

## COMPLAINT 1999 - NO. 5

### Conflict of Interest - State Agency Contract

#### REASONABLE CAUSE DETERMINATION - ORDER OF DISMISSAL

##### **I. Nature of the Complaint**

This complaint alleges that Representative Ed Murray violated RCW 42.52.020 and RCW 42.52.120 by entering into a non-competitive, employment contract with the University of Washington and not submitting the contract to the Legislative Ethics Board to allow a determination of whether the contract was in conflict with the proper discharge of his legislative duties. The complaint also alleges that University of Washington administrators acted in complicity with Representative Murray regarding the allegations.

##### **II. Procedural History**

The Complaint was filed on December 27, 1999. The Board found it lacked jurisdiction with regard to the "complicity" allegation against the University because RCW 42.52.320 limits its enforcement of the ethics law to members and employees of the legislature. An investigation of the remaining allegations was conducted, pursuant to RCW 42.52.420, and the Board deliberated on the complaint at a regular meeting on February 10, and at special meetings on February 17, and February 23, 2000.

##### **III. Determination of Allegations of Fact**

The complaint adopts and incorporates by reference the facts submitted by Representative Murray on October 28, 1999, in his request for an advisory opinion. That request was superseded by this intervening complaint

This Board has determined the following facts:

1. Prior to his appointment as State Representative from the 43<sup>rd</sup> Legislative District in October, 1995, Ed Murray was employed as an assistant to Seattle City Council member Martha Choe, during which time she chaired the Council's Transportation and Economic Development Committee. A large portion of Murray's duties involved research and development of legislative and policy proposals relative to Seattle's transportation system.
2. Representative Murray is (and was during all times pertinent to this complaint) co-chair of the House Capital Budget Committee and a member of the House and Legislative Transportation Committees. The University of Washington is one of the entities which applies for funding through the budgetary processes.

3. Murray was seeking employment in the summer of 1999, when he was reacquainted with Bridgette Chandler on July 29. Ms. Chandler is the Vice President for Regional Affairs for the University of Washington and had been a fellow staff person of Murray at the Seattle City Council. On behalf of the University, Chandler was in the process of hiring three temporary employees to assist her with the issue of siting light rail transfer stations on the campus. One of these positions involved representing the University in negotiations with Sound Transit and facilitating meetings with Sound Transit, the City of Seattle, and the university district community.

4. Representative Murray and Ms. Chandler discussed his status as a legislator and whether that might affect the present job opportunity. Chandler requested advice from the University's legal department and was told there was no legal impediment, from the University's perspective as an employer, to hiring a legislator, and that Murray would be responsible to inform the University if he had any conflict.

5. On August 9, 1999, Murray was hired by the University as a temporary staff person at a rate of \$50.00 per hour. No other persons were interviewed for this position and the employment was to end on December 31, 1999. These terms, together with a brief description of job duties, were set out in internal University e-mails which were later submitted to this Board by Representative Murray.

6. There are no facts which suggest that Representative Murray contacted legislative attorneys on the conflicts issues prior to September 8, 1999, thirty two days after beginning work. In addition, Representative Murray did not discuss any possible conflicts issues with legal counsel for this Board until approximately October 11, two months after entering into the contract with the University. Board legal counsel advised Murray that this Board's precedents did not indicate or suggest a conflict of interest but only the Board could issue a formal opinion and this could be done with a request for an advisory opinion. Representative Murray indicated he would probably make such a request.

7. At the request of Board counsel, a copy of the e-mails, the only known written description of Representative Murray's job, was filed with the Board shortly after October 11, 1999.

8. Representative Murray kept his own time sheets and submitted them for payment on a two week schedule. He reported to Ms. Chandler as her staff. The University deducted social security, medicare, medical aid, and federal tax from his pay and paid the employer's contribution when applicable.

9. The Legislative Ethics Manual, 1999 edition, cautions legislators and staff to submit personal service contracts with state agencies for preview for an analysis of conflict issues. The Ethics Board "General Guidelines for Board Internal Operations" contain instructions for review of "personal service contracts which must be submitted for

approval. . . ." "Personal Service Contracts" are defined in Chapter 39.29 RCW in conjunction with "consultants" who are defined as independent individuals contracting with an agency to perform a service or render an opinion without being subject to the control of the agency. Past legal advice from Board counsel has focused on these references to personal service contracts, how they are distinguishable from general employment contracts, and how the Board materials and rules of operation would support the view that it is the nature of the personal service contract which makes it most likely to be the type of contract which must be subjected to conflict analysis before-the-fact.

10. On October 28, 1999, Representative Murray submitted a request for an advisory opinion and asked if his employment with the University was a conflict of interest or required filing and Board approval. The Board discussed the filing requirement at its next regularly scheduled meeting on December 2, and scheduled the discussion of the conflicts question for the January meeting. On December 13, Murray announced he had quit his job with the University. This complaint followed.

#### **IV. Legal Analysis**

##### **A. Pre-filing of contract with a state agency**

Representative Murray is a "state officer", he has a "beneficial interest" in the contract of employment, and the University of Washington is a "state agency." ( **RCW 42.52.010 - Definitions**).

**RCW 42.52.120** generally prohibits a legislator or legislative employee from receiving anything of economic value outside of his or her official duties unless four conditions are met:

1. The contract must be bona fide and actually performed.
2. The performance of the contract must not be within the course of official duties or under the individual's official supervision:
3. The performance of the contract would not require unauthorized disclosure of confidential information: and
4. The contract cannot have been expressly created or authorized by the officer or employee in his or her official capacity.

The findings of fact support the conclusion that these tests have been satisfied but this does not end the inquiry. In addition, if the contract is with a state agency, officers and employees have additional responsibilities in order to comply with the statute.

**RCW 42.52.120** further provides, in pertinent part:

(2) . . . a state officer may have a beneficial interest in a grant or contract or a series of identical contracts or grants 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 the execution; .

. .

Following the passage of the Ethics in Public Service law in 1994, more commonly referred to as the State Ethics Act, this Board adopted **General Guidelines for Board Internal Operations** which, among other things, provided for a process for submitting contracts for approval. That process states:

*Review of personal service contracts:* Personal service contracts submitted for approval shall be made available to the board in full. Contracts which are submitted for filing only shall be summarized in a report to the board at the next meeting.

"Personal service contracts" are defined in Chapter 39.29 RCW, in conjunction with "consultants."

**RCW 39.29.006(4)** - "Consultant" means an independent individual or firm contracting with an agency to perform a service or render an opinion or recommendation according to the consultant's methods and without being subject to the control of the agency except as to the result of the work. The agency

monitors progress under the contract and authorizes payment.

**RCW 39.29.006(8)** - "Personal service contract" means an agreement, or any amendment thereto, with a consultant for the rendering of personal services to the state which is consistent with RCW 41.06.380. (The reference to RCW 41.06 is to contracts which predated RCW 39 and not pertinent to the present analysis)

In 1996, the Legislature amended the State Ethics Act by adding a definition of "contract" but this Board's guidelines for submission for preview of personal service contracts only, was not changed. The definition now reads, in **RCW 42.52.010(7)**:

"Contract" or "grant" means an agreement between two or more persons that creates an obligation to do or not to do a particular thing. "Contract" or "grant" includes, but is not limited to, an **employment contract**, a lease, a license, a purchase agreement, or a sales agreement. (emphasis added)

In addition, informal legal advice from Board Counsel to legislators and staff has consistently been to the effect that if a non-competitive contract with a state agency is an employment contract, but not a personal services contract, it would most likely satisfy both the statute and the Board's written guidelines to simply file the contract without seeking pre-approval. The reasoning behind this advice is the Board's use of the "personal service contract" analysis. Again, in the Legislative Ethics Manual, 1999 edition, we find a question and answer which offers another example of advice from the Board on what types of contracts must be pre-filed.

Question: Do the filing and approval requirements apply only to personal service contracts?

Answer: No, the law applies to all contracts between legislators or legislative employees and state agencies, including property leases, equipment sales, rentals, and other goods and services.

The inference from this language is that personal service contracts, together with leases, sales rentals, etc., are the only contracts subject to preapproval.

Representative Murray's contract does not resemble a personal services contract. He was subject to the control of the University, he worked as staff to a University official, he was not hired to perform a service or render an opinion according to his own methods and the employer treated him as an employee as evidenced by those customary attributes of supervision and financial arrangements such as tax withholding. For reasons explained later, we do not find the characterization of these types of contracts as "personal service" in nature or not, particularly helpful nor consistent with the intent behind the statute which demands a preview of certain contracts with state agencies.

## **B. Conflict of interest**

### **RCW 42.52.020 - Activities incompatible with public duties**

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.

This is the general "conflicts" statute and this Board has interpreted this provision in light of **RCW 42.52.330**, which states:

By constitutional design, the legislature consists of citizen-legislators who bring to bear on the legislative process their individual experience and expertise. The provisions of this chapter shall be interpreted in light of this constitutional principle.

**.330** establishes a presumption in favor of outside employment (**Advisory Opinion 1995 - No. 1**).

Beginning with **Advisory Opinion 1969 - No. 1**, which was adopted as precedent by this Board in its first opinion, **Advisory Opinion 1995 - No. 1**, conflict questions have followed one of two lines of analysis: a "per se" analysis or a "functional" analysis.

In a "per se" analysis the question is whether the conflict is so severe that the employment itself is a violation of the statute. In the "per se" category, lobbying and offering legislative advice or assistance for compensation would be conflicts of interest (**AO 1969 - No. 1** and **AO 1995 - No. 1**). In **Advisory Opinion 1998 - No. 6**, this Board found that a legislator would have a clear conflict if he served as the executive director of a nonprofit organization which engaged in grass-roots lobbying on a subject which was before the legislature.

There are no findings of fact which suggest that the status of a "per se" conflict, of the nature discussed above, was present in the employment that Representative Murray had with the University of Washington.

The "functional" analysis questions whether there are any activities of this "outside" job which can come into conflict with legislative duties, thereby requiring the legislator to refrain from such activities. The general rule in this analysis, (**AO 1995 - No. 1**) is that a legislator:

does not have . . . (an) interest which is in conflict with the proper discharge of legislative duties if no benefit or detriment accrues to the legislator as a member of a business, profession, occupation, or group, to a greater extent than to any

other member of such business, profession, occupation or group.

In **Advisory Opinion 1995 - No. 4**, we found that a legislator could participate in the consideration of a bill which could have the effect of increasing the value of a building lot owned by that legislator because the "group" was sufficiently large to invoke the citizen-legislator exception.

In a conflict of interest complaint (**In Re Sutherland, Complaint 1995 - No. 2**) this Board dismissed allegations that Senator Sutherland had a conflict because of his personal services contract with Clark County PUD for specified non-legislative duties. Sutherland, at the time, was chair of the senate committee which had control over the fate of utilities legislation both favored and opposed by this utility. After extensive fact finding, the Board employed the "functional" test and found no reasonable cause existed to believe that there had been a violation of the conflicts statute. In other words, nothing he was doing or expected to do for the utility via the personal services contract was related to his legislative duties.

More recently, in **Advisory Opinion 1999 - No. 1**, the Board advised a legislative employee that there was no "per se" conflict of interest between his status as an employee and his potential status as a local school board member. However, because of the nature of some of the duties he was expected to perform as an employee, related to educational issues, he would have to refrain from some of those duties if elected. This is another example of the "functionality" analysis of **RCW 42.52.020**.

**RCW 42.52.120** requires this type of analysis before we even get to the issue of state agency contracts or grants because it establishes pre-conditions for any outside compensation. As stated earlier in this opinion, those conditions are:

1. The contract must be bona fide and actually performed.
2. The performance of the contract must not be within the course of Representative Murray's official duties, or under his official supervision.
3. His performance of the contract will not require unauthorized disclosure of confidential information.
4. The contract was not created by Representative Murray in his official capacity.

The facts in this case show that Representative Murray did not perform a legislative or lobbying function for the University.

The facts in this case show that Representative Murray performed a service under a bona fide contract; the contract was not otherwise within his official duties as a legislator nor under his legislative supervision; there is no issue of unauthorized disclosure of

confidential information and he did not create the contract in his official capacity as a legislator.

## V. Conclusion and Order

### A. Pre-filing

The Board concludes, based upon the Legal Analysis, part IV of this Determination, the issue of preview of contracts between legislators and legislative employees and state agencies has been muddled and subject to conflicting advice. The Board assumes partial responsibility for the confusion surrounding the requirements for pre-filing these contracts and, as of today, announces that it will abandon any attempt to define filing or preview requirements by characterizing the contract as "personal service" in nature, or not. It is our intent to establish a clear and unequivocal test for the preview or filing of contracts which come to the Board in the future.

The failure to present this particular contract to the Board prior to commencing employment with the University might be seen as a technical violation of the State Ethics Act. However, we find that due to our policies and earlier advice, this contract would probably not have come before us for preview and analysis of conflict issues because it is not a personal services contract.

Greater diligence by Representative Murray in seeking the advice of this Board prior to entering into the employment relationship with the University would have allowed the Board to exercise its statutory responsibilities by analyzing the conflict of interest issue, as contemplated by the law. No doubt, we would have discovered the discrepancies existent in the interpretation of this statute and could have engaged in a public discussion while seeking to clarify the law.

The Board interprets the intent of RCW 42.52.120 as requiring that most **non-competitive** contracts should be subject to public scrutiny and public discussion of potential conflict issues, notwithstanding technical legal arguments focusing on the "personal service contract" issue. In an earlier opinion, **Advisory Opinion 1995 - No. 9**, we concluded that the following categories of contracts do not require pre-approval:

- a. Contracts of such wide availability that there is effectively no competition among contractors, and no opportunity for favoritism, such as medical examiner contracts with the Department of Labor and Industries;
- b. Contracts where the financial interest in the individual transaction is insignificant, such as a retail sale of a small item at the posted price; or
- c. The contracting entity is a corporation or other business entity in which the legislator

or legislative employee or his or her spouse has neither a controlling financial interest nor substantial management responsibility over the firm or the particular contracts.

We reaffirm these exemptions from pre-approval by the Board, whether such contracts are competitive or not. In the same opinion, we noted that the filing requirement, which is separate and apart from the pre-approval issue, was broader than the pre-approval requirement. We decided, and reaffirm in this opinion, that even those contracts which are awarded in a competitive environment must be filed with the Board. The only exceptions are those noted above in a - c.

Because of the Board's emphasis today on the issue of competition, as opposed to characterization of contracts as personal service in nature, or not, we acknowledge that this may be viewed as establishing new and enhanced responsibilities on the part of legislators and staff to come forward with their state agency contracts. Because we have "raised the bar", this ruling is to be applied prospectively only. **No longer will contracts be shielded from public debate simply because they may be characterized as employment contracts, instead of personal service contracts.**

To the extent that we would hold Representative Murray to the standard enunciated today, we would be judging his actions and his contract differently from similar contracts which might be held by other legislators or staff, but which were not timely submitted to the Board because of the confusion over the nature of the contract itself - confusion we find emanates from the Board's own use of the term, "personal service contracts."

The Legislative Ethics Board will make the appropriate corrections to the Ethics Manual, 2000 edition, as well as its rules for internal operations which heretofore had called for preview of personal service contracts only. The Board will provide a form, which may be used by legislators and staff, which will indicate whether or not a contract should be filed or whether contemplated contracts should be previewed for conflict analysis. It is the responsibility of legislators and staff to bring such contracts to the attention of the Board through its legal counsel.

Henceforth:

1. The only exemptions from any filing or preview of new or renewed contracts or grants with state agencies are those identified in **Advisory Opinion 1995 - No. 9**:
  - a. contracts of such wide availability that there is effectively no competition among contractors, and no opportunity for favoritism, such as medical examiner contracts with the Department of Labor and Industries;
  - b. contracts where the financial interest in the individual transaction is

insignificant, such as a retail sale of a small item at the posted price; or

c. the contracting entity is a corporation or other business entity in which the legislator or legislative employee or his or her spouse has neither a controlling financial interest nor substantial management responsibility over the firm or the particular contract.

2. All contracts or grants, or renewal of contracts or grants, not exempt under #1 which are awarded or issued as a result of an open and competitive process in which more than one bid or grant application was received, must be filed with this Board within thirty days of the execution of the contract.
3. All other contracts or grants, or renewal of contracts or grants, not exempt under #1 must be submitted to the Legislative Ethics Board before execution of the contract or grant for a determination that the contract or grant would not be in conflict with the proper discharge of the officer's or employee's official duties.

## **B. Conflict of Interest**

This Board has once again been presented with an opportunity to comment on conflict-of-interest. Our legal analysis in section IV references over thirty years of precedent on this subject which, when combined with that section of the State Ethics Act which identifies the citizen-legislature as having its roots in the Washington Constitution, makes it clear that the presumptions are in favor of the citizen-legislators in most conflicts questions related to their employment.

The Board is mindful that legislators can make "outside" employment decisions which, while in keeping with the law, can appear to be short-sighted and not well thought out as far as public perception is concerned. It is obvious that not all outside employment is permissible and that in some areas of employment certain functions or duties of the job will have to be avoided. For instance, Representative Murray could not have become a lobbyist in Olympia for the University; could not have agreed to assist them in preparing the University's legislative agenda; could not have accepted employment which would have placed him in the position of disclosing confidential legislative information; and could not have exercised some sort of legislative prerogative by creating a specific "outside" job and then accepted employment performing that job. It is well settled that it is not a disqualifying factor in most "outside employment" situations to be a legislator.

Stated another way: the facts show the contract was bona fide and actually performed; that light rail, on-campus transit issues are not within Representative Murray's official legislative duties; that he did not create this contract nor does he regulate it as part of those legislative duties; and there is no showing or inference that he would be required or expected to disclose confidential information to the University of Washington in the

performance of the contract.

There is no presumption that it is improper for legislators to have a contract, employment or otherwise, with a state agency. What is improper is to fail to allow light to fall upon these contracts. These contracts should be available to the public and, in certain instances enumerated elsewhere in this opinion, to the Legislative Ethics Board for discussion and debate. The public, in cases where the letter of the law has been complied with, will nevertheless be the final arbiters of whether the spirit of the law has also been satisfied.

The complaint is dismissed.

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James A. Andersen, Chairman.

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Date of Signature