

COMPLAINT 2011 – NO. 1

In Re Armstrong

DETERMINATION OF NO REASONABLE CAUSE – ORDER OF DISMISSAL

May, 2011

1. Nature of the Complaint

The complaint alleges that Rep. Mike Armstrong (Respondent) violated numerous provisions of the State Ethics Act (Act). The allegations in the complaint are directly linked to Respondent's private employment with the Port of Chelan County (Port) and Respondent's support of specific legislation favored by the Port and the association to which the Port belongs, the Washington Public Ports Association (WPPA). The WPPA is an association of ports that lobbies for all the State's port districts and it has created a formal group of port employees called the WPPA Legislative Committee (Committee). The WPPA describes the role of the Committee as follows: "The Legislative Committee directs legislative advocacy, discusses issues which may become legislation and devises strategy for legislative action." Respondent is not a member of the Committee but his supervisor at the Port is a member.

2. Background

Respondent is serving his sixth term in the House of Representatives. In June 2008 the Port Commissioners approved the position of External Affairs Director for the Port and Respondent was hired as the External Affairs Director in July 2008. Respondent has served in that capacity from that time until the present and reports directly to the Port's Executive Director, Mr. Mark Urdahl. The duties of the Director as described in the Port's Position Description include, among others, the development of a state legislative agenda and strategy and meeting with state elected officials to advocate for Port projects. Qualifications include an extensive knowledge of and experience successfully functioning within the structure and function of federal, state, regional and local government.

According to Port records the Respondent is placed on leave without pay status during legislative sessions and on other occasions when he is attending legislative meetings.

3. The Allegations

- i. The first allegation is that because the Respondent simultaneously holds the elected position of State Representative and the position of External Affairs Director for the Port, he has violated the common-law principle of incompatible offices.
- ii. The second allegation is that Respondent works as a lobbyist for the Port and the WPPA and when he votes on legislative bills impacting the Port or the WPPA he is securing or attempting to secure special privileges and immunities for those entities in violation of RCW 42.52.070.
- iii. The third allegation is that Respondent has a per se conflict of interest because as a Port employee he cannot properly represent all the citizens of the State or all the citizens of his legislative district, which includes multiple counties. The conflict of interest statute is RCW 42.52.020.
- iv. The fourth allegation is that Respondent sponsored three bills which were legislative policy goals of the Port and the WPPA. This claim apparently is a charge of conflict of interest.
- v. The fifth allegation is that Respondent violated the Executive Conflict of Interest Act when he participated in house committee hearings. The Board recognizes that the complainant may have intended to reference the conflict of interest provisions of the Act directed at legislators since this Board does not have jurisdiction over executive branch employees who are not legislators or legislative employees. This allegation is viewed, therefore, as a conflict of interest charge directed at Respondent's participation in house committee hearings which dealt with the three bills the complainant has pled as evidence of the Respondent's improper involvement in legislation favored by the Port and/or the WPPA.
- vi. The sixth allegation is that Respondent violated RCW 42.52.040 (unlawfully assisting another in a transaction involving the state) when he acted simultaneously as a State Representative and as a Port employee and as a lobbyist for the WPPA.
- vii. The seventh allegation is that Respondent's acceptance of employment with the Port is a per se violation of the Act's confidentiality provisions, RCW 42.52.050, because it is a position that by its nature requires or induces him to disclose confidential information that he holds in the position of legislator.
- viii. The eighth allegation is that Respondent violated RCW 42.52.070, the "special privileges" statute, because he used his legislative position to secure privileges for the Port, its business partners and the WPPA. This claim appears to be directed at Respondent's support of the three bills favored by the Port and the WPPA.
- ix. The ninth allegation contains selected portions of several other provisions of the Act. In support of these charges the complaint offers no alleged facts other than those put forward in support of allegations i-viii. These statutes are:

- a. 42.52.030 – prohibits legislators from having a beneficial interest in certain transactions;
- b. 42.52.110 - prohibits legislators from asking for or receiving a gift for performing or omitting performance of any official duty;
- c. 42.52.120 – prohibits legislators from receiving anything of value outside official duties (with exceptions);
- d. 42.52.140 – prohibits legislators from seeking, soliciting or accepting anything of economic value if it could reasonably be expected to influence a vote, judgment or be considered a reward for action or inaction; and
- e. 42.52.170 – prohibits, under certain circumstances, a person from giving, paying or loaning anything of economic value to a legislator.

4. Conclusion

After an extensive investigation the Board concludes that it lacks jurisdiction over allegation (i) and that the remaining allegations (ii-ix) are not supported by reasonable cause to believe the Act has been violated.

5. The Investigation

The complaint was filed with the Board on February 14, 2011 and an investigation was commenced pursuant to RCW 42.52.420.

The investigation involved interviews and the review of over 4,000 documents. Interviews were conducted with the Respondent and his Legislative Assistant; two registered lobbyists for the WPPA; and on two occasions in Wenatchee, March 8 and April 6, with Executive Director Urdahl and the Port's Director of Business Operations, Ms. Judy Bradford.

The House Office of Program Research assisted in a search of records for a list of Respondent's sponsorship of legislative bills. The Legislative Service Center assisted the investigation through the establishment of search protocols for legislative e-mails and documents germane to the complaint. This search provided 139 e-mails and/or documents which contained references to the WPPA, the Port of Chelan, the WPPA lobbyists, Mark Urdahl, Judy Bradford, the Public Records Act or 1139 or 1299 or 1300 (these were the public records bills cited in the complaint as those bills the Respondent should not have sponsored or supported).

The fact that the WPPA had a Committee charged with the creation of a legislative agenda was discovered during the course of the investigation and the Board directed that a second legislative computer search be conducted for e-mails and/or documents containing the names of those on the Committee. A list of Committee members was provided by the WPPA and the second search provided 33 documents with both the first and last name of Committee members and 2,289 documents which contained last names the same as the last names of Committee members.

With regard to the 33 documents, the Respondent's Port supervisor Urdahl was mentioned most often and in most instances as a "cc" on e-mails also copied or sent to Respondent. None of these included any information which suggested or indicated that Respondent was employed by the Port to represent the Port's interest in the Legislature. The balance of these documents were in the nature of legislative-related meeting notices and several were directed at legislative transportation studies.

With regard to the 2,289 documents, most of these contained the last name of "Rothlin." Jim Rothlin was listed as member of the Committee but "Rothlin" is also the last name of the Chief of Staff for the House Republican Caucus and most of these two thousand plus documents were from, or to, Chief of Staff Rothlin. None of these documents were related to Committee member Jim Rothlin. None of the documents contained any information which would suggest or indicate that Respondent was engaged in working for the WPPA as a lobbyist as alleged in the complaint.

Information provided by the Port included over 2,000 of Respondent's incoming and outgoing Port e-mails and the Port's letter of offer of employment to Respondent. None of these contained any information which would suggest or indicate that Respondent was employed by the Port to lobby in Olympia.

In addition, the Port provided payroll information for Respondent for July 2008 through January 2011. This information reflects Respondent's leave without pay status during legislative sessions.

Further, the Port provided "Claim for Expenses" for Respondent for July 2008 through December 2010. No expenses were found for trips to Olympia for legislative expenses or for expenses involving other legislators.

Other materials requested by the Board and provided by the Port include; a sworn statement by Mark Urdahl describing Respondent's actual job duties which, he states, do not involve all the duties contained in the job description; Port Commission meeting minutes establishing the position of External Affairs Director; and job descriptions and position history of a former Port employee and former legislator who performed at least some of the Port duties required of Respondent.

6. Determination of Facts

Based upon the Board's investigation and consideration of the complaint there is reasonable cause to believe that the following are the pertinent facts of this case.

- (1) Respondent was hired by the Port in July 2008 and from that time to the present has been employed as the Director of External Affairs (Director).

- (2) The Port places Respondent on leave without pay status during legislative sessions and on other occasions when Respondent is traveling on legislative business.
- (3) The Port's written job description for Director contains duties which, if performed by Respondent, would be in conflict with the prohibitions found in earlier Board opinions relative to paid legislative services provided by a legislator to a private employer.
- (4) Among other things, the job description calls for the Director to assist in the development of a state legislative agenda and strategy.
- (5) Mr. Mark Urdahl is the Port's Executive Director and is the Respondent's direct supervisor at the Port. In his sworn Declaration Urdahl states that Respondent, because of his status as a member of the Legislature, has not been assigned any duties or responsibilities concerning state government and legislative matters. The Board's investigation revealed no facts to the contrary.
- (6) The investigation revealed no facts, other than the overbroad job description, to support the complaint's contention that Respondent was employed by the Port to develop state legislative strategies. In his sworn Declaration Urdahl states that the references to the development of legislative strategies were included in the description in the hope the Port could join with other local, governmental entities in cooperative local efforts.
- (7) In his sworn Declaration Urdahl summarizes Respondent's role with the Port as one of managing contracts and relationships at the local level. The investigation revealed no facts to the contrary notwithstanding the job description for the External Affairs Director.
- (8) As alleged in the complaint, Respondent did sponsor and advocate for three bills related to public records. The bills were favored and/or officially supported by the WPPA and the Port.
- (9) Respondent is not employed by the WPPA and the investigation revealed no facts to suggest or indicate that he has any personal financial interest in the outcome of legislation favored by the WPPA.

7. Conclusions of Law

Allegation i – Doctrine of Incompatible Offices is a judicial prohibition.

The Doctrine is a judicial prohibition which limits the ability of a person to hold more than one public office at the same time if the duties and functions are incompatible. The Board has previously determined that it lacks jurisdiction to enforce the doctrine (In Re Sheldon, C2005 – No. 6). RCW 42.52.320 states that the authority of the Board is limited to enforcement of "...this chapter and rules adopted under it with respect to members and employees of the Legislature."

Allegation ii – The Respondent is not a hired lobbyist for the Port or the WPPA and his support and advocacy of the three bills does not confer any special privileges on either entity.

RCW 42.52.070 states that except as required to perform duties within the scope of employment, no legislator may use his or her position to secure special privileges or exemptions for any one, including self. The sponsorship of legislation is within the scope of

employment of a legislator, this invoking the exception. In addition, when a legislator becomes an advocate for a person public resources and the office of the legislator may be used if a government official or government office is involved or that person is seeking assistance on legislative issues. If either of these two conditions is met, there is a sufficient and tangible legislative nexus to conclude that the advocacy is within the scope of a legislator's employment and/or within his or her official duties (Advisory Opinion 2006 – No. 1 and others). There are no facts to support the claim that Respondent used his position to confer a special privilege on the Port or the WPPA.

In addition, there are no facts which suggest that the Respondent used his position as a legislator to improperly benefit himself in this case, such as threatening the Port to give him a job or suffer legislative consequences.

Allegation iii – Simultaneous employment as a legislator and as a Port employee is not a per se conflict of interest.

The complaint concludes that Respondent cannot properly represent the State or his legislative district while representing the interests of the Port. The complaint offers no facts in support of the proposition that citizens outside the boundaries of the Port District are being unlawfully denied proper representation as a consequence of Respondents status as a Port employee. This is, in substance, the same argument put forth in allegation (i) related to the Doctrine of Incompatible Offices except that here the complaint alleges a conflict of interest.

The conflict of interest statute, RCW 42.52.020, prohibits a legislator from having an interest, financial or otherwise, direct or indirect, or engaging in a business or transaction or professional activity that is in conflict with the proper discharge of the legislator's official duties.

The Act directs the Board to analyze conflict of interest allegations pursuant to the citizen-legislator concept which has its foundation in the State Constitution. Accordingly, few instances of outside employment constitute per se conflicts of interest. The concept of a citizen-legislature assumes that many legislators will be engaged in employment outside the Legislature. Per se conflicts of interest include employment as a legislative lobbyist; employment as the executive director of an organization which has lobbying the Legislature as a principal activity; employment as a state agency director; and employment as an agency legislative director (citations omitted). There is no basis for concluding as a matter of law that Respondent may not work for the Port while serving as a legislator.

Allegation iv – It is not a per se violation of the conflicts of interest statute to sponsor or support legislation favorable to one's employer.

This allegation is related to the Respondent's support of the three bills that were legislative policy goals of the WPPA and therefore generally supported by the Port. Numerous opinions of the Board have held that a legislator is not prohibited from supporting legislation favored by the legislator's outside employer or opposing legislation disfavored by that employer (citations omitted). The facts of each case must be looked at to determine, for example, if the legislator is

paid for his or her legislative successes or if the outside employment is conditioned on effective legislative representation.

Allegation v – Participation by Respondent in House committee hearings in support of the three bills does not constitute a conflict of interest.

This allegation is related to (iv) above. The complaint alleges the Respondent has a conflict of interest because he participated in the house hearings on the three public records bills. If the Respondent does not have a conflict of interest through his sponsorship of the bills it does not follow that he has a conflict of interest when he attends a legislative hearing to testify in favor of the bills.

Allegation vi –A legislator does not unlawfully assist another in a transaction involving the state when he supports legislation favored by his outside employer.

The complaint bases this charge on the “fact” that Respondent is a lobbyist for the WPPA. As previously determined this is not a fact. The complaint, relying on this non-fact, continues by concluding that Respondent should not have been involved in promoting the three bills favored by the WPPA and by doing so he provided unlawful assistance to the WPPA in violation of the Act. The inquiry could end here but it may be instructive for further complainants for the Board to clarify the terms of the “transaction involving the state” statute. The definition section of the Act, RCW 42.52.010(23)b, states that “Transaction involving the state” does not include the following: *Preparation, consideration, or enactment of legislation, including appropriation of moneys in a budget, or the performance of legislative duties by an officer or employee...*”

By the terms of the statute, Respondent’s preparation, consideration and support of the bills did not constitute a “transaction involving the state.”

Allegation vii – The Respondent’s employment with the Port is not a per se violation of the Act’s confidentiality statute.

RCW 42.52.070 provides, in pertinent part, that no legislator may accept employment or engage in any business or professional activity that the legislator might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the legislator by reason of his or her official position.

The complaint requests the Board to conclude, as a matter of law, that Respondent violated this provision when he agreed to be a Port employee. We decline to do so.

First, mere employment with the Port creates no reasonable expectation that Respondent would be required or induced to make an unauthorized disclosure of confidential information. Second, the Board has ruled on its scope of inquiry when it has been alleged this statute has been violated and has determined that the identification of the confidential information must be established before the question of unlawful disclosure can be answered (In Re Roach – C2003 – No.2). In the present case there has been no identification of confidential information.

Allegation viii – The special privileges allegation was previously addressed in allegation ii.

This allegation appears directed toward Respondent's support of three bills and if it is the allegation is repetitive. The special privileges allegation was pled in (ii) and dismissed. If the allegation is not related to the support of the three bills then it may be a general allegation that Respondent "must" have used his legislative position in some other fashion to secure unlawful privileges for the Port, its business partners and the WPPA. No facts are alleged in support of this proposition nor were any discovered in the investigation of the facts.

Allegation ix – This allegation lists five more provisions of the Act which were violated. None of the five allegations is supported by any alleged facts other than those put forward in allegations i-viii. They are:

RCW 42.52.030 – Financial interests in transactions - in pertinent part:

- (1) No state officer or state employee, except as provided in subsection (2) of this section, may be beneficially interested, directly or indirectly, in a contract, sale, lease, purchase, or grant that may be made by, through, or is under the supervision of the officer or employee, in whole or in part, or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract, sale, lease, purchase, or grant.
- (2) (this section exempts certain employees of higher education)

The complaint does not involve a contract, sale, lease, purchase or grant made by the Respondent or under his supervision as a legislator. His employment with the Port was a private relationship for payment of salary for Port duties. The statute is inapplicable.

RCW 42.52.110 – Compensation for official duties or nonperformance – in pertinent part:

No state officer or state employee may, directly or indirectly, ask for or give or receive or agree to receive any compensation, gift, reward, or gratuity from a source for performing or omitting or deferring the performance of any official duty, unless otherwise authorized by law except: (1) The state of Washington; or (2) – (certain employees of higher education)

Providing legislative advice and assistance is an official duty under this statute. (Advisory Opinion 1995 – No. 1). However, a legislator who agrees to be paid to work with members of the Legislature in a capacity which actually was the same capacity in which he would work with them on legislation in which he was interested during the legislative session would violate this provision (Senate Advisory Opinion 1969 – No. 1).

This statute is broader than just voting for or against a bill. It also prevents a member from providing legislative assistance for pay, other than legislative compensation, if the assistance is directed toward any anticipated or pending legislative measure and is designed to assist the recipient obtain a favorable outcome with respect to the measure (House Advisory Opinion 1991 – No.2).

Even though the Port's written job description suggests otherwise, the Board's extensive investigation discovered no facts to indicate that Respondent has agreed with the Port or the WPPA to be paid for working with legislators on the three bills or that he has agreed to be paid by the Port or the WPPA for providing either entity with legislative advice or assistance.

RCW 42.52.120 – Compensation for outside activities – pertinent part

- (1) No state officer or state employee may receive anything of economic value under any contract or grant outside of his or her official duties.

The prohibition in this subsection does not apply when each of the following conditions is met:

- (a) The contract is bona fide and actually performed;
- (b) The performance or administration of the contract or grant is not within the course of the officer's official duties, or is not under the officer's or employee's official supervision;
- (c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee (*note: 42.52.040 deals with "transactions involving the state" and as previously noted .040 exempts the preparation, consideration, or enactment of legislation as well as the performance of legislative duties*);
- (d) The contract or grant is neither performed for or compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift (*note: .150(4) limits gifts to officers and employees of regulatory agencies*);
- (e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity;
- (f) The contract or grant would not require unauthorized disclosure of confidential information.

The facts of this case show that all these conditions have been satisfied and that Respondent is not prohibited under this statute from employment with the Port. With regard to (f), confidential information, we have previously dismissed allegation (vii) which characterized Respondent's acceptance of employment with the Port as a per se violation of confidentiality.

RCW 42.52.140 – Gifts

No state officer or state employee may receive, accept, take, seek, or solicit, directly or indirectly, anything of economic value as a gift, gratuity, or favor from a person if it could be reasonably expected that the gift, gratuity, or favor would influence the vote, action, or judgment of the officer or employee, or be considered as part of a reward for action or inaction.

There are no facts, alleged or discovered, which support the claim that Respondent received a gift, gratuity, or favor from the Port or WPPA. He received compensation for his private employment with the Port. This statute is also known as involving the concept of "quid pro quo." In analyzing .140 the Board is primarily looking for conduct which offers or appears to

offer something specific in exchange for something specific. There is no evidence in this case to support a claim of “quid pro quo.”

RCW 42.52.170 – Giving, paying, loaning, etc., anything of economic value to state employee
No person shall give, pay, loan, transfer, or deliver, directly or indirectly, to any other person anything of economic value believing or having reason to believe that there exist circumstances making the receipt thereof a violation of RCW 42.52.040, 42.52.110, 42.52.120, 42.52.140, or 42.52.150.

Since the complaint does not allege or plead facts which suggest that Respondent gave, paid, loaned or transferred anything of economic value to another believing or having reason to believe the receipt thereof would violate one or more of the sections of the Act, the citation of this statute in the complaint must relate to actions of the Port and/or WPPA. The question then is whether the Port or WPPA provided the Respondent with anything of economic value in violation of any of the provisions of the Act listed in .170?

The answer is “no.” Each of these statutes listed in .170, except .150, has been analyzed previously in this opinion.

. 040 involves “transactions involving the state” and exempted from this definition is the preparation, consideration, or enactment of legislation or the performance of legislative duties.

.110 would prohibit the Port and WPPA from paying compensation to the Respondent for performing his legislative duties or omitting or deferring his legislative duties.

.120 would prohibit the Port from providing employment compensation unless the employment was bona fide, actually performed, not under Respondent’s official duties or supervision, not created by him in his capacity as a legislator, etc.

.140 would prohibit the Port and WPPA from giving the Respondent a gift, gratuity or favor if it could reasonably be expected that the gift, gratuity or favor could reasonably be expected to influence Respondent’s action, judgment or vote or be considered as part of a reward for action or inaction.

.150 is the gift statute and prohibits most gifts totaling over \$50. .150 does not prohibit the Port or WPPA from making acceptable gifts to Respondent within the parameters established by the Act for all potential gift-givers.

The Board’s investigation discovered no facts to support a conclusion that either the Port or WPPA provided compensation to Respondent for performing his legislative duties; provided compensation for anything other than bona fide employment; provided a gift, gratuity, or favor in exchange for legislative action, judgment or vote or as a reward for legislative action or inaction; or provided Respondent with an illegal gift.

8. Summation

The main question posed in this complaint is to what extent a legislator may be of legislative assistance to the legislator's outside employer? That inquiry begins with the Act's directive to the Board that the Board is to interpret the Act consistent with the concept and the constitutional design of a part-time citizen legislature.

The outside employer cannot condition employment on legislative results or pay the legislator to push or advance the employer's legislative agenda or to oppose legislation disfavored by the employer. These prohibitions are broader than just voting for or against a bill. A legislator may not provide legislative advice or assistance to an outside employer for pay or as a condition of employment if that advice or assistance is directed toward any anticipated or pending legislative measure and is designed to assist the employer receive a favorable outcome.

Absent facts that a legislator is engaged in any of these types of prohibited employment, the Act does not prohibit a legislator from introducing, supporting, advocating or voting for legislation which may benefit an outside employer or opposing legislation disfavored by the employer.

9. Recommendations

This case illustrates the confusion which can result from an imprecise job description and a less than adequate explanation of the accompanying benefits package.

Among the numerous materials reviewed during the investigation were the Declaration of Mr. Urdahl relative to the Respondent's job duties and the Port's written job description. A necessary element of a job description is the "essential job functions" section. The Board strongly recommends that legislators and private employers make an effort to ensure that the duties and responsibilities of the legislator/employee are clearly and accurately set forth and that the legislator/employee, when acting in his or her legislative capacity, is not expected to provide any special legislative treatment or favorable legislative decisions in exchange for compensation.

Legislators and outside employers need to be thoughtful when considering or negotiating compensation packages. Compensation packages are most commonly understood to be inclusive of benefits such as sick, personal and/or vacation time. There may be legitimate business reasons for offering these benefits to legislator/employees during a legislative session. Perhaps, for example, these were necessary recruiting tools because there were few people available to perform the job or maybe the job functions are highly specialized. Whatever the business reasons which support the employer's decision to allow accrual of benefits during the time a legislator/employee is absent from the business and attending to legislative duties, we recommend those reasons be reflected in the employment documents. Otherwise, there could be questions about whether the accrual of these benefits would be viewed as a form of compensation for legislative work.

In the present case we are satisfied that the facts made available to us through the investigation determined that Respondent was on leave without pay while attending legislative sessions and otherwise conducting his legislative business.

10. Order

It is HEREBY ORDERED, ADJUDGED AND DECREED that allegation (i) is dismissed for lack of jurisdiction and that allegations (ii-ix) are dismissed for lack of reasonable cause to believe the Ethics Act was violated.

David R. Draper, Chair

Date: 5/26/11