

Legislative Ethics Board

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COMPLAINT 2021 – No. 1

In re Graham
May 14, 2021

ORDER OF DISMISSAL – LACK OF REASONABLE CAUSE

I. NATURE OF COMPLAINT

The Complaint alleges the following: “Rep. Graham [Respondent] made several offensively inappropriate comments, unbecoming of an elected official representing Washington state, toward multiple Black and people of color who gave public testimony.” The complaint alleges that these questions violated the Legislative Code of Conduct and the Ethics in Public Service Act (Act) in that legislators are to treat all others with respect, dignity and civility, regardless of status or position, and to refrain from engaging in hostile, intimidating, offensive or unlawful activities or behaviors that may amount to discrimination, harassment, sexual harassment, or bullying. Although the complaint does not cite a specific statute that has been violated, the allegations were investigated under RCW 42.52.070 (special privileges).

II. JURISDICTION

The Board has personal and subject matter jurisdiction over the allegations in this complaint. RCW 42.52.320.

III. PROCEDURAL HISTORY

Complaint 2021 – No. 1 was received by Board counsel on February 11, 2021 and was discussed during the Board’s regularly scheduled meetings on March 1, 2021 and April 29, 2021.

IV. FINDINGS OF FACT

1. Respondent has been a member of the House of Representatives since January 2019 representing the 6th legislative district.
2. The following questions or comments by Respondent are what is alleged to have violated either the Code of Conduct or the Act.

A. HB 1203 - Concerning community oversight boards

3. HB 1203 was heard by the House Public Safety Committee chaired by Rep. Goodman on January 26, 2021. Respondent is a member of this committee.
4. The complaint alleges that the following questions Respondent asked Lynn Idahosa-Berry, a Black woman the following question; “Thank you, um, and this question is for Lynn, um, I, I’m sorry, I-nahosa? Hi. Hi. Thank you for um weighing in today and for um for your insight into this issue. I noticed, you know, you mentioned you’re a mom and so am I. Um, and, you know. I am very struck by it situations like that happened, for me, I’m in Spokane, but on the west side. Where we just experienced an illegal activity that was happening with racing, where an officer, which, you know, most people would possibly call, especially if that’s happening in their neighborhood um and the police officer responds and is surrounded by whomever was there. Um. Obviously creating a very frightening situation. Would you agree that part of what we’re looking at when we’re talking about solutions when we’re talking about real solutions moving forward, is that we not only have to have accountability on an officer side if they do something wrong but we need to start having conversations in our homes, with our children about what type of behavior is expected when they are out in the public and engaging in uh, you know, in their own activities that are part of what it is that we’re seeing this is not a one-sided issue, would you agree with that?”
5. Rep. Graham asks King County Councilmember Girmay Zahilay, a Black man, the following question: “Thank you, Chair Goodman, uh This question is for Councilman Zah-hell-ay. The situation that you just brought up. Do you condone the behavior of the individuals that surrounded that officer’s car? And were violently beating on it to the point where the person mentioned that they felt that their life was in danger? Are these officers supposed to be able to take care of themselves when a crowd is around their car being violent? Are they supposed to just stay there and take it? What would you do?”

B. HB 1264 - Establishing an equity statement for legislative proposals

6. HB 1264 was heard by the House Committee on State Government & Tribal Affairs, chaired by Rep. Valdez, on January 25, 2021. Respondent is a member of this committee.
7. Respondent asks the following question of Mr. Hur, lobbyist for One America: “Along the same lines, I’m curious as far as the data that is going to be being collected um we are obviously talking about disparities. Who is included? Who the data um? Who’s actually included and who might be excluded in this legislation?” Then continues her line of questioning: “So what, ugh, thank you, Mr. Chair. So. Representative Thai, from what I’m understanding from what I’m hearing you say. Because when we’re talking about disparities, that is something that often regardless of what somebody’s color maybe has a lot to do with maybe do they have parents that can work? There, there’s a lot that goes into that. My concern um is that I am very concerned about making sure that some you know, that somebody is not going to be excluded just because of the color of their skin. I don’t agree with that I think that is wrong. I don’t see equity in that at all. Um, if we’re looking and if we are going to get accurate numbers then it really should be if this is if the sole focus of this is equity then we need to be looking across the board at all of the information. So that when we’re making those

decisions for our constituents, we know we're doing the best for all of our constituents so I appreciate your care and concern about this."

C. HB 1283 - Including the open carry or display of weapons within the offense of criminal mischief

8. Respondent commented to the prime sponsor Rep. Tana Senn, "Uh Thank you, Chair Hansen, and uh, thank you, Rep. Senn, for your consideration for public safety. I'm curious with the conversation that was just happening we had an example of the exact thing the weaponizing of people defending themselves that happened in Missouri. Uh the people that were defending themselves were charged. Is this the type of thing that you're talking about and supporting as far as leaving it up to our court system to decide?"
9. Respondent commented on Ms. Lyn Idahosa-Berry's testimony. She is from the Federal Way Black Collective as she held her young son during her public testimony, "Thank you, Chair Hansen. So in listening to the testimony from Ms. Idahosa, I'm a little bit confused whether we are talking about law enforcement carrying weapons or if this is private individuals. If I'm hearing you correctly, that what I hear you to say is that family members: mothers, fathers, grandmas, grandpa - do not have any responsibility to talk to their kids about situations that happen that you know that can be confrontational and what do we expect from the public in these situations as far as responding?"
10. Respondent also asked Ms. Lyn Idahosa-Berry the following question: "Yes, Thank you. And I very definitely respect what you're saying. I'm fully on the side of de-escalation. I'm asking you if you feel the same way regarding people that feel threatened when there is groups of people carrying Molotov cocktails and they're carrying pipes and they're carrying sticks or frozen bottles of water that are... you've mentioned that you're talking about people being in fear at protests but you're only specifically talking about one group of people and you're not referring to the other actual violence that we've seen."
11. Respondent asks Liz Hjselmseth, a concerned citizen, "Thank you, and I'm sorry I would butcher your last name but, so I'm curious how you feel when you're talking about the intimidation or crimes being committed with guns if you support shortening sentences for individuals that commit crimes with guns?" Ms. Hjselmeth replied that she was not there to testify on that topic.
12. Respondent asked Ms. Nyla Fritz, a middle school principal, who lost her little brother in a shooting in Moses Lake, Washington, "Thank you, Chair uh. Chair Hansen. So Ms. Fritz, the, you know, I, as a mother who's had a child that was shot, I absolutely sympathize with your loss. I am so very sorry that that happened and I'm on your side as far as holding people accountable that commit those types of crimes. As far as this particular bill is concerned, was this one individual that was there that was open carry? I'm trying to understand how that story equates with this particular bill."
13. Respondent asked Mr. Daniel Mitchell the following question, "Thank you, Chair Hansen. Mr. Mitchell, I am going to... Uh, given what you were talking about with your testimony and the very real fear and concern that you have with the story you just shared there was somebody who wasn't familiar with the second amendment so just very quickly I'd like to just go over

that really quick...so suffice it to say you are in support of the second amendment that protects your rights in these situations where clearly there are individuals that meant to do you or somebody else harms that you support our second amendment?" To which Mr. Mitchell responded that he supports all of the amendments, supports all of the constitution, and doesn't puts his finger on any one particular amendment and say it's more valuable than another. They all stand equally in his beliefs.

14. Respondent asked Olympia City Councilmember Madrone, "Thank you, Chair Hansen. I'm sorry Dani, your last name I can't read it - it's half gone. So given the fact that you're bringing up the Olympia area, do you feel just as strongly when you're talking about gun violence that you have members in your community that I've talked to that are just as concerned about the violence that's been going on from the people who aren't carrying guns but are armed with other things that are just as dangerous or deadly? I'm talking about all of it." To which, Councilmember Madrone responded, "I see this legislation as politically neutral and needs to be applied in such a way and that we avoid disparate responses that could suggest any kind of political bias."
15. Respondent asked Ms. Emma Silver the following question: "Thank you, Chair Hansen. Ms. Silver, so, you do recognize that with this bill the way that it's stated just by the mere fact that someone feels threatened that they could actually be charged with a felony, do you support that?" Ms. Silver clarified that groups of people who are armed use it to intimidate.
16. Respondent asked Rabbi Weiner the following question: "Thank you, Chair Hansen and my question is for Rabbi Weiner. With the violence that we've seen all across the nation where not only homeowners, store owners with these the riots that are happening and that's absolutely meant for intimidation. How do you feel about the maybe somebody that's a homeowner or shop owner where they might have multiple family owners or family members protecting their property. How do you feel about that this bill affecting the fact that they might be charged with a felony under that circumstance?"

D. Email from Rep. Drew Hansen

17. On February 2, 2021, Rep. Drew Hansen, chair of the House Committee on Civil Rights & Judiciary, sent an email to all the persons who testified in support of HB 1283. That email stated as follows:

I'm writing to those who testified in support of HB 1283 in the Civil Rights and Judiciary Committee today. I want to apologize for how the hearing proceeded today—specifically, for how some members of the Committee treated several of you. We want the public to feel welcome to testify, and I did not do an adequate job ensuring that members of the Committee treated public testifiers with the respect and courtesy that we expect.

I will be speaking with the ranking member (the lead Republican on the committee, Rep. Walsh) again about our expectations for the Committee. I said at the beginning of today's hearing (and had earlier communicated to Rep. Walsh) that we expect a civil, respectful Committee, which was clearly not the experience this morning. I should have done a better job enforcing that decorum

among the members, which is on me, but I will be speaking with Rep. Walsh to reinforce our expectations—as some members may be more receptive to that message from Rep. Walsh rather than me.

I wanted to thank you for coming to testify this morning. It takes a lot of courage to testify in public, especially on an issue that causes many of you to revisit especially painful experiences in your lives. I am deeply grateful that you took the time to testify, and I apologize wholeheartedly that the Committee did not hear your testimony with the respect and civility that you deserve.

Sincerely, Rep. Drew Hansen

E. Respondent's Response

18. When interviewed as part of the investigation, Respondent indicated that she did not intend her questions to be insensitive or offensive. She stated that in asking the questions cited in the complaint, she was trying to understand the positions that the testifiers were taking on the bills being heard.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Legislative Code of Conduct

The legislature adopted the Legislative Code of Conduct in House Concurrent Resolution 4401 during the 2019 session. The Code of Conduct provides as follows:

The Legislature is committed to maintaining a professional and respectful environment for all members of the legislative community.

As stewards of the public trust each member of the legislative community is expected to:

- Conduct themselves with self-awareness, self-respect, and professionalism;*
- Treat all others with respect, dignity, and civility, regardless of status or position; and*
- Refrain from engaging in hostile, intimidating, offensive, or unlawful activities or behaviors that may amount to discrimination, harassment, sexual harassment or bullying.*

This Code of Conduct applies equally and at all times to all members of the legislative community, both on and off the capitol campus.

The Board has no independent subject matter jurisdiction over alleged violations of the Code of Conduct. To the extent an alleged violation of the Code of Conduct could also be construed as a violation of the Ethics Act, however, the Board would have concurrent subject matter jurisdiction with House and Senate administrations.

B. Special Privileges (RCW 42.52.070)

RCW 42.52.070(1) prohibits a legislator from using his or her position to obtain something someone similarly situated would not be able to obtain. Pursuant to an amendment made to the statute during the 2019 session, the legislature also included, in pertinent part, the following language:

(2) For purposes of this section, and only as applied to legislators and employees of the legislative branch, “special privileges” includes, but is not limited to, engaging in behavior that constitutes harassment. As used in this section:

(a) “Harassment” means engaging in physical, verbal, visual, or psychological conduct that:

(i) Has the purpose or effect of interfering with the person’s work performance;

(ii) Creates a hostile, intimidating, or offensive work environment . . .

The complaint alleges that Respondent, by her questions to several people who testified, harassed them, which is prohibited by RCW 42.52.070. Because the addition of “harassment” to RCW 42.52.070 is so recent, the Board has only issued one ruling on what conduct constitutes harassment in the legislative context. *See In re Morgan*, 2020 – No. 3. That ruling is not applicable to the facts of this case.

C. Article II, § 17, Washington State Constitution

Article II, § 17 of the Washington Constitution provides: “No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate.” The scope of the state constitution’s “speech and debate” clause has never been considered by the Washington courts. To the extent other courts in states with similar constitutional provisions have considered this issue, however, they have determined that if a member is engaged in legislative business at the time he or she makes a statement, he or she is acting within the privilege afforded by that state’s constitution. *AGO Opinion No. 134* (May 14, 1962).

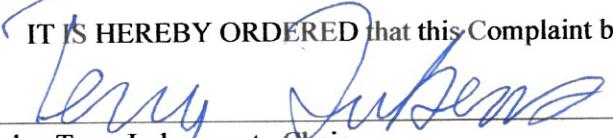
A canon of statutory construction provides that a “statute ought not to be construed to violate the constitution if any other possible construction remains available.” *Rust v. Sullivan*, 500 U.S. 173 (1991). In determining the meaning of “harassment” for purposes of RCW 42.52.070, therefore, the Board should not interpret the term in a way that would penalize conduct or speech that is protected by Article II, § 17 of the Washington constitution; doing so would cause RCW 42.52.070 to violate the constitution as applied.

The Board holds that when legislators ask questions or make comments to persons testifying on bills during an official legislative committee hearing, those comments or questions cannot constitute harassment for purposes of RCW 42.52.070, even if the questions are offensive, insensitive, rude or awkward. Even though the actions in this complaint may not violate the Act, they may nevertheless constitute a violation of the Legislative Code of Conduct or a provision in the House or Senate’s administration protocols which the chambers have the authority under the Constitution to enforce.

VI. CONCLUSION AND ORDER

The Board finds no reasonable cause to believe Respondent violated any provisions of the Act as alleged in this Complaint.

IT IS HEREBY ORDERED that this Complaint be dismissed.



Judge Terry Lukens, ret., Chair

Date: 5/14/21