

COMPLAINT 2006 – NO. 8
In Re McMilian

REASONABLE CAUSE DETERMINATION, STIPULATION AND ORDER

November, 2006

I. Nature of the Complaint

The Complaint, filed by the Board on its own motion pursuant to RCW 42.52.410(2), alleges that House employee Jean McMilian, Respondent, (1) used the facilities of the House of Representatives for the purpose of assisting the campaign for the election of Rep. William Eickmeyer in violation of RCW 42.52.180 and (2) made improper personal use of the facilities of the House on her own behalf and on behalf of others in violation of RCW 42.52.160.

The Complaint was filed on August 28, 2006. The Board concluded it had both personal and subject-matter jurisdiction and ordered an investigation by Mr. Ken Wilson, dba Wilson Investigative Services.

Ms. McMilian responded to the allegations by letter on September 18, 2006 in which she denied her use of House facilities for the Representative's campaign and admitted improper personal use of those facilities.

II. Conclusions

The Board concludes there is no reasonable cause to believe that Respondent violated RCW 42.52.180 through the use of House facilities to improperly assist Representative Eickmeyer's campaign for election.

The Board concludes there is reasonable cause to believe that Respondent violated RCW 42.52.160 through the improper personal use of House facilities on her behalf and on behalf of others.

Facts

1. The Respondent is employed as a Legislative Assistant for Rep. Eickmeyer and was working in that capacity during the time subject to the investigation. The investigation covered the time frame from January, 2003 until July, 2006.
2. Respondent admits to using her state computer to conduct personal business for herself and the Representative and using her legislative office phone to make numerous long distance SCAN phone calls to the Representative's campaign manager, her close personal friend, as well as long distance SCAN calls to other friends and family members.

3. Respondent states that most of the phone calls to the campaign manager began as calls to pass along scheduling information regarding the Representative or were attempts to locate him but that many evolved into lengthy personal calls.
4. Respondent cooperated with the investigator in reviewing the calls to the campaign manager and expressed surprise and concern with the frequency and length of the calls. The calls ranged in length from one minute to eighty-one (81) minutes. Two hundred twelve calls (212), totaling five thousand ninety-seven (5,097) minutes were placed by Respondent on her SCAN line to the campaign manager.
5. Respondent acknowledged that some of the calls to the Sound Institute, the Representative's employer, were unrelated to legislative business. There were fifty-seven (57) calls to the Sound Institute during legislative sessions and Respondent states these were likely calls to relay information to and from the Sound Institute at the request of the Representative. A sampling of these calls show that Respondent was at times a contact point for business issues related to the Sound Institute.
6. Respondent identified several other long distance SCAN phone calls as personal. Thirty-nine (39) calls to the Representative's daughter, another close personal friend; six (6) calls to the Women's Correction Center in Purdy; and twenty-nine (29) calls to North Bay Mortgage Company.
7. It is difficult to determine the exact cost to the House of the personal phone calls to the campaign manager due to the representation of the Respondent that at least some of those calls began as legislative-related and evolved into personal calls. Total cost of these SCAN calls is \$285.48. Other calls, purely personal in nature, totaled \$17.34.
8. Several documents were prepared by Respondent on her state computer which were personal to her or were personal business on behalf of the Representative. These documents included personal letters to family, a letter-to-the-editor, a letter to a judge, and documents written on behalf of family members. Letters written on behalf of the Representative included a letter written to a third party regarding Sound Institute, a letter addressed to an unsuccessful job applicant for the Sound Institute and a letter to the staff at Sound Institute.
9. A number of e-mails between Respondent and the Representative's campaign manager initially suggested, on their face, a possible collaboration in assisting the Eickmeyer campaign. The investigation revealed that Respondent forwarded campaign-related e-mails to the campaign manager, absent substantive comment, when those e-mails had been sent to the Representative's office by third parties. There are no facts to suggest that Respondent encouraged the receipt of these e-mails or held herself out as a campaign contact while on the job as the Representative's Legislative Assistant.

10. The total cost of this investigation was approximately \$3,000. The facts indicate that two-thirds of that amount may be attributed to allegation number 2 – improper personal use of public facilities.

IV. Discussion of Violations of Law

RCW 42.52.160 – Use of persons, money or property for private gain.

- (1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.
- (2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.
- (3) The appropriate ethics board may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

This statute therefore prohibits all personal use of public resources outside one's official duties unless the Board has exercised its discretionary authority to craft narrow exceptions to the prohibitions. The Board has, in Board Rule 3, provided for limited exceptions to the statute and has provided a number of hypothetical examples to assist legislators and staff (see Legislative Ethics Manual, 2005-2006 edition, pages 84-89). In addition, every time a legislative employee logs on to their office computer the following warning appears on the initial screen:

REMINDER: You are logging on to the Washington State Legislature's computer network. Use of resources, including the Washington State Legislature's computer network and state issued computers, must comply with the State Ethics Act, RCW 42.52. and Legislative Ethics Board Rule 3.

Rule 3 creates a multi-prong test which, if all conditions are met, permits some limited personal use of public resources (emphasis added). The rule may be summarized as follows:

If there is no actual cost to the state or the cost is de minimis, if there is a public benefit, and if the use does not interfere with the performance of official duties, then infrequent and incidental use of state resources for private benefit may be permissible.

In addition:

Rule 3(4)(c) provides that "(A) legislator or legislative employee may not make private use of any state property which is consumable such as paper, envelopes or spare parts, even if the actual cost to the state is de minimis."

RCW 42.52.160(1) also prohibits the use of public resources to benefit the Sound Institute.

Respondent's use of public facilities in this case is devoid of any public benefit analysis and the frequency and length of the personal phone calls can only be reasonably viewed as interfering with the performance of official duties. Use of public facilities to assist the Sound Institute under the facts of this case finds no exception in Rule 3 or in Board precedent (e.g., Complaint 2005 – No. 1, In Re Higginbotham).

V. Order

Based upon a review of the Complaint, Respondent's answer thereto, and the Board's investigation, the Board determines there is reasonable cause to believe Respondent violated RCW 42.52.160 through improper personal use of the facilities of the House for herself and others.

There is no reasonable cause to believe that Respondent violated RCW 42.52.180 to assist Representative Eickmeyer's campaign through the use of the facilities of the House and that allegation is dismissed.

Board Rule 1(H) provides that a complaint may be settled by stipulation. The Board accepts the Respondent's letter in response to this Complaint as part of that stipulation.

Now, Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Respondent

shall pay to the Washington State Legislative Ethics Board the sum of One Thousand Dollars (\$1,000) for a portion of the cost of the investigation of this case and the additional sum of Two Hundred Dollars (\$200) to the House of Representatives for costs associated with improper personal use of the SCAN system.

Pursuant to Board Rule 5(D) these assessments are the personal responsibility of the Respondent and must be paid within 45 days of the date of this Order, unless an extension is granted by the Board.

I, Jean McMilian, hereby certify that I have read this Reasonable Cause Determination, Stipulation and Order in its entirety; that I stipulate to facts, conclusions of law and penalties; that I have had the option of reviewing this agreement with legal counsel, or have actually reviewed it with legal counsel and fully understand its legal significance and consequence. I agree to sign it as a resolution of this matter and have voluntarily signed.

Jean McMilian

Date:

Having reviewed the Reasonable Cause Determination, Stipulation and Order, and on behalf of the Legislative Ethics Board, the stipulation is accepted.

Wayne Ehlers, Chair

Date: