

COMPLAINT 2001 - NO. 1

Personal Use of State Resources

ORDER OF DISMISSAL

September 13, 2001

I. NATURE OF THE COMPLAINT

Complaint 2001 - No. 1, alleges that Amber Oien, Legislative Assistant to Representative John Pennington, violated the State Ethics Act (Act) by using a legislative computer to send a personal e-mail, which discussed a constituent case being investigated by the office of the Representative, to a significant number of family and friends.

II. JURISDICTION

The Complaint accuses a legislative employee of improper use of state resources. RCW 42.52.320 directs the Board to enforce the Act and rules adopted under it with respect to members and employees of the legislature.

RCW 42.52.160 generally prohibits personal use of state resources. The Board finds that it has both personal and subject-matter jurisdiction.

III. PROCEDURAL HISTORY

The complaint was received on April 18, and a preliminary, oral investigative report was presented at the regularly scheduled Board meeting on May 10. The Board reviewed a preliminary written report at the June 14 meeting and ordered further fact-finding. No meeting was held in July. On August 9, the Board reviewed the updated investigative report and engaged in extensive discussions on the issue of personal use of legislative computers. The Board directed this Order be drafted for consideration at the September meeting.

IV. DETERMINATION OF ALLEGATIONS OF FACT

1. On March 22, 2001, a weekly Montesano newspaper published an article on a failed local business owned by Marcus Searls. Mr. Searl's spouse, Audra Oien-Searls, is the sister of the respondent in this case, Amber Oien. On the same day, a copy of this article was sent via electronic mail (e-mail) to Amber Oien at her legislative office. The article discussed, among other things, certain debts which might be owed by Marcus Searls.

2. On March 23, Audra Oien-Searls contacted the office of Representative Pennington and after one or more discussions between the Representative, Amber Oien, and Audra, the Representative authorized Amber Oien to use the facilities of his office on behalf of Audra. The nature of this assistance was to gather public information which might shed light on the extent of Mr. Searls legal difficulties. In addition, at least one legislative staff member would be contacted with a general question about a spouse's liability for debts incurred by the other spouse prior to marriage. Contemporaneously, Audra Oien-Searls sought independent legal advice on a dissolution of her marriage.

3. Subsequent to Representative Pennington's approval to assist Audra, but prior to any efforts to obtain the information sought by her, Amber Oien forwarded the newspaper article, together with a message she had drafted, to a list of family and friends. This transmission took place at 12:43 p.m., March 23. Eighteen e-mail addresses were recorded as recipients of this transmission. The message from Amber urged support and prayers for her sister and advised the recipients that Amber had legislative, legal and research staff working on behalf of Audra. In addition, the e-mail advised that Audra would be filing for a dissolution and generally took issue with the veracity and character of Marcus Searls.

4. Efforts to obtain the information sought by Audra Oien-Searls took place from March 23 until April 2. On April 2, having obtained a copy of Amber Oien's March 23, e-mail, Marcus Searls contacted Board counsel, accusing Amber Oien of using her legislative office to cause his divorce and to spread lies about him. Searls demanded an apology. Upon learning of this, on April 2, Representative Pennington directed Amber Oien to cease further work on the Oien-Searls file and transfer the file to another legislative office. Letters to that effect were sent to Audra Oien-Searls and Marcus Searls. Marcus Searls then filed this complaint against Amber Oien

V. ISSUE AND CONCLUSION

We begin with an observation: This Board is charged with enforcing the Act and not deciding if someone is or is not being truthful in a marital dispute. To the extent that Mr. Searls may seek our opinion on whether Amber Oien is adversely affecting his marriage he will be disappointed. The personal use of state equipment is the issue before the Board.

The complaint presents an issue without Board precedent.

1. *Issue* - Does a personal use- exception from the prohibition on the use of state resources constitute a defense against an allegation that a legislative employee used those resources to discuss legislative business with family and friends?

2. *Ruling* - No. The Act, and Legislative Ethics Board Rule Number 3, prohibit personal use of state resources when such use interferes with the performance of official duties. We find that personal use of the type found in this case improperly interferes with the performance of official

duties, even if the use is one-time, de minimis, and performed on an employee's lunch break; our ruling is prospective in nature, given the lack of prior guidance in this area.

VI. ANALYSIS

RCW 42.52.160 generally prohibits state officers or state employees from employing or using any person, money, or property under his or her official control or direction. There are two exceptions:

(1) . . .

(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 official duties.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

In accordance with (3), this Board adopted **Legislative Ethics Board Rule Number 3 (Rule 3): Private Use of State Resources** (Pages 80-85, Legislative Ethics Manual, 2001 Edition). In the introduction we identify the general parameters associated with permissible private uses of state resources.

(1) Introduction.

. . . .Where use is incidental, infrequent, involves de minimis or no cost to the state, does not interfere with performance of official duties, and is reasonable in light of legitimate needs and expectations of the public work force, neither the public trust nor government efficiency suffers to any significant degree.

Sub (3) of Rule 3 defines "de minimis." We note that in assessing whether or not a personal use is acceptable, the question of whether that use is "de minimis" is but one of the factors to be considered and it is tied solely to the question of cost. **Rule 3(3)(b)(i)** states:

(i) The cost to the state is de minimis if the actual expenditure of state funds is so small as to be insignificant or negligible.

No personal use of state resources can be permitted unless that use results in insignificant or negligible cost to the state (de minimis) and in addition does not interfere with official duties. That is clear from the unambiguous language of RCW 42.52.160(3), and Rule 3. The Board feels this is an important point lest any one be misled into thinking that if a personal use is "de minimis," it is appropriate under the Act and the inquiry is complete.

Rule 3 also recognizes special rules for: campaign-related activity (never permitted under a private use analysis); use of equipment removed from the legislative office; use of consumables; and use of state computers. On the issue of computers, the rule states:

(4) Special qualifications and limits.

(a) . . .

(b) . . .

(c) . . .

(d) A legislator or legislative employee may not make private use of state computers or other equipment to access a computer network or other database for personal use unless there is no cost to the state and the use does not interfere with the performance of the legislator's or the employee's official duties. Legislative electronic mail and internet uses which do not incur charges are examples of uses which meet the no-cost test.

The phrase "does not interfere with the performance of the legislator's or the employee's official duties" could be viewed as meaning that notwithstanding the personal use there is still "time" to complete the official duties. That is too narrow a definition. Rather, given the fact that we begin with a statute which prohibits personal use of state resources, and then permits this Board to define narrow exceptions, those exceptions must not be allowed to undermine the general philosophy behind the prohibition. That philosophy was expressed in the report of the **Commission on Ethics in Government and Campaign Practices** (January 6, 1994, page 12).

Public resources are entrusted to public officers and employees to further the public interest. Appropriation of public facilities, equipment, services, and personnel for personal benefit can undermine this trust and impede the proper performance of government's work. At the same time, legitimate need exists for limited exceptions to this rule. Where use is occasional, of de minimis cost and value, does not interfere with performance of official duties, and is reasonable in light of legitimate needs and expectations of the public work force, neither the public trust nor government efficiency suffers to any significant degree. For example, it is appropriate to recognize that a public employee may need to make occasional and brief use of a work phone for a personal local call.

Rule 3 quotes this paragraph verbatim. It is clear to this Board that the personal use exceptions are not intended to provide a rationale or "escape hatch" for those actions which interfere with official duties, such as performing constituent work.

The decision to dismiss this case is not reached without a great deal of discussion. Ms. Oien benefits from the fact that the Board has never ruled on the particular legal point raised here but we are concerned about the course of events in this case. There are no facts which suggest that

she consulted with the Representative about the propriety of sending this e-mail. It is apparent that Amber Oien viewed the e-mail as personal, given the time of day it was sent and the tone and tenor of the content. Our investigation does not indicate that the Representative instructed Amber about how to proceed with her efforts other than to treat the case as she would any other constituent case. Under the circumstances of dealing with a family member, more direction and oversight would have been preferable. We hope the Representative will review this matter with Amber and reach a clear understanding about the proper use of state resources.

This case illustrates how difficult it may be to remain objective about the proper use of state resources when such a strong emotional connection to the case at hand is present. It is clear that Amber Oien was very emotionally involved in the assignment approved by the Representative and, that as a result, objectivity and common sense suffered.

In drafting **Rule 3**, the Board foresaw the difficulty in providing examples for every type of situation involving personal use of state resources so, in addition to the numerous examples given there, the Board posed questions for staff to ask themselves before engaging in such use.

(5) Guidelines and hypothetical examples.

(a) Questions to ask yourself:

(i) Will my personal use of public resources result in added costs or any other disadvantage to the legislature? Am I using this resource in order to avoid personal expense?

(ii) Are my supervisors aware of my personal use of public resources? Do I feel a reluctance to discuss this subject with my supervisor or my fellow employees?

(iii) Am I confident that my use of legislative equipment will not compromise the security or integrity of legislative information, software, or the legislative information network?

(iv) Are public resources being used for purposes that could be embarrassing to the legislature by creating an appearance of impropriety?

If this e-mail, as well as the decision to perform the services for Oien-Searls in the Pennington office, had been subjected to this type of analysis before-the-fact, there would probably have been no actions upon which to base this complaint.

The Board has, from time to time, added hypothetical examples to **Rule 3** and we are directing counsel to prepare another example, in accordance with this opinion, for inclusion in the next edition of the manual.

VII. ORDER

Based upon a review of the complaint and the Board's investigation, and a finding of no prior guidance on this issue;

IT IS ORDERED, that the complaint be dismissed.

IT IS FURTHER ORDERED, that Board Rule 3 be amended by adding an example, consistent with this opinion, to clarify that in the future a personal use of state resources as identified in this case will violate the State Ethics Act.

James A. Andersen, Chair