

November 21, 1995

Advisory Opinion 1995 - No. 17

This advisory opinion is requested by Timothy A. Martin, Chief Clerk of the House of Representatives. Mr. Martin has waived the right to confidentiality afforded to persons requesting advisory opinions.

QUESTION

Would it be a violation of the State Ethics Act for a legislative employee to prepare, at a legislator's request, any of the following letters when the letters are prepared during the employee's work hours, are on the legislator's official stationery, are signed by the legislator, and are mailed at state expense?

Letter No. 1: This letter is to a state agency. It contains only the legislator's favorable recommendation for a person or entity's application for a grant from the agency and a statement urging the agency to approve the application.

Letter No. 2: This letter is to individuals or organizations (for profit and/or nonprofit). It contains only a solicitation for contributions to a fund held by a nonprofit organization for payment of travel expenses and registration fees of legislators to enable them to attend an educational conference.

Letter No. 3: This letter is to a person who has achieved a civic distinction of some sort (such as becoming an Eagle Scout or being named to a scholastic honor roll) and contains only the legislator's congratulations for the achievement.

Letter No. 4: This letter is to a member of Congress or to a federal governmental official. It contains only the legislator's favorable recommendation of a candidate for admission to a service academy.

Letter No. 5: This letter is to a nonprofit organization. It contains only the legislator's endorsement of the organization. It is reasonable to assume that the letter may be used in connection with the organization's fundraising efforts.

OPINION

The Board answers this question as follows: Subject to the conditions set forth in this opinion, the Board finds that it would not constitute a violation of the State Ethics Act for a legislative employee to prepare Letter No. 1 and Letter Nos. 3, 4 and 5. The Board finds that

it would constitute a violation of the State Ethics Act for the legislative employee to prepare Letter No. 2.

As a general rule, this Board will interpret the State Ethics Act as not barring a legislative employee from preparing a letter requested by a legislator if the Act does not bar the legislator from using public resources to prepare the letter. Therefore, to answer the question presented here, it is necessary for the Board to first determine the authority of legislators to prepare the letters included in the question.

While this opinion request raises issues under several provisions of the State Ethics Act, the major questions that the request presents deal with the scope of a legislator's authority. Is this authority limited to carrying out legislative functions that fall within a strict reading of the State Constitution's legislative article, Article II, or does it also include the community or public purpose functions that legislators increasingly exercise, but that are not mentioned in the legislative article? With this opinion, we decide that legislators do possess expansive authority to carry out these community or public purpose functions. We reach this conclusion for a number of reasons. First, we believe that the public expects legislators to exercise these functions. Second, we believe that these functions bring citizens in touch with their government and can serve to increase trust in government, especially in the legislative branch. Third, and most important, we believe that these functions have been firmly established by historical custom and practice within the legislative branch. It is not the charge of this Board to reverse these important historical developments in the evolution of the legislative branch.

There are two rules in the State Ethics Act that are applicable to this opinion request. They are as follows:

RCW 42.52.070: "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."

RCW 42.52.160: "(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 public duties. . . ."

Subject to the exceptions for "duties," RCW 42.52.070 prohibits legislators from using their official positions "to secure special privileges" for themselves or others and RCW 42.52.160 prohibits legislators from using public resources "for the private benefit or gain" of themselves or any other persons. Generally, we will interpret the exception for "duties" broadly to encompass a legislator's discretionary and nondiscretionary authority. We now apply these rules

to the five letters in the opinion request.

Letter No. 1

With Letter No. 1, a legislator would use his or her official position and public resources to help secure a state agency's approval of a grant application. We find that preparation and sending of this letter would fall within legislative duty and, therefore, would not be prohibited by these rules.

Legislators customarily write letters supporting grant applications filed with state agencies, particularly on behalf of persons residing within their legislative districts or organizations located within their districts. With regard to such letters, we advise legislators to take care not to violate the above quoted "special privileges" provision of the State Ethics Act.

In *Advisory Opinion 1995 - No. 1*, our first opinion, we interpreted the "special privileges" provision as also largely encompassing the former Code of Legislative Ethics' prohibition against the use of "improper means to influence a state agency, board, or commission." In effect, we held that the legislative duty exception does not apply when "improper means" are used to influence a state agency.

To assist legislators and legislative employees avoid violations of the "improper means" prohibition, we provide the following advice with regard to their official communications with state agencies on behalf of constituents or other parties: Legislators and legislative employees should avoid communications that agency officials or employees might reasonably perceive as threatening. While such perceptions of a threat would not themselves constitute violations of the "improper means" prohibition, they certainly would create an argument that violations have occurred. The following are examples of communications that would carry a high risk for being perceived as threatening: A communication in which the agency official or employee is reminded that the legislator chairs a committee having jurisdiction over the agency's programs. A legislator's persistent communications on behalf of a constituent or other party. A communication stressing that favorable agency action is important to the legislator or that the legislator will be disappointed if a favorable decision is not made. Because of the perception of threat, we advise legislative leaders and committee chairs to exercise special care in their state agency communications on behalf of constituents or other parties.

Letter No. 2

With Letter No. 2, a legislator would use his or her official position and public resources to solicit money to enable legislators to attend an educational conference. We find that this solicitation would not fall within legislative duty and, therefore, would be prohibited by the State Ethics Act's prohibition against legislators using their positions "to secure special privileges" for themselves or others.

With respect to Letter No. 2, we assume that most, if not all, of the persons or

organizations that would be solicited or that would respond favorably to such a solicitation would be engaged in lobbying activities before the Washington Legislature or would be an employer of someone who was so engaged. We do not believe that the public would support a concept of legislative duty that would permit the use of public funds to pay for this kind of letter.

Letter No. 3

With letter No. 3, a legislator would use his or her official position and public resources to congratulate a person who has achieved a civic distinction. We find this letter to be within legislative duty. We believe that sending a congratulatory letter to a person who has achieved a civic distinction will be viewed by the public as an appropriate recognition for achievement, and not as a misuse of public resources. Elected officials have traditionally honored persons who have achieved civic distinctions.

We advise members to exercise caution in sending congratulatory letters at public expense. Mass mailings of such letters would not seem to fall within legislative duty. Nor would sending congratulatory letters to persons whose civic achievements are not extraordinary. Mass mailings of such letters or sending them to persons whose achievements are not extraordinary may very well violate the previously quoted prohibition in RCW 42.52.160 against the use of public resources "for private benefit or gain." We caution members that birthdays and regular graduations are not normally extraordinary achievements.

Letter No. 4.

With Letter No. 4, which is to a member of Congress, the legislator would use his or her official position and public resources to recommend a candidate for admission to a service academy. We find that preparation and sending this letter would be within legislative duty and, therefore, would not be prohibited by the State Ethics Act. Legislators have historically provided letters of recommendation for service academy candidates. The public expects legislators to provide the letters of recommendation and we find no reason why they should not continue to provide them. Such letters are not only a service to the candidates but also assist members of Congress and the service academies to select the most qualified candidates.

Letter No. 5.

With Letter No. 5, a legislator would use his or her official position and public resources to endorse a nonprofit organization. The circumstances of the letter are such that it is "reasonable to assume that" the organization may use the letter for fundraising efforts. We find that preparing and sending this letter is within legislative duty and, therefore, would not be prohibited by the State Ethics Act.

¹ *Such letters also seem suspect under the prohibition in RCW 42.52.180 against the use of public resources for campaign purposes. .*

We assume here that the nonprofit organization is carrying out some public good with which the legislator agrees. Perhaps, the organization is involved in providing housing for low income persons or a home for abused children. Legislators frequently are called on to endorse such organizations and the public expects them to do so.

We are concerned, however, that a legislator's authority to promote nonprofit organizations not be abused. It is one thing to prepare and send, at public expense, a single letter along the lines of Letter No. 5 and another thing to prepare and send, at public expense, a mass mailing along the lines of Letter No. 5. Also, we do not believe it is appropriate for legislators to engage in direct fundraising at public expense. We advise legislators to limit their endorsements to single letters and not include direct fundraising appeals in them.² Also, we advise legislators that the authority to promote nonprofit organizations should not be used to promote political organizations or for any campaign purpose.

CONCLUSION

With this opinion, the Board recognizes the evolution of the office of state legislator. Legislative duties today are truly expansive. Citizens expect their legislators to be ombudsmen and community leaders, as well as legislators in the strict sense. The four letters that we approve in this opinion are evidence of this expansion. However, that there are limits to a legislator's authority is demonstrated by our decision holding that the solicitation letter, Letter No. 2, would violate the State Ethics Act. Because the major issues involved in this opinion have not previously been addressed by this Board and because, without Board clarification, the provisions of the Act are unclear with respect to the letters, our advice in this opinion on Letter No. 2 and on other communications to be avoided is prospective only.

² *This advice does not apply to workplace solicitations such as are involved in the state's United Fund drive or in fundraising efforts to provide assistance to legislative employees or their family members who are in need.*