

Legislative Ethics Board

BOARD MEMBERS:
SHONTRANA GATES-WERTMAN
SEN. CHRIS GILDON
REP. DAVID HACKNEY
TOM HOEMANN
LARRY HOFF
STEVE O'BAN
SEN. JAMIE PEDERSEN
PAM TAJIMA PRAEGER
REP. MIKE STEELE



1007 WASHINGTON ST. SE
OLYMPIA, WA 98501
360-786-7343
www.leg.wa.gov/leb

JENNIFER STRUS - COUNSEL
Jennifer.Strus@leg.wa.gov

COMPLAINT 2023 – No. 11

In re Berry

June 21, 2023

NO REASONABLE CAUSE - ORDER OF DISMISSAL

I. NATURE OF COMPLAINT

The Complaint alleges that Respondent violated RCW 42.52.020 by serving as a member of the Arts Fund Board of Directors because the Board engages a lobbyist.

II. JURISDICTION

The Board has personal and subject matter jurisdiction.

III. PROCEDURAL HISTORY

Complaint 2023 – No. 11 was received on April 24, 2023 and discussed at the Board's regularly scheduled meeting on June 12, 2023.

IV. FINDINGS OF FACT

1. Respondent is a member of the state House of Representatives representing the 36th legislative district. She was first elected in 2020 and re-elected in 2022.
2. In August 2022, after Respondent had been asked to join the ArtsFund Board, she consulted House Counsel about whether she could ethically serve as a Board member.
3. House Counsel brought this question to the other legislative ethics advisers at their weekly meeting on August 30, 2022. The ethics advisers' advice, provided to her by email, was that she could serve on the Board; however, as a Board member she could not solicit lobbyists for funding and could not sign funding request letters although it was permissible for her name to appear on the ArtsFund letterhead. Respondent was also cautioned about the use of public resources in serving as a Board member.
4. ArtsFund raises funds from individuals and businesses to support the region's nonprofit arts sector through grants and other organizational assistance. Through its allocation process, ArtsFund has distributed more than \$100 million in grants to more than 650 large and small arts groups that span a variety of disciplines throughout King and Pierce counties.

5. Respondent joined the ArtsFund board in November 2022. It is a volunteer position. She missed all of the meetings from January-April 2023 because of her legislative duties.
6. The duties of the Board include strategic planning, hiring and firing of the CEO, and financial matters of the organization.
7. ArtsFund does employ a lobbyist for the Building for the Arts program, which is a capital program. ArtsFund does not lobby on policy issues.
8. The Building for the Arts (BFA) program was created in 1991. Its purpose is to help direct state funds to arts and culture capital projects in Washington State. The legislature appointed the Department of Commerce as the program administrator. The program is funded entirely through the sale of state bonds and does not involve federal funds. Since it began, BFA has provided \$129 million in grants to over 262 capital projects.
9. The lobbyist hired by ArtsFund lobbies for the organizations recommended for the biennial Building for the Arts grant. ArtsFund coordinates this effort on behalf of the organizations that are recommended for funding. The ArtsFund Board is not involved.

V. ANALYSIS AND CONCLUSIONS OF LAW

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.”

The analysis used to determine whether a legislator has a conflict with outside employment is equally applicable in analyzing the situation when a legislator is a member of the Board of Directors for a non-profit organization. *In re Dhingra*, 2022 – No. 4. In determining whether a legislator’s Board of Directors membership presents a conflict of interest with the legislator’s official duties, the Board has historically used two tests: *per se* and functional. See *In re Pedersen*, 2022 – No. 3.

The *per se* test looks at whether a legislator’s outside employment presents such a direct conflict with his or her official duties that the employment itself would violate .020. The functional test asks whether there are any activities of the “outside” employment that would conflict with a member’s legislative duties, thereby requiring the legislator to refrain from such duties or refrain from the outside employment. *In re Eickmeyer*, 2006 - No. 3.

The general rule is that a legislator does not have an interest 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. *Advisory Opinion 95-1* (adopting the provisions of Joint Rule 2 of the former Code of Legislative Ethics).

Using the *per se* test, the question is whether membership on a board of directors of an organization presents such a direct conflict with a legislator’s official duties that the member cannot sit on the board while serving as an elected official. If the organization’s major purpose or mission is grass roots lobbying

or providing the state legislature with policy recommendations on a particular issue, the legislator's membership on the organization's board of directors could constitute a *per se* conflict of interest. See *Advisory Opinion 1998 – No. 6* (Board equated an organization's purpose of "public education" to grass roots lobbying which it indicated was a *per se* conflict under .020).

Under the functional test, which is the applicable test in this matter, the question is whether the Respondent's board membership accords her a "benefit or detriment . . . 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." The Board finds no evidence of a benefit or detriment that accrued to Respondent because of her membership on the board of directors of ArtsFund. Respondent donated her time to the board; she was not paid as a board member. The application of the functional test to this complaint's set of facts indicates that there was no violation of RCW 42.52.020 resulting from Respondent's board membership. Furthermore, the employment of a lobbyist by a non-profit organization does not automatically make a legislator's membership on the Board of Directors a violation of RCW 42.52.020, especially when the Board does not oversee the work of the lobbyist.

The Board should also consider Board Rule 1.N.2. in determining Respondent did not violate the Act. This Rule provides: "in considering a complaint, the Board will give weight to the fact that the person charged in the complaint relied in good faith on staff advice." Before agreeing to serve on the ArtsFund Board, Respondent sought the advice of House Counsel who brought the issue to the legislative ethics advisers. The evidence indicates that Respondent followed the advice she was provided.

VI. ORDER

IT IS HEREBY ORDERED that reasonable cause does not exist to believe Respondent violated RCW 42.52.020. The complaint is dismissed.



Tom Hoemann, Chair

June 21, 2023

Date