

**COMPLAINT 2005 - NO. 6
In Re Sheldon**

July, 2005

Determination of Jurisdiction and Reasonable Cause - Order of Dismissal

I. NATURE OF THE COMPLAINT

Senator Tim Sheldon currently serves as both a State Senator and a Mason County Commissioner. The Complaint alleges Senator Sheldon has violated the Ethics in Public Service Act (Act) by simultaneously holding the two elective offices.

The allegations may be combined and summarized as follows:

1. Serving in both offices violates the common law Doctrine of Incompatible Offices.
2. Senator Sheldon (i) has a conflict of interest with his role as County Commissioner, in violation of RCW 42.52.020, and (ii) he violated unspecified provisions of the Act whenever he ". . . voted on any matter within the State Senate."
3. By serving as County Commissioner Senator Sheldon has ". . . accepted a position that by its nature requires or induces him to disclose confidential information he holds in the position of Senator," in violation of RCW 42.52.050.
4. Senator Sheldon violates RCW 42.52.040(1), which prohibits some types of assistance provided by legislators to other persons in certain "transactions involving the state, when he participates as both a State Senator and a County Commissioner."

II. CONCLUSIONS

1. The Doctrine of Incompatible Offices is a judicial (common law) doctrine. The Act does not confer jurisdiction on the Ethics Board to enforce this Doctrine.
2. (i) There is no reasonable cause to believe Senator Sheldon has a conflict with the proper discharge of his legislative duties, in violation of RCW 42.52.020, solely because he also serves as a county official and (ii) there are no provisions within the Act which would prohibit a senator from voting on every issue which comes before the Senate. There is no reasonable cause to believe that by voting on any matter, Senator Sheldon has violated the Act.
3. There is no reasonable cause to believe that RCW 42.52.050, which addresses the issue of confidential information, is violated when it is alleged there is a per se prohibition on holding these two elective offices because of the potential for concerns of confidentiality. Apart from the issue of dual office holding, the Board will not exercise jurisdiction over alleged violations of .050 unless there is identifiable information at issue.
4. There is no reasonable cause to believe that RCW 42.52.040(1), which places limitations on legislators in certain "transactions involving the state," is violated when it is alleged the statute is violated solely because the Senator holds two elective offices.

III. ANALYSIS

1. *Doctrine of Incompatible Offices* - The Complaint alleges the Doctrine of Impermissible (sic) Offices is a common law doctrine, established through judicial opinions and implemented and enforced by the courts. We agree. The jurisdictional limits of this Board have been established by the Legislature and may be found in RCW 42.52.320.

Authority of legislative ethics board

(1) The legislative ethics board shall enforce this chapter and rules adopted under it with respect to members and employees of the legislature. . . .

Notwithstanding our conclusion that the Board lacks jurisdiction over this common law doctrine, we believe it is helpful to look briefly to other sources for an explanation of the doctrine as it may relate to conflict of interest, a subject which is addressed by the Act.

In an opinion of the Washington Attorney General, AGO 61-62 No. 177, it was concluded that the offices of state representative and public utility district commissioner were not incompatible under the common law doctrine. In that opinion the Attorney General quoted from a New Jersey court case which recognized that a particular situation may arise in which the interests of the individual in his two capacities may conflict but this is to be distinguished from the common law doctrine of incompatibility.

"There is a difference between the subject of incompatible offices and the subject of conflict of interests. In the former, a clash of duties inheres in the very relationship of one office to the other and is contemplated by the scheme of governmental activities, albeit the occasions may be rare. The consequence will be the nonperformance (or the questionable performance) of one of the other prescribed duties. On the other hand, a conflict in interests by virtue of a dual officeholding by a legislator will not inevitably arise as an incident of the relationship of the two offices. It may arise depending upon what bills are introduced. If it should, the incumbent is not put to a choice of duties. Rather the conflict relates to the duty of one office, the legislative seat. It is true that, if a conflict of interests should arise, it may cast a cloud upon the objectivity of the exercise of legislative discretion. Yet the possibility of a conflict of interests is not peculiar to the case of duality of officeholding by a legislator. Rather it is part of a larger problem which inheres in the nature of the legislative authority and confronts all members of that department of government. This is so because the police power and the taxing power range so widely that every legislator, whether he be in a private calling or in another public post or in neither, must inevitably have some interest which may conceivably be affected by some legislative proposal at some time." *Reilly v. Ozzard*, 33 N.J. 529, 166 A. (2d) 360 (1960) at page 370.

2. *Conflict of Interest and Voting* - The Complainant asks this Board to conclude that Senator Sheldon has a per se conflict of interest because he is a Mason County Commissioner. We decline the invitation to expand the Act so that part time legislators who may hold a second elective office are deemed to be automatically in violation of the Act. The Complaint refers to "unspecified" provisions of the Act which would deny Senator Sheldon the opportunity to vote on any matter before the Senate, regardless of the subject, because he took an oath as County Commissioner. There are no provisions in the Act which would deny, on a universal basis, the ability of a legislator to vote on matters before the Senate.

RCW 42.52.020 provides:

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.

This Board has consistently reaffirmed the citizen-legislator concept, based upon the constitutional principle of a part time legislature. The Legislature recognized this principle in RCW 42.52.330 and therein directed that the Act is to be interpreted accordingly. The constitutional principle of a part time legislature establishes a presumption in favor of employment outside the legislature, for legislators. Complaint Opinions 1999 - No. 5 and 2003 - No. 3. Beginning with Senate Ethics Board Advisory Opinion 1969 - No. 1, adopted as precedent in this Board's first opinion, Advisory Opinion 1995 - No. 1, conflict of interest questions have followed one of two lines of analysis; *per se* or *functional*.

Very few non-legislative employment opportunities are prohibited outright. When they are so prohibited, they are referred to as *per se* conflicts of interest. In a *per se* analysis the question is whether the conflict is so severe that the employment itself is a violation of the statute. Being employed as a lobbyist and serving as executive director of a non-profit engaged in lobbying an issue before the Legislature have been found to be *per se* conflicts of interest for a legislator. Advisory Opinions 1969 - No. 1 and 1995 - No. 1.

Examples of employment situations where the Board has found that a legislator's employment with another governmental entity is not a *per se* conflict of interest include the following: A legislator may serve as a judge pro tempore, Advisory Opinion 2001 - No. 1. A legislator may be employed by Washington State University, Complaint Opinion 2003 - No. 3 or the University of Washington, Complaint Opinion 1999 - No. 5. A legislator may also be employed by King County or the City of Everett, Complaint Opinions 2000 - No. 4 and No. 5, respectively.

Some might argue that "true" employment cases should be viewed differently than the present one, where a legislator is elected to another office, but we find no such distinction in the Act in a *per se* conflicts analysis. This Board would elevate form over substance if we were to conclude that Senator Sheldon as County Commissioner should be judged differently in a *per se* conflict of interest analysis than he would be if he were an employee, in the traditional sense, for a state or local government entity.

In a functional analysis of conflict of interest the Board would inquire, for example, whether there are instances when Senator Sheldon should refrain from being involved in an issue in his legislative capacity while he is a County Commissioner. The general rule for legislators, when acting in their legislative capacity, may be found in several opinions, including Advisory Opinion 1995 - No. 1. 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 business, profession, occupation or group, to a greater extent than to any other member of such business, profession, occupation or group.

Several opinions recognize substantial flexibility for legislators to introduce legislation and advocate its passage when such legislation would, or could, benefit a legislator's employer or benefit the legislator equally with other members of a sufficiently large class. See, for example, Advisory Opinion 1995 - No. 4 (legislator could participate in the consideration of a bill which may increase the value of his property along with the property of others); Advisory Opinion 1995 - No.6 (legislator may advocate for and vote on a bill which could benefit his employer in the future); and Complaint Opinion 1995 - No. 2 (chair of committee could consider his employer's bill in committee,

support it and advocate its passage under the facts of that case). The present complaint does not allege that Senator Sheldon has taken any particular action in his legislative capacity which constitutes a conflict of interest.

3. *Confidential Information* - RCW 42.52.050 states, in pertinent part:

(1) No state officer or state employee may accept employment or engage in any business or professional activity that the officer or employee might reasonably expect would require or induce him or her to make an unauthorized disclosure of confidential information acquired by the official or employee by reason of the official's or employee's position.

The Complaint asserts that the fact Senator Sheldon is also a County Commissioner automatically leads to the legal conclusion that 42.52.050(1) has been violated. This is the same argument put forth in the Complaint with regard to the per se conflict of interest for dual office holders which we have rejected.

Complaint 2003 - No. 2 identified those circumstances when the Board would exercise jurisdiction over a complaint alleging improper disclosure or use of confidential information. In that case we concluded that "confidential information" was a term linked to RCW 42.17.250 *et seq.*, the Public Records Act, and that jurisdiction was established only if we had an identifiable record before us which was clearly public information, or not, or when a Washington court had rendered a decision on the nature of the record in question. No identifiable records or information have been pled or presented in the present case which would allow the Board the opportunity to proceed with this allegation.

4. *Transactions Involving the State* - The Complaint alleges that Senator Sheldon has violated RCW 42.52.040(1) because, again, he is both a State Senator and a County Commissioner. This statute provides:

Assisting in transactions

(1) Except in the course of official duties or incident to official duties, no state officer or state employee may assist another person, directly or indirectly, whether or not for compensation, in a transaction involving the state:

- (a) In which the state officer or state employee has at any time participated; or
- (b) If the transaction involving the state is or has been under the official responsibility of the state officer or state employee within a period of two years preceding such assistance.

There are no Legislative Ethics Board precedents which address RCW 42.52.040. The report of the Commission on Ethics in Government and Campaign Practices, published on January 6, 1994, states that the language of .040 was taken from the old executive conflict of interest act. The purpose of the prohibition, according to the Report, is as follows:

Employees and officials should not benefit personally from assistance to others on matters over which they have influence or responsibility. Such conduct is inconsistent with the view that employees hold positions of public trust and that they should act in the public interest. The public interest can be compromised, or at least the appearance of integrity in the government's decision making process can be compromised, if such assistance is permitted. The Commission recommends clarifying the definition of "transaction involving the state" by providing that the term does not include legislation or proposed legislation (at page 18 of the Report).

The Legislature adopted this recommendation when it passed the Act by including the following in the definition section.

"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; or a claim, case, lawsuit, or similar matter if the officer or employee did not participate in the underlying transaction involving the state that is the basis for the claim, case, or lawsuit. RCW 42.52.010(21)(b)

In accord with our analysis of conflict of interest and confidentiality, we reject Complainant's contention that a per se violation of RCW 42.52.040 occurs solely because a legislator holds another elective office. The Complaint fails to identify any instance of alleged wrongdoing in violation of this statute.

IV. ORDER

The Complaint is dismissed in its entirety.

The allegation that dual office holding by a legislator violates the common law Doctrine of Incompatible Offices is dismissed for lack of jurisdiction.

The allegations that dual office holding by a legislator constitutes per se violations of RCW 42.52.020, RCW 42.52.040(1) or RCW 42.52.050 are dismissed for lack of reasonable cause.

James A. Andersen, Chair