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COMPLAINT 2013 – NO. 1

In Re Ericksen, Litzow, Fain, Hewitt and Schoesler

Complimentary Legislative Business Meals
December, 2013

Order of Dismissal – Notice of Intent to Engage in Rule Making

1. Nature of the Case

The complaint was received on July 10, 2013. An investigation was conducted pursuant to RCW 42.52.420 and the Legislative Ethics Board (Board) discussed the complaint at regularly scheduled meetings on September 4, October 10, and December 10.

There are two allegations in this complaint and each is related to gifts to legislators in the form of food and beverage.

- (1) Respondents violated RCW 42.52.150(5) of the Ethics in Public Service Act (Act) when they accepted free meals and beverages from lobbyists on more than infrequent occasions.
- (2) Respondents violated the Act when they requested and received the maximum daily legislative expense allowance for those days when they received a meal or meals from lobbyists on a complimentary basis.

With regard to the first allegation, the statute reads as follows:

A state officer or state employee may accept gifts in the form of food and beverage on infrequent occasions in the ordinary course of meals where attendance is related to the performance of official duties. Gifts in the form of food and beverage that exceed fifty dollars on a single occasion shall be reported as provided in chapter 42.17A RCW (RCW 42.52.150(5)).

With regard to the second allegation, which is related to the legislative expense allowance, no provisions of the Act are cited.

2. Determinations of Fact

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

1. Lobbyists are required to report to the Public Disclosure Commission (PDC) any meal occasion which costs more than \$25.00, identify the legislators who are present, and itemize the amount spent on each legislator. This level of specificity is seldom found in the reports.
2. Legislators are required to report to the PDC a gift of food and beverage that exceeds \$50.00 on a single occasion.
3. No PDC statutes, rules or regulations require lobbyists or legislators to report gifts of food and beverage which are less than \$25.00 so the actual number of free meal occasions cannot be determined.
4. The PDC has the authority to adjust the \$25.00 reporting threshold and is currently considering making an upward adjustment. An upward adjustment would result in fewer PDC records available to the public and the Board by which to judge the frequency of complimentary meals.
5. Lobbyist reports are inconsistent. The same meal event may be reported differently by different lobbyists. It is difficult to obtain reliable data from these reports of complimentary meals due to these inconsistencies.
6. Attribution of dollar amounts for complimentary meals for particular legislators may not be made with any level of confidence.
7. The number of meal occasions may be determined with a greater degree of accuracy than the cost of the meals.
8. Based upon lobbyists' reports the number of meal occasions over \$25.00 for the Respondents most likely ranged from 41-75 for the period beginning January 1, and ending June 30, 2013. Based upon these reports it is most likely the Respondents received the following numbers of complimentary meals from lobbyists, valued at over \$25.00 per occasion, from January 1, through June 30, 2013: Ericksen – 75; Schoesler – 68; Litzow – 44; Fain – 44; Hewitt – 41.

3. Conclusions

1. The Act does not define "infrequent occasions." There is no legislative history on what the term means nor are there any opinions of the Board directly on point. The absence

of any standard or guidance has created a situation where legislators do not know at what point their actions may constitute a violation of the Act. Because of the uncertainty surrounding the statute the Board is divided on the question of whether there is reasonable cause to believe the Act has been violated in this case.

2. The Board finds that there is no reasonable definition of “infrequent” with which the number of known gifts received by these legislators could be permitted under the Act. The Board agrees that legislators would benefit from having clear guidance about the number of gift meals that are permitted over a particular period by the statute. Given the lack of such guidance previously, the Board concludes it would be unfair to establish a standard in this case and then apply it to these legislators or any other legislators who have accepted complimentary meals.
3. The statute should be clarified. The Board recognizes that the Legislature, in adopting the Act’s gift provisions, provided many definitions which this Board has enforced. In addition, the Legislature was explicit when it established the fifty dollar gift limit for most gifts other than the meals in question in this case and the Board has enforced this limit. In other words, the Legislature has provided the Board and legislators with clear standards in other sections of the gift laws and may wish to do so with RCW 42.52.150(5).
4. If the Legislature should choose not to address this issue in the 2014 session, the Board will proceed with a post-session rule-making process designed to establish an enforceable standard through a definition of “infrequent occasions.”
5. This complaint is dismissed. A similar complaint was received after this one was taken under consideration. The second complaint alleged an additional thirty-two legislators violated the law on gift meals. It contains no documentation other than unsubstantiated dollar amounts associated with each legislator and these amounts are not attributed to any identifiable source. The complaint focuses on dollars while the gift meal statute addresses occurrences .

Because of the Board’s determination to dismiss Complaint 2013 No. 1 for the reasons previously stated, the second complaint is rendered moot. It follows that the Board will not entertain similar complaints on the subject of what constitutes “infrequent occasions” until such time as an enforceable standard is adopted.

6. In Complaint 2006 No. 10, it was alleged that a legislator had violated the Act because he accepted the full legislative reimbursement rate for days he was not present during the legislative session. The legislative reimbursement rate is established pursuant to the authority granted to the Legislature by RCW 44.04.120 and is known as the “in lieu of per diem” statute. However, RCW 42.52.320 limits the jurisdiction of the Board to

enforcement of the Act. The Board determined that the Act "...confers no authority on the Board to adjudicate issues relating to the conditions of payment of per diem to legislators provided for in RCW 44.04." The complaint was dismissed for lack of jurisdiction. The allegation in this case, that Respondents violated the Act when they received the maximum daily legislative expense allowance for a day when they also received a complimentary meal, is dismissed for lack of jurisdiction.

7. During the course of the investigation it became apparent to the Board that lobbyists are not always accurate when they report gift meals to the PDC. Lobbyists and legislators are reminded that the lobbyist-host must be present.

*Unsolicited food and beverages in the form of hosted receptions and meals related to official duties are exempted from the fifty dollar limit by RCW 42.52.150(2)f and (5). In order to come under that provision, however, the event has to include participation by the lobbyist-host. **If a meal is involved, there must be direct contact and discussion of legislative business**, as stated by the Board in Advisory Opinion 1996 – No. 15, Restaurant Association Event (emphasis added).*

4. Summary

1. The Board has serious concerns about the allegations raised in this complaint. The Board has held three meetings over several months to discuss those allegations and their relationship with the Act. The Board will continue to work on resolutions to the questions that have been raised.
2. Even if the lobbyist reports on file with the PDC were accurate and complied with reporting requirements the statute in question lacks an enforceable standard. After the 2014 legislative session the Board will consider the adoption of a rule, or rules, that define "infrequent occasions."
3. Until an enforceable standard is established, either by board rule or legislative action during the 2014 session, the Board will not entertain ethics complaints based upon allegations that free meals and beverages have been accepted on more than infrequent occasions. Any rule of the Board which establishes a definition of "infrequent occasions" will be applied prospectively.
4. The Board reminds lobbyists and legislators that the lobbyist or lobbyists who propose to pay for a gift meal must be present at the occasion. Otherwise, the receipt of the gift meal would be a violation of the Act (RCW 42.52.150(5)).
5. The allegation with regard to acceptance of complimentary meals on days when the maximum legislative reimbursement was also received is dismissed for lack of subject-matter jurisdiction.

Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this complaint is dismissed.

Kristine F. Hoover

Kristine F. Hoover, Chair

Date: *12/18/2013*