

May 9, 1996

COMPLAINT 1996 - NO. 2

REASONABLE CAUSE DETERMINATION - ORDER OF DISMISSAL

I. Nature of the Complaint

The complaint alleges that Representative Lois McMahan violated the State Ethics Act by including campaign material in a document she mailed at public expense to constituents in January, 1996.

II. Procedural History

Complaint 1996 - No. 2 was received on February 22, 1996. The complaint was transmitted to the Office of the Attorney General for staff assistance on February 23, 1996, pursuant to RCW 42.52.450, because it alleges a violation of RCW 42.52.180 by a legislator.

An investigation was conducted pursuant to RCW 42.52.420. The results were submitted to the Board in an investigative report on March 19, 1996. The Board requested further investigation, and a supplemental report was submitted on April 18, 1996.

III. Determination of Allegations of Fact

The document which is the subject of the complaint is entitled "Directory of Elected Officials." It was mailed on January 30, 1996 to 37,191 addressees. The postage and production costs for this document brought Representative McMahan's recorded totals for these costs for the 54th Legislative Session to \$16,268.11 and \$14,521.55, respectively.

The cover page of the document sets forth its title and also contains a picture of Representative McMahan; a slogan: "They govern best who govern least"; and a statement that it is provided "Compliments of Representative Lois McMahan." Page 2 contains a message from Representative McMahan regarding a questionnaire which she had previously mailed to her district constituents, and a notice of a town hall meeting. The seventh page contains an invitation for the recipient to attend a "District Day" tour of the Capitol and a luncheon with the 26th District legislators. The remaining four pages of the document constitute the "Directory of Elected Officials," which contains the names, addresses and telephone numbers of federal, state and local officials that residents of the 26th District may wish to contact. The back sheet of the document is the address page. It has a printed postage mark indicating that the mailing cost was paid for by the state.

IV. Determination of Allegations of Ethics Law Violations

A. Relevant Statutes

RCW 42.52.180 prohibits the use of state resources for the purpose of assisting a campaign for election. For purposes of this complaint, the pertinent portions of RCW 42.52.180 provide:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

. . .

(c) Activities that are part of the normal and regular conduct of the office or agency; . . .

In addition to RCW 42.52.180, there is another statute that is relevant to this complaint. RCW 42.17.132 places certain restrictions on mailings by incumbent legislators during most of the last year of their term of office. A violation of this statute would also be a violation of RCW 42.52.180. RCW 42.17.132 provides as follows:

During the twelve-month period preceding the last day for certification of the election results for a state legislator's election to office, the legislator may not mail to a constituent at public expense a letter, newsletter, brochure, or other piece of literature except as provided in this section.

The legislator may mail one mailing no later than thirty days after the start of a regular legislative session and one mailing no later than sixty days after the end of a regular legislative session of identical newsletters to constituents.

The legislator may mail an individual letter to an individual constituent who (1) has contacted the legislator regarding the subject matter of the letter during the legislator's current term of office; or (2) holds a governmental office with jurisdiction over the subject matter of the letter.

A violation of this section constitutes use of the facilities of a public office for the purpose of assisting a campaign under RCW 42.52.180.

The house of representatives and senate shall specifically limit expenditures per member for the total cost of mailings, including but not limited to production costs, printing costs, and postage.

B. Analysis

One of the factors specified in RCW 42.52.180 in determining whether it has been violated is whether the activity is part of the "normal and regular conduct" of the office. Newsletters to constituents are permitted by House rules so long as they conform to certain guidelines issued by the House. RCW 42.17.132 places additional specific restrictions on mailings within the legislator's last year of office. By the terms of the statute, violations of RCW 42.17.132 are also violations of RCW 42.52.180. The three issues under those statutes which are raised by this complaint are: (1) whether the mailing in question constitutes a "newsletter;" (2) whether its contents are consistent with normal and regular conduct for the position of legislator; and (3) whether the expenditure limit for mailings has been violated.

1. Newsletter

RCW 42.17.132 prohibits any Representative during the 1996 Session from mailing a "letter, newsletter, brochure, or other piece of literature" to constituents, except for the limited circumstances set forth. The only exception which allows unsolicited mailings to constituents are two mailings of "identical newsletters to constituents" within the time limits set forth in the statute. If the mailing in question is a "newsletter," there is no violation of this provision. If it is a "brochure" or "other piece of literature" it is not permitted.

The term "newsletter" is not defined in the statute. Therefore, the ordinary meaning of the term should apply. "Newsletter" is defined in Webster's New World Dictionary, College Edition, as a "report issued by a firm, governmental agency, etc. to keep employees or the public informed of pertinent matters." Webster's Third New International Dictionary defines the term to include "a printed sheet . . . containing news or information of current interest to or bearing upon the interests of a special group." Part of the mailing in question consists of a report to constituents on pertinent legislative matters, as well as information about opportunities to communicate with the representative on legislative issues. This material clearly fits within the definition of newsletter. However, the document also includes a multi-page directory of officials.

Does the directory render the document something other than a newsletter? If so, then RCW 42.17.132 and RCW 42.52.180 would be violated. While the directory does not directly fit the concept of informing the public on pertinent matters, it does provide information of interest to or bearing upon the interests of a special group—the constituents to whom it is mailed. The directory provides them information which may be needed in order to communicate their

concerns and needs to their elected and appointed governmental officials. The board therefore finds that a directory may be included in a newsletter, without changing its classification as a newsletter.

2. Other content

As noted in subsection 1., the other content falls within the definition of a newsletter. The content does not advocate the election of a person to an office or promote or oppose a ballot proposition.

3. Expenditure limit

RCW 42.17.132 requires the House of Representatives and the Senate to establish expenditure limits for their individual members. It also states that a violation of that statute is a violation of RCW 42.52.180. Therefore the board finds that exceeding the expenditure limit established by the House of Representatives or the Senate is a violation of RCW 42.17.132 and by reference RCW 42.52.180.

The statute requires the House of Representatives and the Senate to establish a limit on "the total cost of mailings" (emphasis added). The Senate adopted a single limit for production and mailing. The House of Representatives, through the Executive Rules Committee, established separate production and postage limits of \$ 14,000 and \$ 23,000, respectively, for the 54th session of the legislature.

In this case, the January mailing brought Representative McMahan's production cost to \$16,268.11 (less approximately \$600 in reimbursement due from the Senate for a joint mailing); and her postage cost to \$14,521.55. Investigation of these amounts shows that the House accounting system made it difficult, if not impossible, to receive timely information about costs expended or to predict what it would cost to produce a document for mailing. House administration reports that steps are being taken to improve the House accounting system.

The board finds that in this case there was probably a violation of the House production limits, as a result of the January mailing. The House has since changed its limits to a single limit as the Senate has done, partly because of the difficulty of tracking separate amounts and predicting production costs in advance, and partly because members had been allowed in the past to exceed individual limits so long as the total limit was not exceeded. In any event, the board finds that its jurisdiction is limited by the statute to the total cost of the mailings, and that Representative McMahan was well within the total limit.

V. Conclusion and Order

Based on a review of the complaint and the board's investigation, the board determines that there is no reasonable cause to believe that Representative Lois McMahan committed a violation of

the State Ethics Act. The complaint is dismissed.

Theлма Jackson, Chair