

Legislative Ethics Board

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COMPLAINT 2021 – No. 3

In re Klippert

May 14, 2021

ORDER OF DISMISSAL – LACK OF REASONABLE CAUSE

I. NATURE OF COMPLAINT

The Complaint alleges the following: “Rep. Klippert [Respondent] made several offensively inappropriate comments, unbecoming of an elected official representing Washington state, toward multiple Black and people of color who gave public testimony.” The complaint alleges that these questions violated the Legislative Code of Conduct and the Ethics in Public Service Act (Act) in that legislators are to treat all others with respect, dignity and civility, regardless of status or position, and to refrain from engaging in hostile, intimidating, offensive or unlawful activities or behaviors that may amount to discrimination, harassment, sexual harassment, or bullying. Although the complaint does not cite a specific statute that has been violated, the allegations were investigated under RCW 42.52.070 (special privileges).

II. JURISDICTION

The Board has personal and subject matter jurisdiction over the allegations in this complaint. RCW 42.52.320.

III. PROCEDURAL HISTORY

Complaint 2021 – No. 3 was received by Board counsel on February 11, 2021 and was discussed during the Board’s regularly scheduled meetings on March 1, 2021 and April 29, 2021.

IV. FINDINGS OF FACT

A. General

1. Respondent has been a member of the House of Representatives since January 2009 representing the 8th legislative district.
2. The following questions or comments by Respondent are what is alleged to have violated either the Code of Conduct or the Act.

B. HB 1054 - Establishing requirements for tactics and equipment used by peace officers

3. HB 1054 was heard by the House Public Safety Committee chaired by Rep. Goodman on January 12, 2021. Respondent is a member of this committee.
4. Respondent asked Rep. Jesse Johnson, sponsor of HB 1054, Vice-Chair of the House Public Safety Committee and a member of the Black Member Caucus: "OK, I'll go with the wha-, first one of eight, leaving seven, hopefully to being able to ask the sponsor of this bill. So Rep. Johnson, on, it was uh the 31st of January 2011, when the papers reported DOC uh Officer Jayme Biendl was murdered um at, I think, Monroe Penitentiary by a very large man and she was not a very large correctional officer so my question to you is in fighting for her life are you telling me that if this bill is passed by the legislature and signed into law that Jayme Biendl had she that day been able to get her in a position, herself in a position to use a lateral vascular neck restraint to save her life. She would have been no longer in compliance with this law should it pass into law so that you're telling me she could not have used lateral vascular neck restraint to save her life when a much larger man was attacking her and in fact killed her."
5. Respondent asked Sonia Joseph, a woman of color, and a member of the Washington Coalition for Police Accountability, who lost a loved one at the hands of law enforcement the following question: "Sonia, you, if I recall correctly, you said my son would not be stopped if he were white. I'm just wondering if you have any evidence to support that statement. It's a very powerful statement and if there's evidence I'd just like to hear what that evidence is."

Ms. Joseph then answered Respondent's question citing national data to which he responded, "Then no specific evidence to support that your son specifically would not have been stopped if he was white?" Chair Goodman had to intervene saying, "I think we're going to avoid litigating any..." to which Respondent quickly responded, "OK, Thank you."
6. Respondent then asked Fred Thomas, another member of the Washington Coalition for Police Accountability, and a Black father who lost his son at the hands of law enforcement, the following question: "Mr. Thomas you said that tear gas should not be used to disperse a crowd. My question to you sir is if a very large political action group um comes to your neighborhood and protests in front of your house so that you cannot move from your house or your community is basically trapped, what tool would you want law enforcement to use to disperse a crowd that refuses to disperse to protect you and your community. If not tear gas, if not water, because we used to use that in the past too, what would you suggest we use to help you and your community to get that crowd dispersed so you could live your lives?" Mr. Thomas responded, "Well, let me answer that with this: had the SWAT team chose tear gas over a bullet, my son would be alive today. So yes, I do have a problem with that I did have a problem with that until I learned that the military won't even use tear gas against known enemies on the theater of battle. So if our own military won't use it against our enemies why should our police force use it on our citizens?"
7. Respondent also asked a question of Michael McPhearson, a member of the Washington Coalition for Police Accountability as follows: "Thank you, Sir. My question is for Michael. Is

Michael still around? I flew helicopters for twenty years, landed people, on Mt. Rainier to do rescues. If now I am armed with a weapon in a helicopter that I bought from the military, say, a Huey for a buck, is that now an armed helicopter, and would that be allowed? Because it says it can't give - the helicopter that used to be military helicopter if its armed is not allowed so if I am armed in that vehi-in that helicopter, am I an armed helicopter?"

C. HB 1203 - Concerning community oversight boards

8. "Representative Johnson, I'm reading on page one, lines 17, 18, and 19, where it says increased community oversight will lead to better policy for avoiding adverse incidences between law enforcement officers and community members. This last weekend in communities in uh, Western United States, um, I heard there was an incident where there was some street racing. A law enforcement officer simply pulled his vehicle where the illegal street racing was taking place and then riots took place after that. I'm just wondering in your opinion, if this bill were to pass, and signed into law. How would this bill help decrease adverse incidents between law enforcement officers and community members such as that?"
9. After the first two constituents gave public testimony, Respondent tried to comment, "It was going to be about what he would do and how law enforcement..." but Chair Roger Goodman reiterated that this was about community oversight boards with oversight of the hiring of chiefs and about policies and procedures, not individual investigations and apologized to King County Councilmember Girmay Zahilay. He did not want to get sucked into litigating individual investigations about the Tacoma event because he did not want to get into the details of the particular event.

D. HB 1267 - Concerning investigation of potential criminal conduct arising from police use of force, including custodial injuries, and other officer-involved incidents

10. Respondent asked Representative Debra Entenmann, who is a part of the Black Member Caucus, "Thank you Mr. Chair. Thank you, Rep Entenmann for bringing this piece of legislation or this bill before us today. My question to you is as you said, "ability to respond within an hour," I am a law enforcement officer. I've been for over 27 years and a uniformed military officer. To respond within an hour even as a soldier uh or as a deputy unless you are in uniform in your vehicle, it is awfully hard to respond within an hour. Do you think this is a realistic expectation for this organization?"

E. HB 1283 - Including the open carry or display of weapons within the offense of criminal mischief

11. "Rep. Senn, thank you for coming to our committee and presenting this bill today. Just very quickly, the 2nd Amendment to the U.S. Constitution says the right of the people to keep and bear arms should not be infringed. The Washington state constitution the right of the individual citizen to bear arms in defense of himself or the state should not be impaired. So my question to you is if I live in a gated community and a riotous crowd breaks through the gate and is now standing in my yard and imposing on my yard and I step out with my family to see what is going on and I'm armed with a rifle or a pistol a deadly weapon. Will I now be in violation of this bill if it passes into law and then if we as legislators vote for this as will we be in violation of the oath that we swore to support the constitution?"

12. Respondent asked Ms. Lyn Idahosa-Berry of the Federal Way Black Collective as she held her young son during her public testimony, “Uh Lyn, I heard your testimony. Did you mean to testify against considering police accountability or open carry of weapons?”
13. Respondent asked Ms. Nyla Fritz, a middle school principal who lost her little brother in a shooting in Moses Lake, Washington, “Thank you, Mr. Chair and Nyla. Thank you very very much for your testimony. I live in Kennewick, Washington. I’m a school resource officer and I very much appreciate your testimony. My question to you is: if someone, a school resource officer, or someone, with a weapon would have been there that day when that person approached the school with a weapon, do you think they would have been able to stop them possibly and you brother would still be alive today?” To which Ms. Fritz responded, “no.”

F. HB 1310 - Concerning permissible uses of force by law enforcement and correctional officers

14. On January 29, 2021 during a House Public Safety Committee, Respondent stated as follows: “Thank you, Mr. Chair I will be voting no today on this uhh bill. I have seen in my career as a law enforcement officer some very heinous crimes um drive-by shooting where innocent victims not associated or intended to be harmed in any way shape or form had been shot and some injured and some have died as a result of that. Um, juvenile gang members who have gone to teachers' classrooms late at night when the teacher was working late at night and and stabbed them right outside of their classroom and killed them um for criminal gang activity. So some of these enhancements that have been put in our law have been put there for a reason. The way that this particular bill is worded I can’t support it at this time in the interest of public safety. Thank you, Mr. Chair.”

G. Email from Chair Hansen

15. On February 2, 2021, Rep. Drew Hansen, chair of the House Committee on Civil Rights & Judiciary, sent an email to all the persons who testified in support of HB 1283. That email stated as follows:

I’m writing to those who testified in support of HB 1283 in the Civil Rights and Judiciary Committee today. I want to apologize for how the hearing proceeded today—specifically, for how some members of the Committee treated several of you. We want the public to feel welcome to testify, and I did not do an adequate job ensuring that members of the Committee treated public testifiers with the respect and courtesy that we expect.

I will be speaking with the ranking member (the lead Republican on the committee, Rep. Walsh) again about our expectations for the Committee. I said at the beginning of today’s hearing (and had earlier communicated to Rep. Walsh) that we expect a civil, respectful Committee, which was clearly not the experience this morning. I should have done a better job enforcing that decorum among the members, which is on me, but I will be speaking with Rep. Walsh to reinforce our expectations—as some members may be more receptive to that message from Rep. Walsh rather than me.

I wanted to thank you for coming to testify this morning. It takes a lot of courage to testify in public, especially on an issue that causes many of you to revisit especially painful experiences in your lives. I am deeply grateful that you took the time to testify, and I apologize wholeheartedly that the Committee did not hear your testimony with the respect and civility that you deserve.

Sincerely, Rep. Drew Hansen

H. Respondent's Response

16. Respondent indicated that the questions he asked the various witnesses were not meant to offend the people testifying nor were they intended to be racist. He indicated that he asked the questions seeking clarity on their impact before he could decide how to vote on these pieces of legislation in executive session.

V. ANALYSIS AND CONCLUSIONS OF LAW

A. Legislative Code of Conduct

The legislature adopted the Legislative Code of Conduct in House Concurrent Resolution 4401 during the 2019 session. The Code of Conduct provides as follows:

The Legislature is committed to maintaining a professional and respectful environment for all members of the legislative community.

As stewards of the public trust each member of the legislative community is expected to:

- *Conduct themselves with self-awareness, self-respect, and professionalism;*
- *Treat all others with respect, dignity, and civility, regardless of status or position; and*
- *Refrain from engaging in hostile, intimidating, offensive, or unlawful activities or behaviors that may amount to discrimination, harassment, sexual harassment or bullying.*

This Code of Conduct applies equally and at all times to all members of the legislative community, both on and off the capitol campus.

The Board has no independent subject matter jurisdiction over alleged violations of the Code of Conduct. To the extent an alleged violation of the Code of Conduct could also be construed as a violation of the Ethics Act, however, the Board would have concurrent subject matter jurisdiction with House and Senate administrations.

B. Special Privileges (RCW 42.52.070)

RCW 42.52.070(1) prohibits a legislator from using his or her position to obtain something someone similarly situated would not be able to obtain. Pursuant to an amendment made to the statute during the 2019 session, the legislature also included, in pertinent part, the following language:

(2) 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 . . .

The complaint alleges that Respondent, by his questions to several people who testified, harassed them, which is prohibited by RCW 42.52.070. Because the addition of "harassment" to RCW 42.52.070 is so recent, the Board has only issued one ruling on what conduct constitutes harassment in the legislative context. See *In re Morgan*, 2020 – No. 3. That ruling is not applicable to the facts of this case.

C. Article II, § 17 of the Washington State Constitution

Article II, § 17 of the Washington Constitution provides: "No member of the legislature shall be liable in any civil action or criminal prosecution whatever, for words spoken in debate." The scope of the state constitution's "speech and debate" clause has never been considered by the Washington courts. To the extent other courts in states with similar constitutional provisions have considered this issue, however, they have determined that if a member is engaged in legislative business at the time he or she makes a statement, he or she is acting within the privilege afforded by that state's constitution. *AGO Opinion No. 134* (May 14, 1962).

A canon of statutory construction provides that a "statute ought not to be construed to violate the constitution if any other possible construction remains available." *Rust v. Sullivan*, 500 U.S. 173 (1991). In determining the meaning of "harassment" for purposes of RCW 42.52.070, therefore, the Board should not interpret the term in a way that would penalize conduct or speech that is protected by Article II, § 17 of the Washington constitution; doing so would cause RCW 42.52.070 to violate the constitution as applied.

The Board holds that when legislators ask questions or make comments to persons testifying on bills during an official legislative committee hearing, those comments or questions cannot constitute harassment for purposes of RCW 42.52.070, even if the questions are offensive, insensitive, rude or awkward. Even though the actions in this complaint may not violate the Act, they may nevertheless constitute a violation of the Legislative Code of Conduct.

VI. CONCLUSION AND ORDER

The Board finds no reasonable cause to believe the Respondent violated any provisions of the Act as alleged in this Complaint.

IT IS HEREBY ORDERED that this Complaint be dismissed.



Judge Terry Lukens, ret., Chair

Date: 5/14/21