

Legislative Ethics Board



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COMPLAINT 2020 – No. 13

In re Hudgins
March 4, 2021

REASONABLE CAUSE DETERMINATION AND DISMISSAL OF COMPLAINT

I. NATURE OF COMPLAINT

The complaint alleges that Respondent violated the Ethics in Public Service Act (Act) by using an automated out-of-office response on his official legislative e mail which referred the person e mailing him to his campaign e mail address. Although the complaint does not cite a specific statute to have been violated, the allegations were investigated under RCW 42.52.180 (campaign violation).

II. JURISDICTION

The Board has personal jurisdiction over (former) Rep. Zack Hudgins, the Respondent, who was a member of the House of Representatives at the time the complaint was filed. RCW 42.52.320; *see also In re Reykdal*, 2016 – No. 14. The Board has subject matter jurisdiction over the allegations contained in the complaint.

III. PROCEDURAL HISTORY

Complaint 2020 – No. 12 was received by Board counsel on December 12, 2020 and was discussed during its regularly scheduled meetings on January 18, 2021 and March 1, 2021.

IV. FINDINGS OF FACT

1. Respondent was a member of the House of Representatives from 2003-2021 representing the 11th legislative district. He lost his bid for re-election in 2020.

2. On December 11, 2020, Complainant sent an e mail to several legislators voicing her concerns about the legislature's plan for a remote session.
3. One of the e mails Complainant sent went to Respondent at his legislative e mail address. Respondent had activated an automatic out-of-office e mail response to persons who e mailed him from outside of the legislature.
4. The automatic e mail response Complainant received from Respondent stated as follows:

“It has been an amazing honor serving the people of Washington State and the 11th legislative district for 18 years. I am incredibly proud of my legislative record that created opportunity, protected children and consumers, solved difficult and complex problems, and made government work better for everyone. I worked hard each day to make sure people had a voice in their government. I will always be grateful for the opportunity to make the world a better place that the voters of the 11th gave me.

Beginning in January of 2021, I will not be accessible at this e mail address. You may reach me at zack@zackhudgins.com with non-legislative business. For official business – please reach out to your Representatives.”

5. Complainant researched the e mail address Respondent placed on his out-of-office reply and determined that it was a campaign e mail address. The Board confirmed this fact.
6. In a written response to the complaint, Respondent indicated that he did write and activate the out-of-office e mail about which the Complainant has complained. He stated that he suspended the use of the out-of-office reply when he received notice that an ethics complaint had been filed alleging that the auto-response e mail violated the Act.

V. ANALYSIS AND CONCLUSIONS OF LAW

Respondent's Response

Respondent provided a written response to the complaint. In it he argues that the complaint has three flaws:

- It wrongly assumes there was some assistance to a campaign when an e mail address was included as part of the content in an e mail auto-response. The

complaint does not recognize that the e mail was sent during the post-election allowable time-frame;

- It does not recognize that answering incoming e mail is regular and normal conduct for legislators; and
- E mail addresses and websites are not the same thing as the complaint conflates.

Each of Respondent's arguments will be analyzed separately.

(1) No Benefit to Something that Does Not Exist

Respondent argues that because he lost the election in November, he no longer had a campaign and, as a result, the auto-reply e mail could not have benefitted his campaign. Respondent believes his "candidate" status ended when he lost the election and the election was certified by the Secretary of State on December 4, 2020. He further argues that the auto reply e mail was sent outside the statutory election year activity restrictions which recognize that "the campaign season had ended."

To support his argument, Respondent partially quotes from the intent section to SHB 2106¹ passed during the 2017 session and which amended RCW 42.52.180 and RCW 42.52.185. He argues that in this intent section, the legislature drew a "clear, bright line for the end of campaign season" as follows:

The legislature finds that the prohibition on the use of public resources for campaign purposes serves an important purpose, but that the period prohibiting state legislators from communicating with constituents at public expense is unnecessary once the election, and the campaign itself, has ended. Furthermore, the delay in constituent outreach after the election only hinders a legislator's ability to quickly and effectively respond to requests and keep the public informed . . .

The remaining portion of the intent section states as follows:

"about current state issues, and the various deadlines relating to mailed, e mailed, and web site communications are confusing and need to be harmonized. For these reasons, the legislature intends to change mailed, e mailed, and web site communication deadlines to the same time periods, in order to allow legislators to actively engage with the public on official legislative business in a timely and effective manner."

¹ SHB 2106 made the following changes to two sections of the Ethics in Public Service Act: Changed the election year restriction period for legislative mailings to end on the election certification date, instead of the end of November; required that legislators' permitted communications with constituents during the election restriction period applies during the legislative session until the beginning of the candidate filing period, or during a special session; and provided that the period restricting updates to legislators' websites runs from the beginning of the candidate filing period until the election certification date.

Respondent appears to confuse the election year mailing and other election year restrictions with the ethics provisions of RCW 42.52.180.

The Act does not contain a definition of the term “campaign.” However, in the statutes governing the Public Disclosure Commission (PDC), “election campaign” is defined as “any campaign in support of or in opposition to a candidate for election to public office and any campaign in support of or in opposition to a ballot proposition.” RCW 42.17A.005(19). The start of a campaign is tied generally to the registration requirements for a political committee. RCW 42.17A.205. The end of a campaign is generally considered to occur at the end of an election cycle as that is when campaign fundraising must end. RCW 42.17A.405(2). “Election cycle” means “the period beginning on the first day of January after the date of the last previous general election for the office the candidate seeks and ending on December 31st after the next election for the office.” RCW 42.17A.005(20).

In this matter, the election cycle would have ended on December 31, 2020. Respondent’s out of office e mail response was sent to Complainant on December 11, 2020. The election cycle, from the perspective of the PDC, had not yet ended; therefore, his campaign was still considered active. Although, as Respondent argues, the election year activity restrictions observed by the legislature had ended at the time the auto response was sent, the campaign remained. Furthermore, Respondent was still a legislator at the time he received the e mail from Complainant and could have checked his e mail. In fact, his out of office reply e mail to persons inside the legislative directed those emailing him to contact his legislative assistant.

It is also important to note that while the PDC statutes may have a more limited timeframe for an election campaign because the agency’s focus is on campaign fund raising and other activities, the Ethics Act applies continuously to all elected officials – not just during a specific campaign season. Often the public views elected officials as constantly pursuing reelection. In fact, there have been situations in which members who are far from re-election have been advised not to pursue an activity because it appears to be campaign-like in nature. *See eg., Advisory Opinion, 1997 – No. 7.*

(ii) Answering e mail is regular and normal

Respondent argues in his written response that answering messages from constituents and others can take the bulk of an office’s time and effort and this workload should be recognized as “part of the normal and regular conduct of the office.” Respondent states that Complainant argues there was some political motive in the outbound auto response e mail which he denies because there was no request to support a candidate, campaign or any type of political action in the auto response e mail he sent out. According to Respondent, reaching out to people who write, offering them a way to better direct their inquiries, is clearly in the “normal and regular” conduct of a legislative office.

RCW 42.52.180 prohibits a state officer from using or authorizing the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion or opposition to a ballot proposition. The Board's rules provide further that "[a] legislator or legislative employee may not make private use of state resources for any campaign related activity." Board Rule Number 3(D)(1).

RCW 42.52.180(1) provides a nonexclusive list of what comprises "facilities of an agency." Facilities of an agency "include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency." Official legislative e mail accounts clearly qualify as a facility of an agency.

As Respondent points out, RCW 42.52.180 exempts "activities that are part of the normal and regular conduct of the office or agency." Although the Act does not define the phrase "normal and regular," the Board has construed this phrase over the years in opinions as applied to specific fact patterns. The Board has previously held that such conduct "means activities which are otherwise lawful and customary." *Advisory Opinion* 1995- No. 18 (pg. 3). Furthermore, the Board has previously held that the exceptions to RCW 42.52.180 will be narrowly construed. *In re Schmidt & Huff*, 1998 – No. 3.

Given the time and focus on responding to constituent and other inquiries by a legislative office, such responses would certainly be considered normal and regular conduct, but referring all inquiries made by persons outside the legislature to a campaign address is significantly different. In this case, constituents and others are directed to wait until a new representative takes office or send their inquiry to a campaign address.

Whether the legislative auto-response was properly created at public expense in the first place is not determinative. Rather it is the use to which the auto-response is put which determines whether RCW 42.52.180 has been violated. *In re Hargrove*, 2012 – No. 1. Both RCW 42.52.180 and Board Rule 3(D)(1) do not allow for any campaign related personal use of legislative facilities. And as the Board has previously stated that there is zero tolerance for use of legislative facilities for campaign purposes even if there has been no actual assistance to a campaign. *In re Hunt*, 2019 – No. 3; *In re Young*, 2017 – No. 41; *In re Johnson*, 1996 – No. 1; *Advisory Opinion* 1995 – No. 18.

The auto reply e mail placed by the Respondent on his legislative e mail account which sent people outside the legislature to his campaign e mail account was improper. Respondent argues the response did not assist his campaign because there was no longer an ongoing campaign to assist. Per RCW 42.17A.005(20), the election cycle had not yet ended and, as such, the campaign still existed.² That the auto reply did not "assist" his campaign is not a necessary ingredient to finding a violation of RCW 42.52.180.

² After an election in which a candidate loses, the campaign can remain active, often to pay the outstanding expenses of the campaign.

Even if the election cycle had ended, the provisions of .180 would still apply. It is possible to violate .180 even if a campaign has ended. The campaign site was still active at the time the auto response was sent to complainant. Perhaps Respondent was raising money to retire debt from his 2020 campaign. Perhaps Respondent was contemplating a run for another office. Even if he were not, automatically sending persons who emailed him to his campaign address was neither “normal” nor “regular” and constituted a violation of RCW 42.52.180.

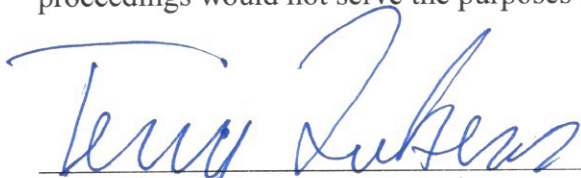
(iii) E mail addresses and websites are not the same thing

Respondent argues that e mail addresses are simple points of contact – “distinct from services that blast out, or host, or promote information/content.” Further, Respondent argues that an e mail address is analogous to a street address, P.O. Box, or phone number in many ways. E mail addresses are simple points of contact information. According to Respondent, that Complainant considered e mail addresses the same as campaign websites was a terrible comparison. “They are no more the same as a P.O. Box at the local post office being the same as a massive billboard on a busy street corner. They may both have [Respondent’s] name on them, but their billing, function, hosting, use, impact and back end are all very different.”

While it would be permissible to direct campaign inquiries to a campaign address, phone number or e mail when a constituent contacts a legislative office by mistake, it is an inappropriate use of state resources to refer legislative inquiries, or in this case, to automatically refer all inquiries from outside the legislature to a campaign contact e mail address.

VI. CONCLUSION AND ORDER

IT IS ORDERED that the Board finds reasonable cause to believe that Respondent violated RCW 42.52.180; however, the Board retains the discretion to dismiss an ethics complaint when it finds, after consideration of all the circumstances, that further proceedings would not serve the purposes of this chapter. RCW 42.52.425. Because Respondent immediately removed the auto reply when this complaint was brought to his attention, the Board has determined that further proceedings would not serve the purposes of the Act and therefore dismisses the complaint.



Judge Terry Lukens, ret., Chair

Date: 3/8/21