

IN RE SUTHERLAND
COMPLAINT 1995 - NO. 2

REASONABLE CAUSE DETERMINATION - ORDER OF DISMISSAL

I. Nature of the Complaint

The complainant alleges that Senator Dean Sutherland violated numerous provisions of the State Ethics Act. The charges are based on the following stated or implied fact allegations: that Senator Sutherland has entered into a personal services contract with Clark Public Utilities for specified non-legislative services; that the Senator has engaged in various legislative activities to promote legislation favored by Clark Public Utilities, including serving as chair of the Senate committee which reported out a bill lobbied by Clark Public Utilities; that the circumstances surrounding the Senator's contract with Clark Public Utilities show, or appear to show, that the parties' true purpose for the contract was not to provide the non-legislative services specified under the contract, but instead for the Senator to assist in carrying out Clark Public Utilities' legislative agenda, that is to perform legislative services for Clark Public Utilities; and that compensation paid by Clark Public Utilities to the Senator under the contract was in reality compensation or a reward for the Senator's legislative services.

The complainant alleges that the above fact allegations show that Senator Sutherland has violated the following provisions of the State Ethics Act: RCW 42.52.010; RCW 42.52.020; RCW 42.52.030; RCW 42.52.040; RCW 42.52.110; RCW 42.52.120; RCW 42.52.140; RCW 42.52.150; RCW 42.52.210; and RCW 42.52.900.

II. Procedural history

Complaint 1995 - No. 2 was received on March 30, 1995. The Board considered the matter on April 6, May 18, and June 8, 1995. An investigation was conducted pursuant to RCW 42.52.420.

III. Determinations of Allegations of Fact

Based on its investigation of the complaint, the Board has made the following determinations:

(1) There is reasonable cause to believe that the Senator has entered into the alleged contract with Clark Public Utilities.

(2) There is reasonable cause to believe the Senator has engaged in legislative activities favored by Clark Public Utilities.

(3) There is not reasonable cause to believe that the parties' true purpose for the contract was for the Senator to perform legislative services for Clark Public Utilities and to receive compensation for doing so. The Board's investigation shows that the Senator performed non-legislative services under the contract and was compensated for doing so. The complainant has not provided, and the Board's investigation has not revealed, sufficient evidence to give the Board reasonable cause to believe that the Senator received any compensation or any thing of value from the utility for the performance of any legislative service.

IV. Determinations of Allegations of Ethics Law Violations

(1) *RCW 42.52.010* is a definitional section which does not contain operative provisions. Therefore, it is not possible that anyone can violate this section.

(2) *RCW 42.52.020* provides that:

No state officer . . . 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 . . . duties.

We do not have reasonable cause to believe that this section has been violated. See **Advisory Opinion 1995 - No. 4**.

3. *RCW 42.52.030* provides that:

(1) No state officer or state employee may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or under the supervision of the officer or employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase, or grant.

(2) No state officer or state employee may participate in a transaction involving the state in his or her official capacity with a person of which the officer or employee is an officer, agent, employee, or member, or in which the officer or employee owns a beneficial interest.

We do not have reasonable cause to believe that this section has been violated. Subsection (1) would apply only if the Senator, in his official capacity, had made or

supervised the contract. A contrary interpretation would conflict with RCW 42.52.330. Subsection (2) would not be violated because, by its terms, for there to be a violation there would have to be a "transaction involving the state." RCW 42.52.010(19)(b) expressly excludes legislative activities from the definition of "transaction involving the state."

4. *RCW 42.52.040* prohibits a public officer or employee, under certain circumstances, from assisting another person in a "transaction involving the state."

We do not have reasonable cause to believe that this section has been violated. As we have previously noted, RCW 42.52.010(19)(b) expressly excludes legislative activities from the definition of "transaction involving the state."

5. *RCW 42.52.110* provides that:

No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the state of Washington for performing or omitting or deferring the performance of any official duty, unless otherwise authorized by law.

Because of our determinations of the allegations of fact, we do not have reasonable cause to believe that this section has been violated. See determination of fact No. 3.

6. *RCW 42.52.120* provides that:

(1) No state officer or state employee may receive any thing of economic value under any contract or grant outside of his or her official duties. The prohibition in this subsection does not apply where each of the following conditions are met:

(a) The contract or grant is bona fide and actually performed;

(b) The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;

(c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;

(d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW

42.52.150(4) from receiving a gift;

(e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity or by his or her agency;

(f) The contract or grant would not require unauthorized disclosure of confidential information.

(2) In addition to satisfying the requirements of subsection (1) of this section, a state officer or state employee may have a beneficial interest in a grant or contract with a state agency only if:

(a) The contract or grant is awarded or issued as a result of an open and competitive bidding process in which more than one bid or grant application was received; or

(b) The contract or grant is awarded or issued as a result of an open and competitive bidding or selection process in which the officer's or employee's bid or proposal was the only bid or proposal received and the officer or employee has been advised by the appropriate ethics board, before execution of the contract or grant, that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties; or

(c) The process for awarding the contract or issuing the grant is not open and competitive, but the officer or employee has been advised by the appropriate ethics board that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.

(3) A state officer or state employee awarded a contract or issued a grant in compliance with subsection (2) of this section shall file the contract or grant with the appropriate ethics board within thirty days after the date of execution.

(4) This section does not prevent a state officer or state employee from receiving compensation contributed from the treasury of the United States, another state, county, or municipality if the compensation is received pursuant to arrangements entered into between such state, county, municipality, or the United States and the officer's or employee's agency. This section does not prohibit a state officer or state employee from serving or performing any duties under an employment contract with a governmental entity.

(5) As used in this section, "officer" and "employee" do not include officers and employees who, in accordance with the terms of their employment or appointment, are serving without compensation from the state of Washington or are receiving from the state only reimbursement of expenses incurred or a

predetermined allowance for such expenses.

Because of determination of fact No. 3, we do not have reasonable cause to believe that subsection (1) of this section has been violated. Subsections (2) and (3) deal only with a public officer's or employee's contract or grant with a state agency. Clark Public Utilities is not a state agency. Subsections (4) and (5) are not relevant.

7. *RCW 42.52.140* provides that:

No state officer or state employee may receive, accept, take, seek, or solicit, directly or indirectly, any thing of economic value as a gift, gratuity, or favor from a person if it could be reasonably expected that the gift, gratuity, or favor would influence the vote, action, or judgment of the officer or employee, or be considered as part of a reward for action or inaction.

Because of determination of fact No. 3, we do not have reasonable cause to believe that subsection (1) of this section has been violated. See *RCW 42.52.330*.

8. *RCW 42.52.150* contains detailed provisions governing "gifts" to public officers or employees.

We do not have reasonable cause to believe that this section has been violated. The State Ethics Act, in *RCW 42.52.010(9)*, defines "gift" as "anything of economic value for which no consideration is given." The complaint contains no evidence that the senator has received any gift and our investigation has not revealed that the Senator has received any gift.

9. *RCW 42.52.210* provides that:

Each legislative employee, agency officer and such employees thereof as the agency head may by regulation provide, who is an officer, agent, member of, attorney for, or who owns an interest in any firm, corporation, association, or other business entity which is subject to state regulation shall file a sworn statement with the secretary of state disclosing the nature and extent of his relationship or interest, said statement to be kept in confidence and to be disclosed only to members of the legislature or any legislative committee which may be organized for the purpose of ascertaining a breach of this code, and the same also to be disclosed to any other authority having the power of removal of any public official or servant.

We do not have reasonable cause to believe that this section has been violated. The section does not apply to Clark Public Utilities because it is not an entity "subject to state jurisdiction" under the statute.

10. *RCW 42.52.900* provides that:

Government derives its powers from the people. Ethics in government are the foundation on which the structure of government rests. State officials and employees of government hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed. Paramount in that trust is the principle that public office, whether elected or appointed, may not be used for personal gain or private advantage.

The citizens of the state expect all state officials and employees to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public's interest. State officials and employees are subject to the sanctions of law and scrutiny of the media; ultimately, however, they are accountable to the people and must consider this public accountability as a particular obligation of the public service. Only when affairs of government are conducted, at all levels, with openness as provided by law and an unswerving commitment to the public good does government work as it should.

The obligations of government rest equally on the state's citizenry. The effectiveness of government depends, fundamentally, on the confidence citizens can have in the judgments and decisions of their elected representatives. Citizens, therefore, should honor and respect the principles and the spirit of representative democracy, recognizing that both elected and appointed officials, together with state employees, seek to carry out their public duties with professional skill and dedication to the public interest. Such service merits public recognition and support.

All who have the privilege of working for the people of Washington state can have but one aim: To give the highest public service to its citizens.

This is the State Ethics Act's intent section. It does not prescribe any operative rules and, in our opinion, cannot by itself constitute a basis for us to determine that there exists reasonable cause to believe that the Senator has violated the State Ethics Act.

V. Conclusion and Order

Based on the Board's review of the complaint and investigation, the Board determines that there is not reasonable cause to believe that Senator Sutherland has committed a violation of the State Ethics Act. Therefore, the complaint is dismissed.

VI. Comment

Although there is not reasonable cause to believe that a violation of the State Ethics Act has been committed, there are a number of aspects about this complaint that are troubling to us. We are concerned about the appearance of improper conduct inherent in a situation where a legislator is awarded a personal services contract, without a rigorous competitive selection process, from an entity that engages in lobbying activities. We caution legislators to be sensitive to the public perception that a relationship exists between the timing of the award and the legislator's election to the Legislature.

Executed this 10th day of June, 1995.

Thelma Jackson, Chair

NOTE TO READERS: For format reasons, this opinion contains only a summary of the complaint filed with the Legislative Ethics Board. If you would like a full copy of the complaint, contact the Ethics Board staff (Tim Burke (360) 786-7103; Tony Cook, (360) 786-7294; Mike O'Connell, (360) 786-7501).