

IN RE WELLS, POE and ANDERSON

Complaint 2003 - No's. 6, 8 and 9

August 21, 2003

REASONABLE CAUSE DETERMINATION - ORDER OF DISMISSAL

1. Nature of the Complaints

The complainant alleges that legislative employees Tabitha Wells, Chrissy Poe and Joe Anderson used their legislative computers to send and receive personal e-mails in violation of Legislative Ethics Board Rule Number 3 - Private Use of State Resources (Rule 3). The Board has personal and subject-matter jurisdiction in these cases.

II. Procedural History

The complaints were received by the Board on April 12, 2003. An investigation was conducted and the Board considered the complaints on May 15, June 26, and July 17, 2003.

III. Issue

Is there reasonable cause to believe the respondent's use of legislative computers exceeded the use permitted by Rule 3?

IV. Answer

No. Rule 3 permits staff to make limited use of their computers to send and receive personal e-mails. Whether or not Rule 3 is violated by personal use of computers is dependent upon the facts of the case and in these cases the respondent's use of e-mail does not rise to the level of an ethics violation.

V. Analysis

1. *Some personal use of public resources may be permitted, but it is not guaranteed.*

RCW 42.52.160 generally prohibits personal use of public resources but permits the Board to craft limited exceptions.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for

occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

The Board adopted Rule 3 in an effort to define appropriate and occasional personal use of public resources. Rule 3 also contains sixteen questions and answers related to personal use as a guide for legislators and legislative employees. It is clear that Rule 3 is not required and without it the general prohibition in **.160** would control.

2. Legislative staff should not assume their personal e-mails sent or received on state equipment are private or protected by the Ethics Act.

The Senate has, as an employer, adopted and published a policy manual which defines many aspects of the employee-employer relationship in that institution. The *Senate Policy and Personnel Reference Manual*, 2003 edition (Manual), contains the following statements under the section on Computer Policies/Internet and Electronic Mail Policy, pages 36 and 37:

Each user is individually responsible for the content of any communication sent via the internet.

The Board agrees. Staff who use their computers for personal use are not generally the victims when that use comes into question and is reviewed.

Monitoring of employees is only initiated following evidence of transgressions . . .

The Senate expects the highest standards of professionalism from staff, and in return rewards that professionalism with respect for employees privacy . . .

The Senate may represent to its employees that it is affording them some degree of privacy or that they may rest assured that their e-mail will not be monitored, but those representations are between employer and employee and do not bind or direct the Board when it is presented with complaints questioning e-mail use. If e-mails are provided to the Board in support of a complaint alleging an ethics violation, the Board will generally analyze the e-mails with respect to the personal use exemption defined in Rule 3, and not whether a broader Senate policy may have promised greater protection to the e-mails. To the extent that the Manual does not distinguish between the promises of an employer and the realities of the Ethics Act, by suggesting that employees have broad privacy rights which may insulate them from ethical claims of improper use of e-mail, it is misleading. The Board will not generally entertain broad claims of violation of privacy with regard to disclosure of personal e-mails (see *In Re Roach - Complaint 2003 - No. 2*).

3. Rule 3 does not establish a maximum number of e-mails or time spent sending or receiving personal e-mails before the personal use exemption is violated. Some prohibited uses are clearly defined. Issues related to frequency and duration of e-mails are more closely identified as issues related to productivity.

Rule 3 covers five pages in the Legislative Ethics Manual, contains sixteen examples of questioned behavior, and exhorts legislators and legislative employees to use common sense and good judgment. A rule which is more subjective in nature than objective presents enforcement challenges. More importantly for respondents in complaint proceedings, the more subjective a rule the more difficult to act in accordance therewith without fear of violating the law.

Rule 3 - Private Use of State Resources - may be summarized as follows:

Infrequent and incidental use may be permissible if there is no actual cost to the state or the cost is de minimis, if there is a public benefit, which may be direct or indirect (such as improvement of employee morale or improvement of work-related job skills) and the use does not interfere with the performance of official duties.

VI. Facts

The investigation of the e-mails in question showed that some occurred during the normal work day while a few took place during the lunch hour or after work. Some consisted of one word while others were several paragraphs. Supervisors related that the employees were completing their work and there was no noticeable lack of productivity. Many of the e-mails may be identified as efforts to provide personal support to and between the respondents. There is nothing in the e-mails to suggest that the same conversations would not be appropriate in a face-to-face situation but the fact that a computer leaves a printed trail brings these accusations to light.

There are no facts which suggest to the Board that these activities rise to the level of an ethics violation. None of the e-mails involved the uses strictly prohibited by Rule 3 such as campaign use, use for personal profit, use of consumables and uses which created extra public expense such as unapproved on-line subscription services.

For the most part, one may view these e-mails as office gossip between friends who should probably reexamine these personal use issues to insure that in the future their behavior cannot be questioned under the Ethics Act. The Board will emphasize Rule 3 in future training and orientation.

VII. Order

The complaints are dismissed for lack of reasonable cause to believe there has been a violation.

James A. Andersen, Chair

