/2 of 1 percent of the FPA's total revenues for that year.

8. While the FPA board considers salary levels of comparable executives in other nonprofit agencies in setting salaries for FPA executives, it has for many years set Representative Chopp's salary at a level lower than that paid to such comparable executives. It does so in order to maximize the amount of funds available for charitable purposes and because the board does not believe its executives should be earning excessive salaries.

9. Based on compensation policies of the FPA board and the relative significance of state contracts or grants to the FPA's total budget, his salary and tenure as executive director would be unaffected even if the FPA lost all of its state contracts and grants.

OPINION

We conclude that, under the circumstances specified in the question, Representative Chopp will not have to obtain our approval of the FPA's contracts and grants awarded by state agencies.

ANALYSIS

Under the State Ethics Act, a legislator must obtain our prior approval of a state agency contract or grant if both of the following are present: the contract or grant has been awarded by a state agency without competitive bidding or competitive selection, and the legislator has a "beneficial interest" in the contract or grant. See: RCW 42.52.120(2).

In **Advisory Opinion 1995 - No. 14**, we decided that the prior approval requirement applies to state contract extensions and amendments, as well as to the original contract. Therefore, the fact the FPA's state contracts or grants are "renewals or continuations" does not remove them from the reach of the requirement. However, because we find that Representative Chopp does not have a "beneficial interest" in the FPA's contracts and grants, we conclude that he need not obtain our approval of them. Our reasons for this conclusion follow.

The State Ethics Act defines "beneficial interest," in RCW 42.52.010(4), as follows:

"Beneficial interest" has the meaning ascribed to it under the Washington case law. . . .

We have previously decided that under the Washington case law the term means a "financial interest." See: **Advisory Opinion 1995 - Nos. 6, 9, and 12**.

Unlike the "beneficial interest" questions before us in our previous opinions, which dealt wholly or partially with ownership interests, here we are asked to decide how the "beneficial interest" definition applies to a legislator whose sole "interest" is that of an employee. The major case on point is the Washington Supreme Court case of *Mumma vs. Brewster*, 174 Wash 112 (1933). This case arose under a statute generally prohibiting a municipal official from having a private financial interest in the municipality's contract or for the furnishing of supplies to the municipality under a contract.

In **Mumma**, the court held that the mayor of the Town of Brewster did not have a prohibited financial interest in the town's contract with an electric utility company that employed him as its district manager. The facts of the case included the following: In his capacity of district manager for the utility, he was in charge of the utility's district office in Brewster and supervised utility employees who determined the monthly amount of energy used by the town and the utility's charges for the use. He owned no stock in the utility and the utility paid him a fixed salary without any commissions or other payments. In his capacity as mayor, he approved the town's payments to the utility for its energy use charges.

The court held that the mayor did not have a prohibited interest in the town's arrangements with the utility. The court stated that:

. . . as an employee to the public service corporation [, he is] is paid a stated salary and no commissions based on receipts or earnings. His position and his salary, no doubt, depend upon the prosperity of his employer, and perhaps, in a remote degree, that prosperity in some small part depends upon the profitable furnishing of supplies to the town, but to hold that this constitutes an indirect interest in Downing would be to

¹ While the prohibition at that time literally applied only to an "interest" and was later changed to apply to a "beneficial interest," the **Mumma** case is interpreted as authority for the meaning of the term "beneficial interest." See **AGLO 1973 No. 6**.

base a presumption upon a presumption, which may not legally be done.

To come within the statutory prohibition, it must appear that . . . [he] directly or indirectly profited from the relation between his employer and the town. . . . The facts utterly fail to show any such situation. It cannot be presumed, without any proof on the subject that, that . . . [he] owes his employment to the fact that he is mayor, or that, if the town should cease to deal with his employer, he would lose his position or receive less compensation for his services.

For the reasons stated in this quote, we believe that Representative Chopp would not have a "beneficial interest" in the FPA's contracts or grants. Like the mayor in **Mumma**, Representative Chopp "is paid a stated salary and no commissions based on receipts or earnings." Also like the mayor, the facts indicate that if the FPA lost its state contracts or grants, Representative Chopp "would not lose his position or receive less compensation for his services."

We caution Representative Chopp that our decision to not require prior approval of the FPA's state agency contracts and grants is limited to the circumstances presented in the Question. We realize that these circumstances may change. Of course, if they do, then our prior approval may be required.