

IN RE DOUMIT
Complaint 2003 - No. 4
August 21, 2003

JURISDICTION DETERMINATION - ORDER OF DISMISSAL

I. Nature of the Complaint

The complaint alleges the following conduct violated the Ethics in Public Service Act (Act).

1. Milt Doumit, as Secretary of the Senate, failed to enforce senate policy and Legislative Ethics Board (Board) Rule 3 by failing to discipline senate employee e-mail use.
2. Milt Doumit failed to comply with requests for copies of these e-mails.
3. Milt Doumit retaliated against the staff person who brought these e-mails forward.

II. Procedural History

Complaint 2003 - No. 4 was received by the Board on April 12, 2003, and considered on June 26, and July 17.

III. Issue

Do any of the allegations present issues subject to the jurisdiction of the Board?

IV. Answer

No. We conclude the following:

1. Internal senate policies are administered by the Secretary of the Senate, not the Board. The Board determines whether the Ethics Act has been violated and whether sanctions will be ordered.
2. The Superior Court is the proper forum for appealing senate decisions denying or restricting access to records requested by an individual under the Public Records Act.
3. The "retaliation" alleged here is a workplace issue, not an Ethics Act issue.

V. Jurisdiction

The Board's jurisdiction is limited by **RCW 42.52.320(1)**.

The legislative ethics board shall enforce this chapter and rules adopted under it with respect to members and employees of the legislature.

VI. Analysis

Allegation #1

The complainant requests the Board review (1) the judgment of the Secretary of the Senate that certain employee e-mails were permissible under the Senate's personal use policy and (2) the Secretary's failure to discipline the employees for alleged violations of the Ethics Act.

(1) The *Senate Policy & Personnel Reference Manual*, 2003 Edition (Manual), contains sections covering senate organization, personnel policies, operating policies, support services, resources, and a compilation of forms required to be filed or submitted for activities such as leave requests, tuition reimbursement, election year activity approval, et cetera.

The Senate's policies on internet and electronic mail use reads as follows (in pertinent part).

Use of this service is limited to the conduct of official Senate business, or the duties of a Senator in representing constituents. Personal use of the Internet is allowed only in cases where: 1) it is incidental, infrequent, involves little or no actual cost to the state; 2) it does not interfere with performance of official duties, and 3) there is a public benefit such as increasing employee morale or improving work-related job skills.

Each user is individually responsible for the content of any communication sent via the Internet. Personal use is also subject to the restrictions imposed on all workplace communications by Senate employees, personal and professional. These long-standing restrictions include adherence to respectful workplace policies regarding sexual harassment, no personal gain from state resources, no electoral campaign uses, no viewing of pornography, and avoiding sustained usage that creates productivity problems. Monitoring of employees is only initiated following evidence of transgressions in these areas. Crossing these lines will initiate the disciplinary process described in this manual under "Disciplinary Actions and Terminations."

As a member or an employee of the Senate, you should be aware that documents created on your PC, correspondence you sent or receive via e-mail and records of sites you visit on the Internet may become public information. While such information is generally not disclosable, there are ways it may lose its privacy or confidentiality. The Senate has the ability to track Internet sites visited by PC's that are connected to our network to ensure

compliance with this policy.

Internet messages, generally have no guarantee of confidentiality, but electronic mail within our network is in most cases secure between sender and receiver. However, e-mail can be mistakenly addressed or forwarded to others for whom it was not intended. Even though you have deleted an e-mail on your screen, there is no guarantee that it has been removed from the system - the same goes for documents created in word processing and other programs available for your use.

Any time you post a comment on a USENET news server, you leave your Internet address behind. Anyone using an Internet search site has the ability to search for the address, determine who has left postings, and read, print, copy, or forward their contents. Postings of a non-legislative nature violate the Senate Internet policy.

Inquiries regarding the particular use of an Internet service, including whether or not such use constitutes "official Senate business" or "permitted personal use" shall be directed to the Secretary of the Senate or Office of Senate Counsel (Manual, page 36).

RCW 42.52.160(3) authorizes the Board to adopt rules allowing a legislator or legislative employee to make some limited personal use of public resources.

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

Pursuant to this authority, the Board adopted **Board Rule 3: Private Use of State Resources**, Pages 80-85, *Legislative Ethics Manual*, 2003 Edition. This rule defines the scope of the personal use exemptions, provides guidelines and hypothetical questions for potential users of public resources, and offers a number of examples for guidance.

Rule 3 permits the personal use of public resources on an infrequent and incidental basis if there is no actual cost to the state or the cost is de minimis, if there is a public benefit, and if the use does not interfere with the performance of official duties.

Rule 3(3)(b)(i) and (ii)

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

A public benefit under this rule may be direct or indirect, such as improving employee morale or activities that improve the work-related job skills of a legislator or employee.

Rule 3 provides further direction on the use of computers.

Rule 3(4)(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.

Rule 3 also recognizes the relationship between the Board's duty to enforce the Act and the ability of the House and Senate to enact policies on use of state resources.

Rule 3(2)

This rule provides guidance on the proper use of state resources. It is not intended to cover every situation that could arise regarding such resources. Further clarifications may be sought from the board.

The Senate and House of Representatives are encouraged to adopt policies applying these principles to their unique circumstances. Nothing in this rule is intended to limit the ability of the Senate and the House of Representatives to adopt policies that are more restrictive. However, violation of a more restrictive Senate or House of Representatives policy will not constitute a violation of RCW 42.52.160, but will constitute a violation of Senate or House of Representatives policy.

The Senate, as previously noted, has adopted a policy on the use of the internet and the use of e-mail. Whether this policy is exactly the same as Board Rule 3 is not the issue raised in the first part of Allegation #1, that the Secretary erred in finding the Senate policy was not violated by these e-mails. Rather, the issue is whether this Board should revisit the Secretary's decision on how he interprets and enforces the Senate's personal use policy. Among other responsibilities, the Secretary of the Senate is responsible for the discipline of senate employees, subject to appeal to the Senate Facilities and Operations Committee, an administrative oversight committee of leaders from both major political parties (*Manual*, pages 6 and 7). The Board is not empowered to administer or enforce the internal senate policy on the scope of personal use of the internet or electronic mail. Neither is the Board the authority to which the Secretary answers when making discretionary decisions relative to disciplinary decisions based on senate policy.

(2) Similarly, there is nothing in the Act which confers upon the Secretary the jurisdiction to adjudicate the scope of the Act. That authority and responsibility has been vested in the Board by the Legislature (*RCW 42.52.320*, previously cited) as has the authority to impose sanctions for violation of the Act (*.320(e)*).

The Board need not examine the contents or circumstances surrounding these particular e-mails in order to respond to this allegation against the respondent. Whether or not an employee has violated the Ethics act through personal use of public resources is a question best addressed through the investigation and analysis of a complaint against the employee, not the Secretary. The Board is aware that such complaints are pending.

Allegation #2

The Public Records Act provides for an appeal process for a requester of records who feels aggrieved by an agency's response to a request to inspect or copy a record. That appeal is to be lodged with the appropriate superior court, not the Ethics Board. In addition, the Legislature has specifically provided that appeals of the decisions of the Secretary of the Senate and the Chief Clerk of the House of Representatives are governed by the superior court procedures.

RCW 42.17.340 - Judicial review of agency actions. (1) Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

RCW 42.17.341 - Application of RCW 42.17.340. The procedures in RCW 42.17.340 govern denials of an opportunity to inspect or copy a public record by the office of the secretary of the senate or the office of the chief clerk of the house of representatives.

If the Board were to entertain appeals from individuals who were denied inspection or copying of records, in the form of complaints to the Board, the Board would be placing itself in the position of the arbiter of disputes involving the state's public records law. That role would be inconsistent with the jurisdiction afforded the courts on public records issues. (See also, **Complaints 2003 - No's 2 and 3**).

Allegation #3

The complainant alleges that Milt Doumit, as Secretary of the Senate, used his disciplinary authority to retaliate against a senate employee.

We have previously concluded that this retaliation claim is a workplace issue, not subject to the jurisdiction of the Board under the facts surrounding the alleged improper e-mails (see **Complaints 2003 - No's 2 and 3**).

VII. Order

The Complaint is dismissed for lack of jurisdiction.

James A. Andersen, Chair