

Legislative Ethics Board

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COMPLAINT 2017 – Nos. 12, 13 and 14

In Re Ericksen

June 30, 2017

ORDER OF DISMISSAL: LACK OF REASONABLE CAUSE

I. Nature of the Complaints

The complaints allege that Sen. Doug Ericksen violated the Ethics in Public Service Act when he accepted a paid position with the Environmental Protection Agency (EPA). Taken together, the complaints allege that his position at the EPA constitutes a “civil office” in violation of Art. 2, Sect. 14 of the Washington State Constitution, that his duties as an EPA employee are incompatible with his obligations as a member of the Washington State Legislature, and that the duties of his EPA position effectively prevent him from performing his job as a legislator.

The complainants, together with several other constituents of Sen. Ericksen, raised multiple theories in support of their argument that Sen. Ericksen’s acceptance and performance of the EPA position constitute violations of the Ethics in Public Service Act. This opinion attempts to address each argument offered in support of the complainants’ conclusion, with particular attention paid to RCW 42.52.020, a statute prohibiting a state officer from participating in an activity incompatible with public duties.

II. Findings of Fact

In January 2017, Sen. Doug Ericksen accepted a position on the transition team for the EPA on behalf of the Trump Administration. As part of the transition team, he accepted the role of “communications lead” for the team. He stated that his job was a temporary position. In an unsuccessful recall petition, he declared: “On January 21, 2017, [I] accepted a temporary job

with President Donald J. Trump's transition team at the U.S. Environmental Protection Agency." His federal identification card will expire on July 12, 2017.

Sen. Ericksen described three functions of his job: media communications on behalf of the EPA, briefing agency employees on issues related to communications efforts, and working with career professionals at EPA to assist in developing a communications strategy. He stated that he produces no policy work, has no oversight authority, and provides no advice to EPA personnel regarding issues before the Washington legislature. As an EPA employee, he stated that his sole connection to Washington residents and businesses has been to guide inquiries to the personnel best suited to answering them.

Sen. Ericksen stated that he was compensated for his EPA position when he was at work in Washington DC. He is "paid by the hour." When traveling, in Olympia, or working on legislative issues while in DC, he stated that he is not paid by the EPA.

When working for the EPA, Sen. Ericksen continued to receive his full legislative salary.

His EPA job required that Sen. Ericksen be present in Washington DC. Accordingly, he missed multiple committee meetings in Olympia. His absence likely impacted the conduct of floor action on the Senate floor, as he is a member of the majority in a 25-24 divided chamber.

Through May 21, 2017, Sen. Ericksen has claimed per diem for only part of the legislative session:

January 9-15, January 31
February 8-9, February 21-28
March 1-12, March 20-26
March 27-April 30
May 2-4, May 15-21

He stated that he has engaged in no activities with dual functions, when he would be appearing as a state senator and on behalf of the EPA.

III. Jurisdiction

The Board has personal and partial subject-matter jurisdiction. RCW 42.52.320.

IV. Conclusions of Law

The complaints and the Board's investigation raised multiple theories regarding Sen. Ericksen's actions and whether those actions constitute a violation of Chapter 42.52 RCW, the limit of the Board's authority. Each issue is addressed individually below.

The Washington legislature is a citizen-legislature, composed of individuals who are authorized to hold non-legislative jobs, and who are presumed to bring the knowledge and experience from those jobs to the work of the legislature. In considering potential conflicts between a legislative and non-legislative job, RCW 42.52.330 requires the Board to interpret such conflicts “in light of this constitutional principle.”

The constitutional “civil office” prohibition.

Article 2, Sect. 14 of the Washington State Constitution limits the ability of legislators to hold certain positions:

No person, being a member of congress, or holding any civil or military office under the United States or any other power, shall be eligible to be a member of the legislature; and if any person after his election as a member of the legislature, shall be elected to congress or be appointed to any other office, civil or military, under the government of the United States, or any other power, his acceptance thereof shall vacate his seat....

The Board’s authority is limited to enforcement of “this chapter [RCW 42.52] and rules adopted under it with respect to members and employees of the legislature.” It does not extend to consideration of constitutional violations. Complaint Opinion 2005 – No. 3 (Green).

When initially adopted, the ethics provisions applicable to legislators included possible constitutional violations. However, such authority was removed when the Ethics in Public Service Act was adopted in 1994.

Incompatible offices.

The doctrine of incompatible offices is a judicial tool used to determine whether an individual should be barred from holding two public positions simultaneously. “Offices are incompatible when the nature and duties of the offices are such as to render it improper, from consideration of public policy, for one person to retain both.” The court should consider “whether the functions of the two are inherently inconsistent or repugnant, or whether the occupancy of both offices is detrimental to the public interest.” *Kenneth v. Levine*, 50 Wn.2d 212 (1957).

Complaints asserting doctrine of incompatible offices have been filed on at least two prior occasions. Each time the Board determined that the doctrine was a judicial doctrine outside of the Board’s jurisdiction. Complaint 2011 – No. 1 (Armstrong); Complaint 2005 – No. 6 (Sheldon) (“The Act does not confer jurisdiction on the Ethics Board to enforce this Doctrine”). In the decade since the Board has made its initial determination on whether it has jurisdiction to consider complaints addressing the doctrine, the legislature has not amended the Ethics in Public Service Act to provide such jurisdiction to the Board.

Acceptance of two salaries.

The Board has faced a version of this question previously. In Complaint Opinion 2016 – No. 4 (Shea), the complaint alleged that Rep. Shea accepted his salary as a legislator when acting on a non-legislative issue. The Board noted that “legislative salaries are implemented through provisions of the Washington State Constitution, Article 28, Section 1” and not through the Ethics in Public Service Act; the Board noted its lack of jurisdiction. *See also* Complaint Opinion 2005 – No. 6 (Sheldon) (acceptance of two governmental salaries).

For the same reasons set forth above regarding the doctrine of incompatible offices, the Board does not have jurisdiction to consider such claims.

Violation of Oath of Office.

The Washington Attorney General has noted the *possibility* that absence from the legislature could be found by a court to constitute a violation of the oath of office. AGLO 1975 – No. 23. That opinion notes that a legislator’s Oath of Office requires the officer to perform the duties of the office to which the person is elected, and that an excused absence – when taken for reasons unrelated to bona fide legislative business – could be considered as a violation of that oath by a court.

According to Sen. Ericksen, his EPA position requires that he be present in Washington DC. During a legislative session, his absences from the Senate are evident through the fact that committee hearings and floor action are televised. Sen. Ericksen’s absences may also be presumed through his limited use of legislative per diem, which he has claimed only when in Olympia for a full day.

However, as cited above, the Ethics in Public Service Act does not extend to consideration of issues that arise outside of Chapter 42.52.RCW. Accordingly, the Board does not have jurisdiction to consider a claim based on a theory advanced by the Attorney General, and explicitly directed at a conclusion that a court could potentially reach. *See* Complaint Opinion 2005 – No. 6 (Sheldon).

RCW 42.52.020 (Activities incompatible with public duties).

RCW 42.52.020 contains the broadest language applicable to the complaints:

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.

On its face, particularly with the factual circumstances set forth above, this provision forms the heart of the Board's appropriate inquiry. Further, the Board has full jurisdiction to consider its application to Sen. Ericksen and his two jobs. RCW 42.52.320.

The doctrine of the citizen-legislator. The concept of the citizen-legislator was not created by the legislature when it passed the Ethics in Public Service Act in 1994. It is based in the Washington State Constitution, which initially required legislative sessions of only sixty days in odd-numbered years. Article 2, Section 12. Other than the "civil office" prohibition in Article 2, Section 14, the constitution does not limit legislators' ability to hold outside professions. (Accordingly, the only other written limits on legislators' non-legislative jobs arise within the ethics act itself, through provisions such as RCW 42.52.020.)

The language of RCW 42.52.020 is broad, and was no doubt intended to provide the Board with authority to consider a variety of conditions affecting part-time legislators: effectively it states, "No state officer may engage in a professional activity that is in conflict with the proper discharge of the state officer's official duties." The legislature provided the Board with a flexible tool to apply as needed, and as circumstances changed.

Nevertheless, the Act also established boundaries for Board action. In considering the application of RCW 42.52.020, the Board is also required to address RCW 42.52.330:

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.

This is a mandatory facet of the Board's deliberative process. Although many provisions of the ethics act (such as the general prohibition on gifts, or use of state facilities in campaigns) are not affected by the citizen-legislator concept, other provisions are clearly impacted. Certainly, when the Board is asked to review whether a particular non-legislative job presents evidence of "activities incompatible with public duties," it also must consider how that provision is to be applied in light of the citizen-legislator concept.

The issue presented by these complaints is a frequent one. The overwhelming majority of legislators hold non-legislative jobs or engage in other professional activity during the months between legislative sessions. Over the last twenty years, the Board issued multiple decisions that consider the broad language of .020 in light of the citizen-legislator concept.

Previous Board decisions generally fell within two categories. In the "functional" series, the Board examined legislative activity to determine if the legislator possibly violated that portion of .020 prohibiting a legislator from having an interest that was in conflict with the performance of official duties. In the "per se" decisions, the Board examined any overlap between a legislator's official actions and the legislator's compensated non-legislative job.

The functional test. Many of the Board's prior decisions addressing RCW 42.52.020 focus on circumstances in which a member's vote will result in a benefit to that member, in excess of any benefit available to others who may be affected by the legislation. Several decisions have noted that "under this exception, 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 [group] to a greater extent than to any other member of such ...group." Advisory Opinion 1995 – No. 1; Complaint Opinion 1995 – No. 6 (Murray); Complaint Opinion 2005 – No. 6 (Sheldon).

Although not controlling authority for the Board, the legislative chambers also apply this concept in determining whether individual legislators may vote on legislation from which those legislators stand to gain. See Senate Rule 22 and House Rule 19 (D).

Of greatest importance is the fact that the functional test arising under .020 applies to specific legislative actions – votes – and the degree to which a particular legislator stands to gain from those votes. The process necessarily calls for a review of the legislator's non-legislative activities, but in each instance requires consideration of that outside employment and the extent to which a legislator will individually benefit from specific legislative action.

The "per se" test. The other decisions arising under .020 have addressed what appears to be the heart of the provision: whether an activity outside the legislature presents a direct conflict with a legislator's official duties.

Advisory Opinion 1998 – No. 6: a legislator should not accept a position as the executive director of an organization focused on the development of grass-roots lobbying. Such a position represents a *per se* conflict with the statute, as the legislator will be compensated by an outside entity for engaging in legislative activity.

Advisory Opinion 1999 – No. 1: a legislative employee may not provide staff support to a committee regarding K-12 education while also serving as a member of the local school board.

Complaint Opinion 1999 – No. 5: a legislator may not be paid for lobbying the legislature on behalf of his outside employer, may not assist the outside employer in developing a legislative agenda, may not disclose confidential information as a part of the outside employment, and may not create a specific outside job through legislation and then accept employment to perform that job.

Complaint Opinion 2005 – No. 6: service as a county commissioner does not conflict with the official duties of a legislator; that a single person could not hold two government jobs is not a distinction recognized in the Ethics Act.

Complaint Opinion 2011 – No. 1: that a legislator has one set of constituents in his legislative job, and another in his second government job, does not present an automatic conflict of interest.

The “per se” cases are most applicable to the complaints against Sen. Ericksen. In each such case, the Board considers the non-legislative job to answer a direct question: is the legislator being compensated by an outside employer for the performance of legislative duties?

For more than twenty years the Board has recognized that the type of conflict envisioned by .020 is more than simply having a non-legislative job (or other interest) that requires attention and time when the legislature is in session. If that were the case, most legislators would violate the provision several times per session, as it is largely impossible to maintain an outside job if the provision were applied on its face. This result would also require the Board to ignore the explicit direction in RCW 42.52.330: to interpret the ethics act in light of the citizen-legislator provision.

Instead, the Board must review the non-legislative job to determine if that job provides compensation to a legislator for the performance of legislative functions. Such an arrangement would appear to violate both RCW 42.52.020 and 42.52.110 (prohibiting additional compensation for the performance of official duties).

In this instance, the only potential overlap between Sen. Ericksen’s legislative job and his EPA position is the shared interest in environmental issues. The jobs are separate in time and location: Sen. Ericksen performs his official function when not at the EPA, and performs the EPA job only at the agency. He does not work on EPA issues when at his legislative job. He has avoided possible problems that would arise if he engaged in activity that serves both functions. The absence of any information to support the conclusion that Sen. Ericksen is paid by the EPA to perform Washington state legislative functions requires that the complaints be dismissed.

The Board anticipates that this result, particularly when considering the plain language of RCW 42.52.020, could be puzzling to the complainants and Sen. Ericksen’s constituents. Earlier in this opinion, the Board characterized RCW 42.52.020 as follows: “No state officer may engage in a professional activity that is in conflict with the proper discharge of the state officer’s official duties.” On its face it would appear that having a job requiring one to be absent during parts of a legislative session conflicts with the proper discharge of the responsibilities of an elective office.

However, the Board is not only charged with interpreting and applying .020. It is separately required to do so in light of RCW 42.52.330, the citizen-legislator provision. And in the result it reaches in this opinion, it resolves the two provisions in the same manner it has done so for twenty years.

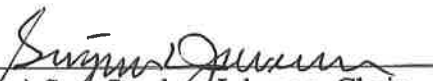
The ultimate question here is a political one – assuming his EPA work continues, whether the time commitments required by Sen. Ericksen’s two jobs are of sufficient concern to the

constituents of his district that they no longer support him in his efforts to remain a state senator. However, that concern is not an ethical one, and is beyond the legal authority of this Board to address.

V. Orders

1. Claims against Sen. Ericksen based on the constitutional "civil office" prohibition, incompatible offices, acceptance of two salaries, and violation of his oath of office are dismissed for lack of subject matter jurisdiction, and

2. Claims against Sen. Ericksen for violation of RCW 42.52.020 are dismissed.


(fmr.) Sen. Stephen Johnson, Chair
Date: June 30, 2017