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ADVISORY OPINION 2022 – No. 1 Interviewing Staff about Collective Bargaining October 2022

The Board has received an advisory opinion request from Bernard Dean, Chief Clerk of the House and Sarah Bannister, Secretary of the Senate, both of whom have waived confidentiality.

I. BACKGROUND

During the 2022 legislative session, the legislature passed ESHB 2124. This bill provides legislative employees with the right to collectively bargain. The bill also creates the Office of State Legislative Labor Relations (Office). The duties of the Office include but are not limited to, conducting negotiations on behalf of the employer. The director of the Office (Director) is also required to contract with an external consultant to gather input from legislative employees, taking into consideration the ethics statute governing conflict with official duties and rules of the House and Senate. The Director must, at a minimum, collect this input using surveys.

Furthermore, the bill provides that the Director, after consulting with the Chief Clerk of the House, the Secretary of the Senate and the administrative heads of the Legislative Agencies, must examine issues related to collective bargaining for legislative employees and, after consultation with the external consultant, develop best practices and options for the legislature to consider in implementing and administering collective bargaining for legislative employees.

By December 1, 2022, the Director must submit a preliminary report to the appropriate legislative committees on the progress of the Director's considerations. A final report is due no later than October 1, 2023.¹

II. QUESTIONS

A. Situation 1

¹ The final report must address the following items: (i) Which employees of the house of representatives, the senate, and legislative agencies for whom collective bargaining may be appropriate; (ii) Mandatory, permissive, and prohibited subjects of bargaining; (iii) Who would negotiate on behalf of the house of representatives, the senate, and legislative agencies, and which entity or entities would be considered the employer for purposes of bargaining; (iv) Definitions for relevant terms; (v) Common public employee collective bargaining agreement frameworks related to grievance procedures and processes for disciplinary actions; (vi) Procedures related to the commission certifying exclusive bargaining representatives, determining bargaining units, adjudicating unfair labor practices, determining representation questions, and coalition bargaining; (vii) The efficiency and feasibility of coalition bargaining; (viii) Procedures for approving negotiated collective bargaining agreements; (ix) Procedures for submitting requests for funding to the appropriate legislative committees if appropriations are necessary to implement provisions of the collective bargaining agreements; and (x) Approaches taken by other state legislatures that have authorized collective bargaining for legislative employees.

1. Would staff responses to survey questions be considered lobbying if the questions cover their opinions about the following collective bargaining topics:

- The establishment of a union;
- The configuration of potential bargaining units;
- The bargaining topics;
- Exemption from bargaining; and
- The future structure of collective bargaining in the legislative branch.

2. Could staff proactively engage the Office on their own initiative or otherwise engage in activities not initiated by the Office?

3. Is the Office at risk of violating the Act in submitting the “considerations” and “options” required by ESHB 2124? Are these risks sufficiently mitigated if the Office submits options and considerations, as opposed to “recommendations”?

B. Situation 2

A bill is working its way through the legislative process. It appears that the bill is going to pass (or not pass). A segment of staff decide collectively that they are not satisfied with the process or outcome and take certain actions.

1. Is it considered lobbying if the staff do the following:

- a) Post their dissatisfaction with the bill on their private social media pages?
- b) Engage in picketing on the steps of the Legislative Building on their lunch break and after work hours expressing their opinion on the bill?
- c) Take personal leave and testify at committee hearings regarding their opinions of the bill?

III. ANALYSIS

A. *Lobbying*

The Act does not contain a definition of “lobbying” and the Board has not been previously asked whether certz staff conduct constitutes lobbying. The definition of lobbying has been contained in the statutes governing the Public Disclosure Commission since it first appeared in Initiative 276, approved by the voters in 1972. The Initiative defined “lobbying” as follows:

"Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the State of Washington, or the adoption or rejection of any rule, standard, rate or other legislative enactment of any state agency under the state Administrative Procedure Acts, chap. 34.04 R.C.W. and chap. 28 B.19 R.C.W.

Under RCW 42.17A.005(34), the current definition of lobbying is as follows:

"Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, or the adoption or rejection of any rule, standard, rate, or other legislative enactment of any state agency under the state administrative procedure act, chapter 34.05 RCW. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization.

The Board has previously held that the definition of lobbying contained in RCW 42.17A.005(34) is the proper definition to use when determining whether actions under the Ethics Act are considered lobbying. *In re House and Senate Staff*, 2022 – No. 11.

Washington has a very broad definition of “lobbying” – one that is largely unchanged from the definition contained in the Initiative. By contrast, Oregon’s definition is narrower: “Lobbying means influencing or attempting to influence legislative action through oral or written communication with legislative officials . . . “ ORS § 171.725. Similarly, Utah defines lobbying as “communicating with a public official for the purpose of influencing the passage, defeat, amendment, or postponement of legislative or executive action.” UTAH CODE § 36-11-102.

The term “influence,” which is key to Washington’s definition of lobbying, is not defined in the Act. As the Board has previously held, when a term is not defined in statute, the ordinary meaning of the term shall apply. *See Advisory Opinion 2020 – No. 1*. Influence is defined as “the power or capacity of causing an effect in indirect or intangible ways or the act or power of producing an effect without apparent exertion of force or direct exercise of command.” MERRIAM-WEBSTER.COM.

Also of some persuasive value in this matter is RCW 42.17A.635. Subsection (d) provides in pertinent part as follows:

For purposes of this subsection, "lobbying" does not include:

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- (ii) Recommendations or reports to the legislature in response to a legislative request expressly requesting or directing a specific study, recommendation, or report by an agency on a particular subject;*
 - (iii) Official reports including recommendations submitted to the legislature on an annual or biennial basis by a state agency as required by law;*
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Although this statutory provision applies to state agency employees, the Board believes the logic underlying the provision also applies to legislative staff when they are directed by legislation to report to the legislature on particular topics.

B. Situation 1

It is the Board’s opinion that staff responses to survey questions covering various collective bargaining topics would not be considered lobbying for several reasons. First, the answers to the survey questions are not provided to influence the passage or defeat of legislation but are being collected to inform the legislature about possible avenues to explore in instituting collective bargaining in the

legislative branch. Furthermore, RCW 42.17A.635(4)(d) makes it clear that if state agency personnel are providing information or opinions to the legislature in response to legislative direction to do so, those responses do not constitute lobbying. Here, too, the legislature is directing the Office to survey legislative staff. Their responses to the survey questions are being provided at the direction of the legislature. It is not lobbying if state agency staff does it; it is also not lobbying if legislative staff does it.

ESHB 2124 also directs the Director to contract with an outside entity to conduct the survey. Presumably, this provision was inserted to ensure the anonymity and confidentiality of the staff responses to the survey. The Board does not believe that the anonymous responses from staff are designed to influence the passage or defeat of legislation and, as such, would not constitute lobbying.

ESHB 2124 requires the Director to issue two reports to the appropriate committees of the legislature. The second report requires the Director to include specific “considerations” on particular collective bargaining topics. The concern raised in the request for this Advisory Opinion is whether RCW 42.52.020 would be violated if the Director makes “recommendations” rather than “considerations” in the second report to the legislature. The Board does not believe it matters whether the report uses the term “recommendations,” “options” or “considerations.” If the report issued by the Office is in response to the legislative direction contained in ESHB 2124, there is no violation of .020.

C. Situation 2

There is a myriad of ways that people use to influence the passage or defeat of legislation. Many people testify as to their support or opposition to legislation during committee hearings on bills. Others write letters to legislators voicing their support or opposition. Some use social media to voice their opinions on legislation. Still others attend rallies – some of which are held on the capitol campus and attended by legislators. All are methods used by various persons, groups, and lobbyists to influence the passage or defeat of legislation.

RCW 42.52.020 provides as follows: “No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer’s or state employee’s official duties.” Employees are prohibited from lobbying; to do so would conflict with their official duties. *See* HOUSE RULE 7 & SENATE RULE 6

Every legislative staff person has a job description whether they are employed by the House, Senate or a legislative agency. In none of these job descriptions is lobbying listed as an official duty of a legislative employee. Furthermore, both House and Senate Rules prohibit lobbying by legislative staff. The proper discharge of a legislative employee’s official duty does not include attempting to influence the passage or defeat of a piece of legislation or lobbying.

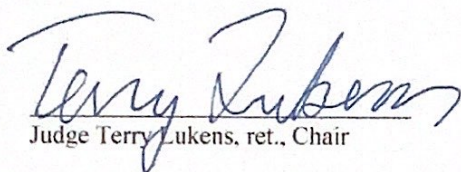
Whether staff post their opinions about legislation on their personal social media; take personal time to testify on a bill in committee or attend a rally held on the campus during their lunch hour, it is all considered lobbying because they are, by their actions, attempting to influence the passage or defeat of legislation. Such actions would constitute a violation of .020 because those actions conflict with their official duties as legislative staff.

IV. CONCLUSION

It is not considered lobbying for staff to respond to an anonymous survey about their views on collective bargaining because their responses are not designed to influence the passage or defeat of legislation. Furthermore, it is not a violation of RCW 42.52.020 for the Director to provide recommendations in the Office's reports to the legislature that are in response to direction from the legislature.

Actions taken by staff in an attempt to influence the passage or defeat of legislation are considered lobbying and are potentially violative of RCW 42.52.020.

ON BEHALF OF THE LEGISLATIVE ETHICS BOARD, this opinion is signed on the 24 day of October, 2022.


Judge Terry Lukens, ret., Chair