

Legislative Ethics Board

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ADVISORY OPINION 2019 – NO. 4A

LEGISLATIVE EMPLOYEE PARTICIPATION IN CAMPAIGN ACTIVITIES
March 2020

The Board has received an advisory opinion request from Brad Hendrickson, Secretary of the Senate, who has waived confidentiality. In his request, Mr. Hendrickson posed two questions. After substantial discussion, the Board determined that it needed more information and discussion before it could respond to the second question. As a result, this opinion responds to only one of the two questions. The second question may be addressed in a later opinion by the Board.

I. BACKGROUND

The Senate practice regarding a legislative employee's participation in campaign activities has been to allow them to fully participate in campaign activities if done on their own time. The Senate does not monitor the activities of its employees on evenings, weekends and vacation time. In the past, Senate employees have been employed by and volunteered for campaigns, and have run for elected office, campaigning on their own time.

The Senate understands that Senate employees may do what they like on their off hours provided the activity is not a conflict with their Senate employment. While the Senate has no formal policy on the matter, it has not allowed employees to take leave without pay or work a reduced (part-time) schedule in order to campaign because it is concerned that allowing leave without pay or working a reduced schedule could be interpreted as a use of state resources.

The House of Representatives has a more restrictive policy covering employees working on campaigns or running for office. The House prohibits employees working on campaigns from being paid to do so from the filing date (usually in May) through the date of the general election. This prohibition applies whether the employee is on leave or not. The House policy further requires an employee to terminate his or her employment with the House if he or she becomes a candidate for any state legislative or statewide elective office.

The requester is not interested in aligning the practices of the House and Senate, but rather, is seeking guidance on the limits of the Ethics in Public Service Act (Act) on the campaign activities of legislative employees.

II. QUESTION

May legislative employees engage in campaign activity in their off hours (evenings, weekends and vacation time) including employment, volunteer activities or as a candidate for public office?

If yes, is the answer different if the employee is a candidate for a legislative office? Statewide office? Local office? Judicial office?

III. ANALYSIS

A. Introduction

Under the Act, there are no provisions that specifically prohibit legislative employees from working on campaigns, whether paid or not, or from running for public office. Legislative employees are, however, prohibited from using any state resources that “directly or indirectly affect” a campaign. RCW 42.52.180.¹

The Board has adopted a “zero-tolerance” policy for campaign-related personal use of legislative facilities, even if such use does not actually assist a campaign. *In re Jill Johnson*, 1996 – No. 1. Any use of state resources by a legislative employee to support the campaign of any person running for state, local or federal office, a judicial position or a ballot measure would violate RCW 42.52.180. This prohibition applies to a legislative employee whether or not on leave, even when engaged in campaign activity on his or her own time, as long as the employee remains a state employee. *See also In re Young*, 2017 – No. 41. As a result, the Board believes that employees who are employed by or volunteer for campaigns may do so only during their non-working hours² or risk violating RCW 42.52.180(1)

¹(1) No state officer or state employee may use or authorize 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 of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. 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. . . RCW 42.52.180.

² Legislative Ethics Board Rule 4 provides as follows: (1) A legislative employee’s working hours are those designated or required by Senate, House of Representatives, or legislative agency work schedule policy. If an employee has a designated work schedule different from the work schedule policy, that employee’s working hours are the hours approved by that employee’s supervisor and the Secretary of the Senate, Chief Clerk of the House of Representatives, or administrative director of a legislative agency, as appropriate.

B. Conflict of Interest

The Board analyzes the situation in which a legislative employee is running for public office under the conflict of interest statute.³ When a legislative employee runs for public office, the concern is that the interests of the legislative employee campaigning for office may create a real or apparent conflict based upon divided loyalties.

Beginning with *Advisory Opinion* 1969 – No. 1, adopted as precedent in this Board’s first opinion, *Advisory Opinion* 1995 – No. 1, conflict of interest questions pertaining to legislators have followed one of two lines of analysis: “per se” or “functional.” In a “per se” analysis, the question is whether the conflict is so severe that the employment or activity itself is a violation of the statute. In the “per se” category, lobbying and offering legislative advice or assistance would be conflicts of interest. *Advisory Opinion* 1995 – No. 1. *See also Advisory Opinion* 1998 – No. 6 (clear conflict if legislator served as executive director of grass roots organization lobbying on subject before legislature.)

In the “functional” analysis the inquiry is whether there are any activities of an “outside” job or activity which can come into conflict with legislative duties, thereby requiring the legislator or employee to refrain from such duties. *In re Eickmeyer*, 2006 – No. 3. Because of the dearth of opinions analyzing RCW 42.52.020 as it pertains to legislative employees, it is not clear whether either the “per se” or “functional” analysis would also apply to legislative employees’ activities. The Board thinks it does apply to employees because the Act is applicable to any state official or state employee and legislative employees are state employees.

It is the Board’s opinion that it is a “per se” violation of RCW 42.52.020 when a legislative employee runs for a state legislative office while continuing to be employed by the legislature. The Board cannot envision a scenario in which a legislative employee running for a state legislative office would not struggle with divided loyalties between campaigning and accomplishing his or her legislative duties.

There could be other scenarios constituting a “per se” violation of RCW 42.52.020 when a legislative employee runs for an office other than a state legislative office. Three scenarios come to mind: 1) a nonpartisan legislative employee runs for an office to be filled by a partisan

(2) “Working hours” do not include the time approved and designated for the employee’s lunch break. Employee lunch periods are assumed to be 12:00 p.m. to 1:00 p.m., unless an employee has a designated work schedule different from the work schedule policy which has been approved by the employee’s supervisor and the Secretary of the Senate, Chief Clerk of the House of Representatives, or administrative director of a legislative agency.

(3) “Working hours” do not include time in official leave status, if the leave has received advance written authorization.

³ RCW 42.52.020 provides that “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.”

election – if the employee is expected to exercise his or her duties in a nonpartisan manner and his or her position requires that he or she maintain the trust of legislators of different political parties, running for office could present a conflict so severe that the employee would have to choose either to remain employed by the legislature or run for office; 2) a legislative employee’s position and duties require him or her to provide services designed to assist legislators in making policy decisions and the employee’s campaign position is at odds with the policy assistance he or she is asked to provide to legislators; or 3) a legislative employee solicits or accepts campaign support from a person who lobbies in the subject area over which the employee has work responsibilities. This list is not meant to be exclusive.

In determining whether there is a conflict of interest if an employee runs for a local, federal, statewide or judicial office, and the situation does not present a “per se” violation as illustrated in the preceding paragraph, the Board believes the “functional” analysis is appropriate. For example, in *Advisory Opinion* 1999 – No. 1, the Board was asked whether a legislative employee could serve as a member of a public school board while performing a variety of tasks, as part of his legislative duties, in the area of K-12 education. Using the “functional” analysis, the Board acknowledged that RCW 42.52.330, which, when determining whether the legislator has a conflict between legislative duties and outside employment, establishes a presumption in favor of outside employment for legislators, does not apply to legislative employees. The Board held that “the possibility that this employee could routinely and properly discharge his substantive and policy-related legislative responsibilities, while at the same time performing the substantive and policy-related responsibilities of a school board member seems remote to us.” The Board concluded that while the Act would not prohibit the legislative employee from seeking election to a school board, if elected, the duties of that position and the employee’s present legislative position would, for the most part, present conflicts which would violate RCW 42.52.020. It recommended that if the employee wanted to run for the school board position, he would have to substantially change his legislative duties to prevent a conflict that would violate .020.

When determining whether a legislative employee’s candidacy violates RCW 42.52.020, the Board will use the “functional” approach. If the employee’s legislative duties can be adjusted to eliminate any potential conflict, there would be no violation of RCW 42.52.020.

C. Other Considerations

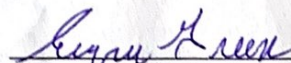
In addition to the conflict of interest analysis, the Board believes it is important to note several other areas that could potentially be problematic when a legislative employee engages in campaign activity or runs for public office.

Legislative employees volunteering or working on campaigns outside their legislative work hours need to be mindful not to reveal any confidential information they may have acquired in

their work as a legislative employee. The Act prohibits an employee from disclosing confidential information learned through his or her legislative position for his or her personal gain or for the benefit of another.⁴ Furthermore, when a legislative employee volunteers, or works on a campaign or runs for a public office, it is important that the employee be clear when dealing with the public about in what capacity they are speaking – legislative employee, campaign worker or candidate.

The Board also notes that either chamber of the legislature may adopt and enforce more restrictive policies than the ethical boundaries provided in this opinion. Conversely, neither chamber may adopt policies that do not adhere to the ethical boundaries provided in this opinion.

On behalf of the Legislative Ethics Board, this opinion is signed on the 30 day of March 2020.



Eugene Green, Chair

⁴ RCW 42.52.050 provides in pertinent part as follows: (2) No state officer or state employee may make a disclosure of confidential information gained by reason of the officer's or employee's official position or otherwise use the information for his or her personal gain or benefit or the gain or benefit of another, unless the disclosure has been authorized by statute or by the terms of a contract involving (a) the state officer's or state employee's agency and (b) the person or persons who have authority to waive the confidentiality of the information. . .