

# Legislative Ethics Board



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## COMPLAINT 2022 – NO. 11 *In re House and Senate Staff* October 24, 2022

### I. NATURE OF COMPLAINT

The complaint alleges that Respondents (various House and Senate legislative staff) violated the Ethics Act by taking sick leave on February 16, 2022, to protest the failure of HB 1806 to advance before the cut-off date for bills in the originating House. Although the Complaint does not cite a provision of the Act alleged to have been violated by Respondent, the Board has analyzed the complaint as alleging a violation of RCW 42.52.020 (activities incompatible with public duties) and RCW 42.52.160 (use of state resources for private benefit).

### II. JURISDICTION

The Board has personal and subject matter jurisdiction. RCW 42.52.320.

### III. PROCEDURAL HISTORY

Complaint 2022 – No. 11 was received on June 7, 2022 and was discussed at the Board's regularly scheduled meetings on June 14, July 26, and September 29, 2022.

### IV. FINDINGS OF FACT

1. On January 6, 2022, House Bill 1806 was pre-filed for the 2022 legislative session.
2. HB 1806 would have authorized legislative employees to collectively bargain. It passed out of the House Labor & Workplace Standards on February 1, 2022 and was referred to the Appropriations Committee. The Appropriations Committee passed the bill on February 7, 2022 and referred it to the Rules Committee.
3. On January 24, 2022, at the request of the House and Senate ethics advisers, Board counsel sent the following email to all House and Senate staff:

*In light of the introduction of SB 5773 and HB 1806, which would allow certain state workers, including legislative staff, to unionize, there have been many*

questions about state staff weighing in on these bills. As a result, it's important to remind everyone about the rules prohibiting legislative employees from lobbying.

Legislative employees, including legislative assistants, session aides, interns and policy staff, may not lobby for or against any bill, regardless of the subject matter. The Legislative Ethics Board has interpreted employee lobbying as incompatible with your official duties under RCW 42.52.020. It is also a violation of Senate Rule 6(1) and House Rule 7.

Although SB 5773 and HB 1806 may directly affect you, providing your opinion and advocating for or against the bill is still considered lobbying.

*What can you do?*

- If your member asks your opinion, you can give them your opinion.
- You can also tell your family or your personal friends your opinion.

*What can't you do?*

- You can't post your opinion on your personal social media. While your social media accounts are yours personally, the prohibition against staff lobbying applies at all times, and lobbying is a conflict with your job at the legislature.
- You can't share your personal opinion in constituent communications. The opinions shared should be your member's opinion.
- You can't share your unsolicited opinion with members. (Again, if they ask you, you can answer.)
- You can't talk to the press regarding the bill. If a reporter wants to know if you support it, you need to tell them that staff are prohibited from lobbying on bills. Then refer the reporter to your PIO.

If communications staff receive any inquiries from the press asking to speak to staff who are willing to comment, the press will be told staff is not able to comment and why. And then they will be referred to a member instead.

We understand that this is not the easiest rule to follow, particularly under the circumstances. Thank you for your understanding, and please reach out to the ethics advisers or me with any questions.

4. The House of Origin cut-off date for bills was February 15, 2022. HB 1806 did not advance.
5. On February 16, 2022, 29 Senate employees, mostly Democratic caucus legislative assistants (LAs) and Senate Democratic caucus staff took sick leave. Most of the staff took 4 hours of sick leave.
6. Also on February 16, 2022, 36 House staff, mostly Democratic caucus LAs and House Democratic caucus staff took sick leave.
7. Many of the staff taking sick leave posted the following message on their email out of office replies:

*Thank you for your email. Due to recent events,  
I am unavailable today.*

*In Solidarity,*

*(Name of Staff)*

7. Both the House and Senate administrations approved the staff's sick leave requests for February 16, 2022.
8. Various news sources carried reports of the staffs' actions. The media characterized these actions as a "sickout" in protest over the failure of the collective bargaining bill, HB 1806 to pass out of the House. Those news sources were:

- Ballotpedia union station
- MyNorthwest.com
- Spokesman Review
- Thehill.com
- Seattle times.com

9. On February 16, 2022, in a media availability broadcast on TVW, Speaker Jenkins was asked the following question by Austin Jenkins: *100 staff have called in sick upset over the collective bargaining bill dying. Speaker Jenkins what is your understanding of what is going on today – how many have called in sick, have they issued demands? What are you hearing about the situation today?*

*Speaker Jenkins' response: what I heard early today – there were somewhere near 50 – the numbers are important but to me what's even more important is we be on a path to get to the place where we want to be – where we desire to be. So I think we are on that path.*

*And I do think that employees – legislative employees are not allowed to lobby by statute – they are prohibited from that so they have to think about what tools they have to express their opinions and this is one of them and I hear them.*

10. On February 22, 2022, Speaker of the House Laurie Jenkins sent an email to all House Democratic members and staff. The same day, this email was shared with all House employees and members by Bernard Dean, Chief Clerk of the House. The email states as follows:

*With a little over two weeks to go, thank you for the work you have done to support the people of Washington this session, and for the past two years during the pandemic. The success of our caucus is due to your partnership with and commitment to the people of Washington, each other and members. This success comes at a cost. The workload pressures you are experiencing as we continue to navigate our recovery from the pandemic are untenable at times. While I recognize the impact the pandemic has had on staff as we close in on year two of remote work, I acknowledge my understanding is limited to your "work life". I know the pandemic has impacted every single Washingtonian's "home life" too, including all of yours.*

*I can't predict when we will officially be out of the pandemic and back to "normal" in the workplace, but I can commit to working to provide House staff the resources needed as we move into this next chapter. Resources go beyond additional staff or new technology options.*

*The ability to collectively bargain is one of those resource options. So, Rep. Riccelli has introduced HB 2124. The bill accomplishes the two primary priorities I support moving forward. First, the prohibition on staff collective bargaining is lifted. Second, a Legislative Labor Relations Agency is created to facilitate these efforts moving forward. The new agency is tasked with providing options for legislative branch bargaining that reflects our unique workplace and ensures there is a statutory framework that recognizes the complexities of our work environment.*

*There is a delayed implementation for lifting the collective bargaining prohibition so that the new agency can provide framework options to the legislature but there is a date certain when the prohibition is lifted.*

*I understand there are a lot of emotions and stresses around this issue. I hear you. I see you.*

*My goal has been to ensure you have the right to bargain in a framework that acknowledges our highly unique work environment.*

*I believe Rep. Riccelli's new bill accomplishes those two things, and I fully support the bill moving forward this session. What comes next: the bill will move through Appropriations in the coming week, and Rep. Sullivan will have an amendment to the House budget bill to fund the new Labor Relations Agency. In addition to funding this bill, the House budget includes additional resources for all House workgroups.*

*The Chief Clerk will use the results of the upcoming workload study to determine how to allocate those resources and move forward on resource needs in the next biennium. Again, thank you for your service to the people of this state and to the members of our caucus. Also, thank you for supporting one another during these past couple of years. There are a lot of lessons we can learn from all of you and your commitment to each other during these unprecedented times.*

Laurie

11. On February 23, 2022, HB 2124 (Rep. Riccelli's new bill) was introduced and referred to the House Appropriations Committee. This bill extends collective bargaining rights to legislative employees. This bill passed the legislature on March 10, 2022 and was signed by the Governor on March 31, 2022.

## V. ANALYSIS AND CONCLUSIONS OF LAW

### A. Introduction

The issue presented in this complaint is whether legislative staff's action in taking sick leave in response to the non-passage of a collective bargaining bill constitutes lobbying.<sup>1</sup> If their actions are considered lobbying, the question then becomes whether these actions were in conflict with their official duties in violation of RCW 42.52.020. There is also the question of whether staff action in taking sick leave to protest the non-passage of HB 1806 constitutes a violation of RCW 42.52.160 – using public resources for private gain. Each of these questions will be analyzed separately below.

### B. Lobbying

The definition of lobbying is contained in the statutes governing the Public Disclosure Commission. The definition first appeared in Initiative 276 approved by the voters in 1972. The Initiative defined "lobby" and "lobbying" as follows:

*"Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the State of Washington, or the adoption or rejection of any rule, standard, rate or other legislative enactment of any state agency under the state Administrative Procedure Acts, chap. 34.04 R.C.W. and chap. 28 B.19 R.C.W.*

<sup>1</sup> Senate Rule 6 prohibits staff lobbying: "1) No senate employee shall lobby in favor of or against any matter under consideration. 2) Senate employees are governed by joint rules and chapters 42.17 (the Public Disclosure Act) and 42.52 RCW (the Ethics in Public Service Act)."

House Rule 7 prohibits staff lobbying: "Employees of the house shall perform such duties as are assigned to them by the chief clerk. . . . No house employee shall seek to influence the passage or rejection of proposed legislation."

Under RCW 42.17A.005(34), the current definition of lobbying is as follows:

*"Lobby" and "lobbying" each mean attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington, or the adoption or rejection of any rule, standard, rate, or other legislative enactment of any state agency under the state administrative procedure act, chapter 34.05 RCW. Neither "lobby" nor "lobbying" includes an association's or other organization's act of communicating with the members of that association or organization.*

Washington has a very broad definition of "lobbying" – one that is largely unchanged from the definition contained in the Initiative. By contrast, Oregon's definition is narrower: "Lobbying means influencing or attempting to influence legislative action through oral or written communication with legislative officials . . . ORS § 171.725. Similarly, Utah defines lobbying as "communicating with a public official for the purpose of influencing the passage, defeat, amendment, or postponement of legislative or executive action." UTAH CODE § 36-11-102.

The definition contained in RCW 42.17A.005(34) has commonly been accepted within the legislature and is a standard long used in ethics training of staff. For purposes of applying the provisions of the Act, the Board hereby adopts the definition of "lobby" and "lobbying" contained in RCW 42.17A.005(34).

The term "influence" which is key to Washington's definition is not defined in the statute. As the Board has previously held, when a term is not defined in statute, the ordinary meaning of the term shall apply. *See Advisory Opinion 2020 – No. 1*. Influence is defined as "the power or capacity of causing an effect in indirect or intangible ways or the act or power of producing an effect without apparent exertion of force or direct exercise of command." MERRIAM-WEBSTER.COM.

The question is whether staff's actions in taking sick leave to protest the non-passage of the collective bargaining bill constituted "lobbying" as that term is defined in RCW 42.17A.005(34). Staff using sick leave, especially when their out of office replies indicate why they are absent, could be construed as lobbying. If staff, through the use of sick leave, are attempting to influence the passage or defeat of legislation, then their actions constitute lobbying. Did the use of sick leave "produce an effect without apparent direct exercise of command"? It appears that it did by Speaker Jenkins's own words in the TVW interview "*so they have to think about what tools they have to express their opinions and this is one of them and I hear them.*" A week later, a new bill allowing collective bargaining by legislative employees was introduced in the House. The Board believes that staff were attempting to "produce an effect" or influence the passage of a collective bargaining bill by taking sick leave to show their displeasure at the non-passage of HB 1806, and can conceive of no credible argument to the contrary.

#### C. RCW 42.52.020 – Conflict of Interest

RCW 42.52.020 provides as follows: "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."

Although the Board has not previously been presented with this issue, the ethics advisers have consistently advised that lobbying by legislative employees is a conflict of interest with their official duties

and potentially violative of the Ethics Act. See Finding of Fact #3 above. All new legislative staff receive ethics training. A mainstay of that training is that legislative staff cannot lobby.

Every legislative staff person has a job description whether they are employed by the House, Senate or a legislative agency. This job description sets out the staff person's official duties as a legislative employee. In none of these job descriptions is lobbying listed as an official duty of a legislative employee. The proper discharge of a legislative staff person's official duty does not include lobbying the passage or defeat of a piece of legislation. Furthermore, taking sick leave to protest the non-passage of HB 1806, or lobbying, is a violation of the Act because it is not a duty authorized by a chamber's job description or it was done in violation of an applicable House or Senate rule that the Board regards as defining that person's "official duties."

As legislative staff, the staff person's responsibility is to serve the legislative members. It is the members' opinions that matter not the employee's opinion about particular policy issues. To hold otherwise is to put staff into the same position occupied by a member. Therefore, when staff used sick leave to protest the non-passage of the collective bargaining bill, which actions have already been determined to constitute lobbying, that use of sick leave presented a conflict of interest with the staff's official duties for purposes of .020.

#### D. RCW 42.52.160 – Use of Public Resources for Private Gain

RCW 42.52.160 prohibits the use of public resources<sup>2</sup> under the official control or direction of a legislator or legislative staff or in his or her personal custody, for the private benefit of self or another unless that use is part of a legislator's or legislative staff member's official duties. *In re Schmidt*, 2006 – No. 4. Public resources have been defined by the Board in various opinions over the years. Sick leave, which is a benefit paid for with public funds and provided to all legislative staff, would clearly be considered a facility of an agency. Furthermore, the exception to this rule – that the use of public resources is part of the legislative staff person's official duties – would not be applicable in this matter as we have already determined that lobbying is not an official duty of legislative staff.

An argument could be made that the use of sick leave to protest the non-passage of a collective bargaining bill, which, in some people's opinions would have benefitted the person taking the leave, is a violation of .160. It is the use of public resources (sick leave) for the personal benefit (being able to collectively bargain) of the person taking the sick leave. In *Knudsen v. Wash. State Exec. Ethics Bd.*, 156 Wn. App. 852 (2010), the Court of Appeals held that the use of the work email system by a community college instructor to encourage her colleagues to contact their legislators about a bill currently before the legislature was a violation of RCW 42.52.160. The court opined that .160 does not require that the email result in private benefit or gain; rather, it requires that the email be sent for that purpose. *Id.* at 861. (emphasis added).

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<sup>2</sup> Public resources or "facilities of an agency" include but are not limited to use of stationery, postage, machines, and equipment, use of state employees of an agency during working hours, vehicles, office space, publications of the agency, and clientele lists served by the agency. RCW 42.52.180(1). The Board has also determined that other items not on this list are facilities of an agency. See *Advisory Opinion 2021 – No. 1*.

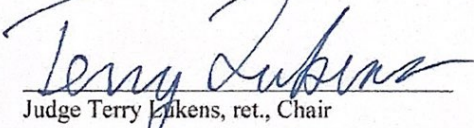
E. RCW 42.17A.635

A section of law governing lobbying by state agency personnel, which originally appeared in Initiative 276, provides the following guidance: "Unless authorized by subsection (3)<sup>3</sup> of this section or otherwise expressly authorized by law, no public funds may be used directly or indirectly for lobbying. However, this does not prevent officers or employees of an [state] agency from communicating with a member of the legislature on the request of that member; or communicating to the legislature, through the proper official channels, requests for legislative action or appropriations that are deemed necessary for the efficient conduct of the public business or actually made in the proper performance of their official duties. **This subsection does not apply to the legislative branch.**" RCW 42.52.635(2) (emphasis added).

This statute was originally designed to curtail the use of public funds by state agencies for lobbying purposes. But subsections (2) and (3) provide exceptions to the general rule. Interestingly, the Initiative specifically stated that these exceptions did not apply to the legislature and that language remains in the current version of the statute. Presumably, the reason for this caveat and its continuation is not to allow legislative staff to lobby, but rather to clarify that the exceptions to lobbying that apply to state agency staff do not apply to legislative staff because it has always been clearly understood that lobbying has never been an official duty of legislative staff.

VI. ORDER

IT IS HEREBY ORDERED: that reasonable cause exists to believe that staff actions in taking sick leave in response to the failure of HB 1806 to advance constituted lobbying and violated both RCW 42.52.020 and RCW 42.52.160. The Board has not previously been presented with the issue of staff lobbying and because it has not had the opportunity to opine on this issue, it has determined that this decision be applied prospectively only. However, henceforth, the Board will not hesitate to find a violation should staff be involved in lobbying any legislation in the future.

  
Judge Terry Lubens, ret., Chair

Date: 10/24/22

<sup>3</sup> RCW 42.17A.635(3) provides as follows: Any agency, not otherwise expressly authorized by law, may expend public funds for lobbying, but such lobbying activity shall be limited to (a) providing information or communicating on matters pertaining to official agency business to any elected official or officer or employee of any agency or (b) advocating the official position or interests of the agency to any elected official or officer or employee of any agency. Public funds may not be expended as a direct or indirect gift or campaign contribution to any elected official or officer or employee of any agency. For the purposes of this subsection, "gift" means a voluntary transfer of any thing of value without consideration of equal or greater value, but does not include informational material transferred for the sole purpose of informing the recipient about matters pertaining to official agency business. This section does not permit the printing of a state publication that has been otherwise prohibited by law.

**COMPLAINT NO. 2022 – NO. 11**  
*In re House & Senate Staff*  
Dissenting Opinion – Rep. Larry Hoff

While I agree that the actions taken by staff in this matter violated both RCW 42.52.020 and RCW 42.52.160, I strongly disagree with the Board's order that this reasonable cause finding be applied prospectively only. The prohibition on lobbying by legislative staff has been clear for many years and is included in all staff training done by the Ethics Advisers. Furthermore, House Rule 7 and Senate Rule 6, which apply to legislative staff, both explicitly prohibit lobbying by staff. The Board has erred by ignoring these facts in its penalty phase. To do so has set a troubling partisan picture and further clouds future disciplinary actions deemed appropriate by the Legislative Ethics Board.