

## COMPLAINT 2006 – NO. 3

In Re Eickmeyer

November, 2006

### REASONABLE CAUSE DETERMINATION AND ORDER OF DISMISSAL

#### I. Nature of the Complaint – conflicts of interest – special privileges

The Complaint was filed with the Board on May 17, 2006 and was the subject of Board discussions at regularly scheduled meetings on July 20, August 17, September 21 and October 26 (the Board did not meet in June). The Complaint is somewhat general but the allegations suggest conflicts of interest and use of position to secure special privileges. The two statutes at issue are RCW 42.52.020 and RCW 42.52.070.

#### **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.

#### **RCW 42.52.070: Special privileges.**

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parent, or other persons.

#### Complainant alleges the following:

1. Rep. Eickmeyer (Respondent) lobbied for increased off-reservation gambling while Executive Director of the Sound Institute of Family and Children's Services (Sound Institute).
2. The Sound Institute received \$200,000 from the State Department of Transportation (DOT).
3. Documents submitted to the Washington State Gambling Commission show income from Sound Institute in excess of \$75,000 while Respondent's personal financial statements on file with the Public Disclosure Commission show income less than \$75,000.
4. Respondent's son, Ezra, is employed as a lobbyist to watch his father's Committee on Hood Canal, while lobbying for septic systems.

5. It is unknown by the Complainant if contracts between the Sound Institute and the Department of Social and Health Services (DSHS) are competitively bid each year.

## **II. Jurisdiction**

Allegation #3, alleged discrepancies in the reporting of Respondent's income with the PDC and Gambling Commission, does not invoke Chapter 42.52 RCW and therefore is not within the jurisdiction of this Board. Allegation #4 may be viewed as a statement of fact in support of Complainant's assertion that special privileges are an issue in this case. Allegation #5, it could be argued, does not raise a legal issue but rather poses a question of fact. However, the Board concludes the issue of whether these bids are competitive may be viewed as supportive of the Complaint with regard to the issue of special privileges. The Board therefore concludes, with the exception of #3, that it has both personal and subject-matter jurisdiction.

## **III. Summary**

The allegations in the complaint, when taken as a whole, suggest the Respondent violated the Ethics in Public Service Act (Act) through his support of a bill which could have benefited his employer and through his use of his legislative position to improperly benefit himself or another.

The investigation discovered no facts which establish reasonable cause to believe that Respondent's support for increased off-reservation gambling was an impermissible activity incompatible with his official legislative duties (conflict of interest – RCW 42.52.020), or that Respondent improperly used his legislative position to secure special privileges for himself, his employer or lobbyist Ezra Eickmeyer (special privileges – RCW 42.52.070).

## **IV. Investigation**

The investigation was conducted by Mr. Ken Wilson, CFE (Certified Fraud Examiner) dba Wilson Investigative Services. Mr. Wilson conducted personal interviews with eight individuals: the Complainant; the Respondent; the Respondent's campaign manager; the Respondent's legislative assistant; two employees of the Sound Institute; and two employers of Ezra Eickmeyer, son of the Respondent.

The investigation included a review of several years of e-mails, voice mail, SCAN phone records and electronic correspondence prepared by Respondent's legislative assistant. The investigation concluded that Rep. Eickmeyer does not use a computer. In addition, the investigator reviewed the contract files, including any related correspondence, for the

client services contract between DSHS and the Sound Institute. The financial reports filed with the Public Disclosure Commission (PDC) by Respondent's son, lobbyist Ezra Eickmeyer, were also examined.

## **V. Determinations of Fact**

There is reasonable cause to believe that the following are the facts in this case.

1. Respondent is Executive Director of the Sound Institute. The Sound Institute is a private corporate entity that is managed by a board of directors to whom Respondent reports. The board of directors establishes Respondent's salary and his employment is at the board's discretion.
2. The Sound Institute supports a facility that provides temporary group housing and counseling to adolescents. The Sound Institute used to operate a bingo hall and utilize pull-tabs as a source of funding for its operations.
3. The allegation that Respondent had an impermissible conflict-of-interest is, according to the Complainant, based upon two articles in which statements were attributed to Respondent.
4. In an article from the *Casino Magazine* dated August 9, 2002 about whether to expand gambling off reservations during a time of financial shortfalls in state government, Respondent was quoted as saying, "At a time the state is really short on revenues and we're looking for areas in which to get income without raising taxes, this is a way to do it." In a second article from *The Seattle Times* dated November 5, 2004 regarding a failed gambling initiative, Respondent was quoted as saying, "I think if you had what is basically a voluntary tax dedicated to education, it would have had a better sell to it."
5. The Respondent admits to supporting the legislation which would have expanded off-reservation gambling but alleges the bill in question did not pass out of committee and that no committee or floor votes were taken on the bill. No evidence to the contrary was discovered.
6. Sound Institute received approximately \$200,000 from DOT when property rights and access to Sound Institute property were diminished during a highway widening project. Sound Institute hired an architect and real estate professional to determine the appropriate value and cost required to make the property useable and DOT agreed to the figure and reimbursed Sound Institute in accord with established policies.
7. Ezra Eickmeyer, Respondent's son, is a registered lobbyist and in addition to other duties monitored his father's committee which was involved in Hood Canal water quality issues. Ezra Eickmeyer's employers felt the son had legislative connections which could be helpful but neither had any evidence that Respondent was involved with or helped Ezra. One of these employers received correspondence from the Respondent saying he would not and could not lend his support to the products promoted by his son's

employer as that would be favoring one industry (related to clean up of Hood Canal) over another.

8. No correspondence or voice mail messages between father and son were discovered which indicated the Respondent was assisting the lobbyist as the latter worked on behalf of his employer(s).

9. DSHS contracts with the Sound Institute provide the Institute with a significant amount of its operating budget.

10. The Sound Institute started receiving money from DSHS under a client services contract prior to the time the Respondent became a legislator.

11. According to the regulations of the Office of Fiscal Management, a client services contract is not required to be bid competitively and the amount of reimbursement a business receives from DSHS under a client services contract is determined by DSHS and is non-negotiable.

12. A review of DSHS contract files failed to show any correspondence from Representative Eickmeyer or any correspondence indicating his involvement in solicitation of the contracts. DSHS files did show that documents signed by Respondent were signed in his capacity as Executive Director of the Sound Institute.

## **VI. Determinations of Law**

### **Conflict of Interest**

Board opinions have consistently reaffirmed the citizen-legislator concept based upon the constitutional principle of a part time legislature. The Legislature codified this principle in RCW 42.52.330 and therein directed that the Act is to be interpreted accordingly. The constitutional principle of a part time legislature establishes a presumption in favor of a legislator's employment outside the legislature (Complaint Opinions 1995 – No. 5 and 2003 – No. 3). Beginning with Senate Ethics Board Advisory Opinion 1969 – No. 1, adopted as precedent in this Board's first opinion, Advisory Opinion 1995 – No. 1, conflict of interest questions have followed one of two lines of analysis: per se or functional. In a per se analysis the question is whether the conflict is so severe that the employment itself is a violation of the statute. Here, there is no allegation nor are there any facts which support a determination that Respondent's employment as Executive Director of Sound Institute is in and of itself a violation of the conflict of interest statute.

In a functional analysis of conflict of interest the question is whether a legislator should refrain from being involved in an issue in his or her legislative capacity. The general rule for legislators when acting in their legislative capacity may be found in several opinions

including Advisory Opinion 1995 – No. 1 and more recently quoted with approval in Complaint Opinion 2005 – No. 6.

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.

Several opinions recognize that legislators may introduce legislation and advocate for its passage when such legislation would or could benefit a legislator's employer or benefit the legislator equally with other members of a sufficiently large class. See, for example, Advisory Opinion 1995 – No. 4 (legislator could participate in the consideration of a bill which may increase the value of his property along with the property of others); Advisory Opinion 1995 – No. 6 (legislator may advocate for and vote on a bill which could benefit his employer in the future; and Complaint Opinion 1995 – No. 2 (chair of committee could consider his employer's bill in committee, support it and advocate its passage under the facts of that case).

The facts in the present case do not support a finding that Respondent's avowed support for a bill which may have increased off-reservation gambling, and which may have benefited the Sound Institute along with other off-reservation gambling sites, constituted an impermissible conflict of interest. In addition, the two quotes attributed to Respondent and offered by the Complainant in support of the conflict of interest allegation appear to be nothing more than a legislator's view, or opinion, on an issue before the Legislature and/or the public.

### Special Privileges

The Complaint alleges that Respondent's employer, Sound Institute, received \$200,000 from the State Department of Transportation. That is true (Determination of Fact #6). The Complaint infers this payment was made to Sound Institute through the influence or connections of the Respondent as a legislator. There are no facts to support this assertion. Rather, the facts are that the payment was made to a business entity for its costs in adjusting to a Department of Transportation highway project which negatively impacted the Sound Institute and that the payment, and the process for establishing the amount of the payment, were in accordance with the rules and the procedures of the DOT.

The Complaint alleges that Respondent's son was a lobbyist and one of his duties was to monitor his father's committee on Hood Canal issues. That is true (Determination of Fact #7). The Complaint infers, apparently, that the son should not have been involved in this activity and that the Respondent must have been, in some way, improperly assisting his son in his lobbying efforts. The Complainant speculates that Respondent was conferring a special privilege on his son. Neither the facts nor the law support this conclusion. First, there is no provision in the Act which confers jurisdiction on this Board over the employment choices made by Ezra Eickmeyer. Second, no facts were discovered which would indicate that Respondent used his legislative position to improperly assist his son, thereby conferring a special privilege upon him.

The Complaint questions whether the contracts between Sound Institute and DSHS are competitively bid and, if not, infers that these contracts must be awarded Sound Institute because of the Respondent's legislative position or influence. The contracts in question are not bid competitively (Determination of Fact #11) as they are "client services contracts," they were instituted between the two entities prior to the time the Respondent became a legislator (Determination of Fact #10) and the amount is non-negotiable (Determination of Fact #11). The only remaining question appears to be whether at some point after being elected to the Legislature the Respondent may have in some way used "improper means" to influence DSHS on behalf of the contracts between that agency and Sound Institute.

In our first opinion, Advisory Opinion 1995 – No. 1, we ruled that certain advisory opinions issued by the former Senate, House, and Joint Boards of Ethics, decided under the former Code of Legislative Ethics, would continue to have precedential value. We determined that former Joint Rule 4, in the old Code, which provided that "A legislator shall not use improper means to influence a state agency, board or commission," was largely encompassed within RCW 42.52.070, and these prior "improper means" decisions will continue to have precedential value. It is not now necessary to review all these cases because the present case is devoid of any facts which show there was any attempt to improperly influence DSHS by the Respondent. Rather, Respondent was elected to the Legislature after being hired as Executive Director of Sound Institute and the non-negotiable contracts in question were either in existence at that time or served as templates for future non-negotiable contracts. In addition, DSHS contract files failed to show any correspondence to that agency from Respondent as a legislator, failed to show any correspondence relative to solicitation of contracts, and failed to show any documents signed by Respondent other than in his capacity as Executive Director of Sound Institute.

## **VII. Conclusion and Order**

Based on a review of the complaint and the Board's investigation of the facts, the Board determines there is no reasonable cause to believe that Rep. Eickmeyer violated either RCW 42.52.020 or RCW 42.52.070. The complaint is dismissed.

Wayne Ehlers, Chair

Date: