

COMPLAINT 2010 – NO. 1

In Re McCune

DETERMINATION OF NO REASONABLE CAUSE – ORDER OF DISMISSAL

March, 2010

I. Nature of the Complaint

The complaint alleges that Representative Jim McCune (Respondent) violated RCW 42.52.180 (use of public resources for campaigns) and RCW 42.52. 185 (restrictions on mailings) when he used public resources to send a legislative update via e-mail to Complainant and other constituents expressing his point of view on a bill under consideration by the Legislature. The e-mail also urged recipients to attend a hearing on the bill, presumably to support the Respondent's position on the legislation. This is the first complaint filed with the Board which presents issues under RCW 42.52.185(c), a 2008 legislative enactment which allows unlimited numbers of electronic newsletters, subject to a cutoff date, during an election year. The Board has both personal and subject-matter jurisdiction.

II. Conclusion

Based upon a review of the complaint and the Board's investigation, the Board concludes there is no reasonable cause to believe that Respondent's use of public resources to express his opinion on the bill and the transmission of that opinion to Complainant through the use of legislative e-mail constituted a violation of the Ethics Act.

III. Determinations of Fact

Respondent utilizes a legislative list-serve system to send electronic messages on legislative issues to his constituents. These constituents may have contacted him on a particular issue or they may have elected to subscribe to more general periodic updates on legislative issues. These electronic messages provide constituents the opportunity to choose to continue receiving Respondent's communications or to discontinue this service. These options are

provided at the end of each message and may be exercised by constituents who “click” on the option of their choice.

On or about February 13, of this year Respondent sent his constituents an update entitled “TAX INCREASE ALERT – Help Stop Senate Bill 6130.” The update explained Respondent’s reasons for opposing the bill and urged constituents to attend a public hearing on the measure. In addition, this communication invited constituents to contact the Respondent if they had any questions and offered to help constituents become involved in the legislative process. The update contained the opt-out or subscribe mechanism described above.

Complainant continued to receive electronic updates subsequent to the filing of this complaint, having chosen not to discontinue the communications.

IV. Determinations of Law

1. Although RCW 42.52.180 prohibits the use of the facilities of an agency (public resources) to assist a campaign for election of a person to an office the prohibition does not apply to “(c) Activities that are part of the normal and regular conduct of the office or agency.”
2. Several prior opinions of this Board (citations omitted) have firmly established that it is normal and regular conduct, and therefore legal conduct, for legislators to use public resources to express their positions on legislative issues. Under the facts of this case, the expression of his opinion and the invitation or request to others to participate in a public hearing in support of that opinion constituted normal and regular conduct of the Respondent’s legislative office.
3. RCW 42.52.185 restricts mailings by legislators, defines electronic mail as mail subject to those restrictions and, among other things, limits electronic legislative updates during an election year to constituents who have requested receipt of the updates. The facts of this case clearly show that Complainant chooses to receive Respondent’s periodic updates on legislative issues. She cannot now claim that Respondent has violated the mailing statute by continuing to include her on his mailing list. RCW 42.52.185 does not require Respondent to establish a mailing list in the first instance or keep a particular constituent on a list.
4. All materials published and/or distributed for public consumption with the use of public resources are subject to the requirements of timeliness, proximity to election, relevance, source of initial statement (if the materials are responsive in nature) and tone and tenor. See, for example, Advisory Opinion 1996 – 11. In the present case the Legislature has determined that this electronic mail to constituents is permitted so the source of initial statement is not an issue, and the mail is permitted for a time certain

during an election year so proximity to election is not an issue. The information was timely and relevant. The tone and tenor of the update was permissible. This requirement is directed at debate which is respectful and does not impugn the character of a legislative colleague or other elected official.

V. Summary and Order

In the context of a present and ongoing debate on a bill before the Legislature, Respondent's use of public resources was not a campaign use. In addition, insofar as RCW 42.52.185 was cited as a statute which was violated by Respondent, we conclude that the only relevance .185 has to this case is whether Complainant may claim Respondent has improperly placed her or kept her on his mailing list. No such claim has been made nor does the record support such a claim.

IT IS HEREBY ORDERED that the complaint is dismissed.

David R. Draper, Chair

Date: