

Legislative Ethics Board

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COMPLAINT 2022 – No. 8

In re Sutherland

January 12, 2023

STIPULATION AND ORDER

I. PROCEDURAL HISTORY

Complaint 2022 – No. 8, received on March 28, 2022, alleged that Respondent violated the Ethics Act (RCW 42.52.070) by his inappropriate behavior toward a legislative employee. The complaint was discussed during the Board’s regularly scheduled meetings on April 18, 2022, June 14, 2022 and July 26, 2022. On July 26, 2022, the Board determined that reasonable cause existed to believe Rep. Robert Sutherland violated RCW 42.52.070(1) and (4).¹

II. FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent was a member of the House of Representatives representing the 39th legislative district. He was first elected to the House in 2018.

2. On December 31, 2022, Bernard Dean, the Chief Clerk of the House, sent an email to all House members and staff that, effective January 10, 2022, testing for COVID-19 would be required for all members and staff who work onsite at the Capitol Campus. The email explained that testing would be required Monday, Wednesday and Friday, with the test on Monday covering access for Monday and Tuesday, the test on Wednesday covering access for Wednesday and Thursday, and the test on Friday covering access for Friday and the weekend. The email also specified that failure to adhere to the guidelines may result in removal from House facilities or other disciplinary measures.

3. On January 7, 2022, Mr. Dean sent another email to all House members and staff, reiterating the testing policy and including more detail, specifically noting that testing was available from 7 AM to 3 PM on Monday, Wednesday and Friday, encouraging House members and staff to register so they could sign up for specific times for testing. The email reiterated that a failure to adhere to the guidelines may result in removal from House facilities or other disciplinary measures.

¹ During the 2022 legislative session, RCW 42.52.070 was amended by ESHB 2046 and former subsection (2) was changed to subsection (4). Other than this technical change, there were no substantive changes to the subsection.

4. Members who had not verified their vaccination status but underwent regular testing as prescribed by the House could access the John L. O'Brien Building (JLOB) or authorized House spaces in the Legislative Building after a negative COVID test was confirmed by the vendor.

5. The general practice during session was as follows: the testing vendor would notify House security and House counsel which members and staff had submitted to testing and the results of that testing. If the results were negative, the member or staff's key card was activated. If the member did not test or the test result was positive, the member or staff's key card was deactivated and remained deactivated until the member or staff tested and/or received a negative test result.

6. On February 26, 2022, an email from Mr. Dean informed all members and staff that, effective March 1, 2022, the requirement to verify vaccination status was rescinded; however, the testing requirements remained in place. Because of this rescission, all key cards were activated.

7. At the end of the testing period for a testing day, House security would notify the deputy chief clerk what key cards had been used that day. The deputy chief clerk would provide that information to House counsel who would compare that information to the persons who had submitted to testing and the test results. The key cards of members and staff who had not been tested that day or who tested positive but whose key cards had been used that day would be deactivated until the next testing day.

8. During this time, the House Republican Caucus (HRC) reserved the Columbia Room in the Legislative Building to have in-person and hybrid caucus meetings. HRC received keys to the room, and neither Washington State Patrol nor House Security had access during this time.

9. On Friday, March 4, 2022, Respondent arrived on Capitol Campus and accessed his office in the JLOB building. He did not submit to a COVID-19 test that day as required by House policy. The test information for Friday, March 4, 2022 was compared to the key card access records for the same day by House security. It was clear that Representative Sutherland accessed the JLOB building without having submitted to a COVID test and receiving a negative result, as required by House policy.

10. The House minority leader was informed that Respondent was in his office at JLOB and had not tested. The caucus chair, Representative (Rep.) Paul Harris, was asked by the minority leader to assist security in having Respondent removed from JLOB.

11. Rep. Harris went to Respondent's office and informed him that he needed to leave and why. Once a security officer arrived to assist in removing Respondent from the building, Respondent was compliant and walked out of the building with Rep. Harris.

12. The following day, which was Saturday, March 5, 2022, Respondent arrived on Capitol Campus around 10:00 a.m. He tried his key card at all the doors to the Legislative Building but he could not get inside. His key card did not work as he did not submit to a test on March 4, 2022 and receive a negative result. Only by testing Monday, March 7, 2022 and receiving a negative result, would his keycard be reactivated. Respondent also tried his keycard to access JLOB, but it did not work there either. House security records confirm Respondent swiped his keycard at the JLOB at 9:57 a.m. on March 5, 2022.

13. Respondent contacted House security officer Tim Martin. Respondent asked to access his office and retrieve things left the day before. Mr. Martin was aware that Respondent had been removed from JLOB the previous day for not submitting to testing, and told Respondent he could not let Respondent access JLOB. Mr. Martin offered to and did retrieve the items for Respondent.

14. After several trips by Mr. Martin Respondent went to the Legislative Building. Respondent could not access the Legislative Building because the doors were locked, and Respondent again approached Mr. Martin at the JLOB Building and asked him for his help in accessing the Legislative Building.

15. Respondent told Mr. Martin that he had been able to access the Columbia Room and the Legislative Building the prior day. Respondent became agitated, and said he could not serve his constituents if he was not able to access the building. Mr. Martin offered to call someone to see if that person could help Respondent. Respondent then requested to use the restroom inside JLOB, but Mr. Martin repeated that he could not let Respondent enter JLOB as he had not undergone COVID testing. Respondent agreed and waited outside of the JLOB building for help to arrive.

16. Mr. Martin then called Sean Hartsock, House Sergeant-at-Arms. He told Mr. Hartsock that Respondent wanted access to JLOB and/or the Legislative Building. Mr. Hartsock told Mr. Martin he would come to campus to assist.

17. Mr. Hartsock and his wife arrived on campus and parked in front of the Pritchard Building. Mrs. Hartsock stayed in the car.

18. Mr. Hartsock approached Respondent. Respondent then asked Mr. Hartsock who he was, and Mr. Hartsock explained he was the Sergeant at Arms.

19. Respondent also stated to Mr. Hartsock, "If you'd stop interrupting me, I don't want into this fucking building, (pointed to JLOB), I want into that fucking building (pointed to the Legislative Building)."

20. Mr. Hartsock told Respondent that State Patrol had access to the Legislative building and he should talk to them. Respondent told Mr. Hartsock "Fuck you," to which Mr. Hartsock responded, "Well fuck you too."

21. There is a security video that shows Mr. Hartsock's vehicle approach and park, Mr. Hartsock exit the vehicle, and walk out of the frame. He does not appear rushed. Neither Respondent nor Mr. Martin are visible on the video at the place where their conversation takes place in front of the JLOB building, as the camera is not pointed to their location. Later in the video, two troopers walk into frame for a few moments. Eventually, Respondent can be seen walking into frame, alone, then out again.

22. The troopers heard the shorter man, later identified as Respondent, use an expletive at least twice.

23. During the exchange between Respondent and Mr. Hartsock, Mrs. Hartsock remained in the car. At one point, she heard Respondent say "That fucking building," and saw him point first at JLOB, and second at the Legislative building. Mrs. Hartsock took two photos of Respondent and Mr. Hartsock.

24. In the first photo, Mr. Hartsock has his back to JLOB and his right arm up apparently to shield his eyes from the sun. Respondent has his back to the camera, with his left hand in his pocket and his right arm pointing toward the Legislative building.

25. In the second photo, both Mr. Hartsock and Respondent are in the same position. Mr. Hartsock's left arm is pointed to the Legislative building and Respondent's right hand is up with his index finger pointed up.

26. Eventually, Respondent gained access to the Legislative building but was unable to get into the Columbia Room. Shortly thereafter, he attended a rally at 12:00 PM that took place on the Capitol Campus. He gave a speech at the rally, which was captured via video by a member of the public. The speech was given about an hour after his interaction with Mr. Hartsock. Respondent's remarks at the rally included the following:

"I'm a little depressed today. I drove down from Snohomish to get into my committee so I can vote on a lousy transportation budget - \$16 B over 16 years and it hardly does crap. And I got locked out of the building because I didn't get tested for COVID. I don't have COVID. I'm healthy. Can't keep the people's representatives from working. And then they almost arrested me about an hour ago. The Sgt at Arms - excuse my French - but I looked at him and said, "fuck you." You're not gonna shut us down. The Silent Majority Foundation - what a great bunch of guys. With their help I've got a lawsuit against Jay Inslee and his vaccine mandate. We're going to court. The Speaker of the House decided to lock us out because we wouldn't show our medical papers. We sued her too. We get to depose her later this week. She's not looking forward to it. So much to say, so little time. (Twitter feed ends).

This excerpt was posted to Twitter by user "notmiguel @antifscmiguel."

27. After the exchange, Mr. Hartsock discussed what happened with his supervisor, Chief Clerk Bernard Dean. Mr. Hartsock did not file a complaint against Respondent. The House of Representatives investigated the incident pursuant to their code of conduct. The investigation was done by House Human Resources Director Niki Pavlicek. As part of her investigation, Ms. Pavlicek interviewed Respondent about what happened. Shortly after that interview, Respondent filed a claim alleging Mr. Hartsock violated the House Code of Conduct.

28. On March 25, 2022, Mr. Dean issued a letter formally reprimanding Respondent. As part of that reprimand, he was directed to both attend a refresher course on respectful workplace expectations and a House approved class on constructive conflict coaching. Respondent's appeal of the reprimand was denied by the House Executive Rules Committee on May 20, 2022.

29. On April 20, 2022, Respondent gave a radio interview on the Jason Rantz Show. During that interview, Respondent was asked about his interaction with Mr. Hartsock. Respondent stated repeatedly during the interview that Mr. Hartsock "assaulted" him, and that is what prompted him to say fuck you.

30. During Board Staff's investigation, Respondent provided two separate statements to Board Counsel Jennifer Strus via email on the following dates: May 26, 2022 and August 31, 2022.

III. CONCLUSIONS OF LAW

1. RCW 42.52.070(1) provides:

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, parents, or other persons.

Respondent accessed his office in the JLOB building on March 4, 2022 and had to be escorted from the building. At the time, he had not submitted a COVID-19 test as required by House policy. On March 5, 2022, Respondent again attempted the JLOB building, as confirmed by House key card access records. Respondent also sought access to the restroom inside the JLOB building through security officer Tim Martin. All legislators were obligated to comply with the House COVID policy, including Respondent. In disregarding that obligation, it is alleged Respondent violated RCW 42.52.070(1) by seeking to leverage his position as a legislator to secure a privilege for himself.

2. RCW 42.52.070(4) provides, in pertinent part, the following:

For purposes of this section, and only as applied to legislators and employees of the legislative branch, "special privileges" includes, but is not limited to, engaging in behavior that constitutes harassment. As used in this section:

(a) "Harassment" means engaging in physical, verbal, visual, or psychological conduct that:

- (i) Has the purpose or effect of interfering with the person's work performance;
- (ii) Creates a hostile, intimidating, or offensive work environment; or
- (iii) Constitutes sexual harassment.

Board Rule Number 7B further provides:

In considering complaints that a legislator or legislative staff has engaged in behavior that constitutes harassment, the Board will apply the following substantive standards:

- (1) Reasonable person standard. If a reasonable person similarly situated would not view the conduct that is the subject of the complaint as constituting harassment, the Board will not view the conduct as harassment.
- (2) Substantial interference standard. In interpreting the provision that defines harassment as conduct that has the purpose or effect of interfering with the person's work performance, the Board will find only substantial interference to be the basis for a reasonable cause finding.

Respondent said "fuck you" to Mr. Hartsock during their interaction on March 5, 2022. Respondent's use of that expletive was confirmed by two Washington State troopers who observed their interaction. Based on this conduct, as well his subsequent public statements about the event, it is alleged Respondent violated RCW 42.52.070(4) by engaging in behavior that constitutes harassment. Specifically, it is alleged Respondent's verbal conduct created a hostile or offensive work environment, and applying Board Rule 7, a reasonable person would have viewed Respondent's conduct as harassment.

IV. STIPULATION AND AGREED ORDER

- 1. The Board has personal and subject matter jurisdiction. RCW 42.52.320.
- 2. Rep. Sutherland agrees that if any or all of the alleged violations were proven at a hearing, the Board may impose sanctions, including a civil penalty under RCW 42.52.480(l)(b) of up to \$5,000, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

3. While Respondent maintains his innocence, Respondent agrees that if this matter were to go to hearing, the evidence available to the Board is such that the Board could possibly conclude that he violated the Ethics in Public Service Act. Therefore, in the interest of seeking an expeditious resolution that does not require a hearing, the parties agree to entry of the stipulated findings of fact, conclusions of law and agreed order.

4. Rep. Sutherland agrees to pay a civil penalty in the amount of one-thousand five-hundred dollars (\$1,500) associated with violations of RCW 42.52, and costs of one-thousand dollars (\$1,000).


5. The total civil penalty and costs payment in the amount of two-thousand five-hundred dollars (\$2,500) is payable in full to the Washington State Treasurer within forty-five (45) days after this stipulation is signed and accepted by the Board, or as otherwise agreed to by the parties.

I, Robert Sutherland, hereby certify that I have read this Stipulation and Order in its entirety; that I have had the option of reviewing this agreement with legal counsel, or have actually reviewed it with legal counsel; fully understand its legal significance and consequence; agree to the entry of findings of fact and conclusions of law, and agree to personally sign it as a resolution of this matter and have voluntarily signed this Stipulation and Order.


Rep. Robert Sutherland

Date: 04 January 2022

Having reviewed the proposed Stipulation, and on behalf of the Legislative Ethics Board, the Stipulation is accepted.


Judge Terry Lukens, ret., Chair