M E M O R A N D U M

October 30, 2009

TO: INTERESTED PARTIES

FROM: JAMES K. PHARRIS
Deputy Solicitor General

SUBJECT: **Use of Public Funds/Facilities on Election Campaigns**

Although 2009 is not a major election year in Washington, there are two statewide measures on the ballot. Initiative Measure 1033 would limit the growth of state, county, and city revenue, and apply excess revenue received to reduce property taxes. Referendum Measure 71 concerns Senate Bill 5688, which would extend additional benefits and responsibilities to domestic partnerships. Both are subjects of broad interest to all voters, including state employees. This, in turn, raises issues concerning the extent to which state officers and employees may be involved with election campaigns and the extent to which public property and facilities may be used for campaign purposes. I attach an updated version of a memorandum I began writing several years ago on this subject. (A copy of this memo may be found at http://www.ethics.wa.gov/RESOURCES/Resources.htm under "Use of Public Funds/ Facilities".

State employees with questions should consult with their own assigned legal counsel, or call me at 664-3027.

JKP/bw

Attachment

M E M O R A N D U M

October 30, 2009

TO: ROB MCKENNA, Attorney General
CORE LEADERSHIP TEAM
LEADERSHIP TEAM
SOLICITOR GENERAL TEAM

FROM: JAMES K. PHARRIS
Deputy Solicitor General

SUBJECT: **2009 Election—Restrictions on Use of Public Funds and Property to Support or Oppose Candidates or Ballot Measures**

I. INTRODUCTION

The primary purpose of this memorandum is to remind everyone in the Attorney General's Office, and through them the client agencies, about the statutory prohibitions regarding the use of public funds and public property and facilities to support or oppose candidates or ballot propositions. The 2009 election will include two statewide ballot propositions in addition to a large number of local offices and local ballot propositions.

II. STATUTORY PROHIBITION AGAINST USE OF PUBLIC FACILITIES TO SUPPORT OR OPPOSE CANDIDATES OR BALLOT PROPOSITIONS

Since January 1, 1995, state agencies and employees have been governed by the state ethics law, codified as RCW 42.52. RCW 42.52.010 defines "state officer" and "state employee" as follows:

> (18) "State officer" means every person holding a position of public trust in or under an executive, legislative, or judicial office of the state. "State officer" includes judges of the superior court, judges of the court of appeals, justices of the supreme court, members of the legislature together with the secretary of the senate and the chief clerk of the house of representatives, holders of elective offices in the executive branch of state government, chief executive officers of state agencies, members of boards, commissions, or committees with authority over one or more state agencies or institutions, and employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work. For the purposes of this chapter, "state officer" also includes any person exercising or undertaking to exercise the powers or functions of a state officer.

(19) "State employee" means an individual who is employed by an agency in any branch of state government. For purposes of this chapter, employees of the superior courts are not state officers or state employees.

Furthermore, subsection (3) of RCW 42.52.180 specifically provides that "[a]s to state officers and employees, this section operates to the exclusion of RCW 42.17.130".

The net effect of these changes, then, is to make RCW 42.52.180 (and not RCW 42.17.130) the relevant statute for analyzing the extent to which state agencies and employees can use public facilities in connection with political campaigns, including campaigns on ballot propositions. The text of RCW 42.52.180 is attached to this memorandum. Several features of the 1994 Act merit special attention.

First, RCW 42.52.180(1) provides that "[k]nowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section." The evident purpose of this sentence is to create imputed liability for supervisors and others who "knowingly acquiesce" in a violation by a subordinate employee.

RCW 42.52.180 provides four types of exceptions to the general prohibition. The first of those four (RCW 42.52.180(2)(a)) relates to action taken by the members of an elected legislative body to express a collective decision supporting or opposing a ballot proposition. The second exception (RCW 42.52.180(2)(b)) provides that "it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds." The third exception (RCW 42.52.180(2)(c)) covers "[a]ctivities that are part of the normal and regular conduct of the office or agency". The fourth exception (RCW 42.52.180(d)) permits "[d]e minimis use of public facilities by statewide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities."

III. CASES, EXECUTIVE ETHICS BOARD MATERIALS, AND ATTORNEY GENERAL OPINIONS

The Executive Ethics Board (EEB) is gradually developing a body of rules and administrative interpretations. The EEB has adopted two rules interpreting RCW 42.52.180. WAC 292-110-020 defines the term "working hours". The definition of "facilities of an agency" in RCW 42.52.180(1) includes "employees of the agency during working hours", and the rule is intended to "flesh out" what the statutory phrase means. A second rule, WAC 292-110-030, defines the term "measurable expenditure". RCW 42.52.180(2)(b) permits elected officials to respond to an inquiry regarding a ballot proposition so long as there is no "actual, measurable expenditure of public funds"; the rule interprets this phrase. These two rules are attached to this memorandum.

The EEB has issued several advisory opinions on the use of public facilities for campaign purposes. One of the early ones, EEB Advisory Opinion 96-10, concluded that an elected official who headed a state agency could, as a matter of "normal and regular conduct", write a letter to agency employees at their home addresses explaining management policies, notwithstanding that the letter was written during an election campaign and that the letter might incidentally assist the official's reelection effort. The opinion was based on a peculiar set of facts, and anyone seeking to extend its reasoning to other fact patterns should be very cautious.

EEB Advisory Opinion 00-08 concerned the use of a state officer's or employee's title in connection with an election campaign. The opinion concluded that the title is not a "tangible facility of an agency" but that any use of a title "must be accompanied by a disclaimer that the officers or employees are speaking only for themselves and not for their agencies."

Several recent advisory opinions also provide valuable guidance. These will not be repeated here, but all of them are available by mail from the Board, 2425 Bristol Court SW, PO Box 40149, Olympia WA 98504-0149, or electronically at www.ethics.wa.gov.

Before the enactment of the current ethics code, state agencies were governed by RCW 42.17.130, which still applies to local governments. Because the language of RCW 42.52.180 is similar to RCW 42.17.130, the case law and opinions construing that statute may still be of relevance in construing the newer law.[1] There are several formal Attorney General Opinions construing RCW 42.17 generally, including RCW 42.17.130. Attorneys trying to interpret the current act should read them, but they should also check their analysis carefully against subsequent changes in the statutes interpreted.

- The first of the three opinions is AGO 1973 No. 14, a long opinion answering some 23 questions about Initiative 276 (the initiative measure whose approval constituted the enactment of what is now RCW 42.17). This opinion is valuable primarily as a discussion of the historical background of the law.

- AGO 1975 No. 23 construes the language concerning "normal and regular conduct of the office or agency" and is worth reading since the same language appears in RCW 42.52.180. The new statute's additions clarify the law in this respect and are substantially in harmony with the analysis contained in AGO 1975 No. 23.

---

[1] There are only a few reported cases construing RCW 42.17.130. *King County Council v. Public Disclosure Commission*, 93 Wn.2d 559, 561, 611 P.2d 1227 (1980), concluded that a county council could, as a matter of "normal and regular conduct", pass resolutions endorsing a ballot measure. *City of Seattle v. State*, 100 Wn.2d 232, 668 P.2d 1266 (1983), held that a city ordinance providing partial public funding for candidates in city elections did not violate RCW 42.17.130. However, subsequent legislation has rendered both of these opinions moot. Later amendments to RCW 42.17.130 explicitly permitted the conduct which the court allowed in *King County Council*, while the enactment of Initiative 134 (RCW 42.17.128) specifically prohibited local governments from using public funds to finance political campaigns for state or local office. In *Washington Education Association v. Public Disclosure Commission*, 150 Wn.2d 612, 80 P.3d 608 (2003), the WEA challenged PDC guidelines discussing RCW 42.17.130's limits on the use of school district facilities in campaigns. The State Supreme Court held that there was no justiciable controversy over nonbinding guidelines.

- AGO 1979 No. 3, construing RCW 42.17.130, concluded that the use of college or university facilities for political conventions, meetings, and candidates' forums did not violate the section, and prohibitions, such as RCW 42.17.130, were not intended to cover "neutral public forum" uses of public property, such as the use of publicly owned facilities on a nondiscriminatory basis for political activities. Since the basic prohibition in RCW 42.52.180 is similar to that contained in RCW 42.17.130, this opinion is probably of continuing relevance in interpreting the new statute. My own view is that RCW 42.52.180, like the older statute, should be interpreted to allow the use of "neutral public forum" facilities when made available on a nondiscriminatory basis for political purposes.[2]

- In a more recent formal opinion, AGO 2005 No. 4 construed the term "elected legislative body" as it appears in RCW 42.17.130. There is parallel language in RCW 42.52.180, but the legislature is clearly the only "elected legislative body" for state government, so this opinion is more useful to local governments than to state agencies.

AG opinions are available on the Internet at: http://www.atg.wa.gov/AGOOpinions/default.aspx.

IV. ADDITIONAL COMMENTS ABOUT THE USE OF PUBLIC FACILITIES

This section of the memorandum is intended to draw together informal advice from a variety of sources (primarily generated in response to ballot measures in previous years), and to point to sources available for help in answering new questions which may arise. Although these answers are intended to be cautious and noncontroversial, the ethics laws are subject to interpretation like all legislation, and reasonable minds might differ on some details. This memo represents my own analysis and is not the official position of the office. Attorneys who are asked for advice about specific situations should check my answers against the current language of the statute, together with any current regulations and any existing or future interpretations of the statute by the agencies with jurisdiction.[3] Where there is disagreement, we should engage in further dialogue with an eye toward giving consistent advice.

As noted above, the Executive Ethics Board has adopted some interpretive rules concerning RCW 42.52.180.[4] Given the language of the statute itself, and factoring in cases and opinions interpreting the older statute (RCW 42.17.130) to some extent, it is possible to make some general statements about political activities under RCW 42.52.180. I think the following activities are quite clearly prohibited by RCW 42.52.180:

---

[2] Although AGO 1979 No. 3 does not explicitly discuss it, some public property constitutes traditional "public forum" areas in which citizens have a constitutional right to assemble and speak. The ethics statute was not intended to prohibit political rallies on the state capitol steps or parades on public streets.

[3] It would be wise to check for interpretive statements both by the Public Disclosure Commission (which continues to administer the provisions of RCW 42.17.130) and the relevant ethics board (*see* RCW 42.52.310-.380).

[4] The law also contemplates individual agency rules on ethics matters. RCW 42.52.200. Many agencies, including the Attorney General's Office, have existing rules or policies which would be relevant to a particular inquiry.

1. Using work hours to solicit signatures for ballot propositions, to raise funds for or against such propositions, or to organize campaigns for or against such propositions. The prohibition similarly bars the use of work time to campaign for or against a candidate for public office.

2. Using public property to campaign for or against a candidate or ballot proposition, except that "neutral forum" public property otherwise open to public use may be used for campaigning also.

3. Using public facilities—including, but not limited to, office space, electronic mail and data processing equipment, word processing and copying facilities, paper, supplies, and any other publicly owned property—for campaigns for or against a ballot proposition, or for or against a candidate, whether during or after work hours.

4. Displaying political material in or on publicly owned vehicles.

5. Displaying or distributing campaign material on publicly owned or operated premises (other than "neutral open forum" property or "personal space" property as discussed below).

6. Using public supplies, equipment, or facilities to print, mail, or otherwise produce or distribute materials supporting or opposing any candidate or ballot proposition.

7. Using publicly owned facilities to instruct or urge public employees to campaign for or against a candidate or ballot proposition on their own time, or stating or implying that their job performance might be judged according to their willingness to use their own time on a campaign.

8. Using public time and/or facilities to draft or pass a resolution by an *appointed* committee, board, or commission taking an official position for or against a pending ballot proposition, or endorsing or opposing a candidate for public office.[5]

Turning to the other side, the following appear to be conduct which is *not* prohibited by RCW 42.52.180:

---

[5] Note that RCW 42.52.180(2)(a) and (b) relate exclusively to elected officials and members of an elected legislative body. Exception (d), relating to "de minimis use of public facilities", also relates only to statewide elected officials and legislators. The only exception which is conceivably applicable to the activities to an appointed board or commission is exception (c), relating to "[a]ctivities that are part of the normal and regular conduct of the office or agency". In light of the specific exception for *elected* boards, it seems unlikely that appointed boards would be held to have the same power by implication. An analysis of this issue would require a careful look at the powers and duties of the particular board, committee, or agency in question.

1. An *elected* legislative body may collectively endorse or oppose a ballot measure if it meets the procedural requirements of RCW 42.52.180(2)(a).[6]

2. An elected official may make a statement in support of, or in opposition to, a ballot proposition at an open press conference, or in response to a specific inquiry, or may make incidental remarks concerning a ballot proposition in an official communication, so long as there is no actual, measurable expenditure of public funds. Again, note that this exception is limited to elected officials and does not, by its terms, extend to such "support" activity as using staff time or state facilities to prepare or distribute such a statement, at least if any "measurable expenditure" of public funds is involved.

3. Statewide elected officials and legislators may make de minimis use of public facilities to prepare or deliver communications giving their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities. Note that this exception is limited, again, to elected officials, and that it is related to the scope of each officer's official duties. Thus, the governor and the members of the legislature may have authority to make statements on more issues than, say, the superintendent of public instruction or the insurance commissioner, whose scope of operation is more narrowly defined.

4. Unless it is inconsistent with some other applicable law or regulation, a public employee is not prohibited from campaigning for or against a ballot proposition on the employee's personal time.[7] It should be clear that the activity is the individual's personal choice and is not tied to job performance in any way. For state employees, the term "personal time" would ordinarily only include: (1)time outside the employee's normal work day; or (2) time when the employee is on vacation leave status or is using leave properly and lawfully accumulated and consistent with applicable statutes and personnel regulations; or (3) on unpaid leave status.[8] As noted earlier, the Executive Ethics Board has interpreted "working hours" in WAC 292-110-020.[9]

---

[6] Note that the body must be both elected and legislative in nature. This issue is discussed in AGO 2005 No. 4, construing language in RCW 42.17.130.

[7] Some state employees whose work is funded with federal funds may be subject to the restrictions of the Hatch Act, a federal statute which is quite different in scope from the state ethics law. Certain employees who work jointly for more than one entity, or who work on contracts for other governments, might be subject to another jurisdiction's restrictions. It is beyond the scope of this memorandum to analyze federal law or restrictions enacted by local governments or other states.

[8] It is an obvious corollary that employees campaigning on their own personal time should avoid stating or implying that they are campaigning on behalf of the state or of a state agency.

[9] The rule recognizes that elected statewide officials do not have working hours as such. Thus, it is up to each elected officer to allocate time between campaigning and other activities. WAC 292-110-020(8). However, elected officers are still prohibited from using, or allowing the use of, staff time or office facilities for campaign purposes. *Id.*

5. Public employees may contact fellow employees, *away from the office*, to circulate petitions or to solicit one another for funds, volunteers, and other activity for and against a ballot proposition or a candidate for public office, but only under circumstances which strictly avoid the use of office time and public property. Officers and employees would be wise to avoid soliciting subordinate employees because, under those circumstances, the subordinate employees may feel (no matter how carefully the campaign is conducted or the inquiry is phrased) that the superior is using improper influence.

6. Where public space is available on a nonrestricted basis to post signs, petitions, and advertisements, or to make speeches and hold meetings, public employees may use these "neutral public forum" spaces to express their own views, including their views on pending ballot propositions, assuming they are not otherwise violating RCW 42.52.180. However, it might well be a violation of the statute for public employees to use their positions to gain special advantage in the use of such "public forum" spaces, such as by signing up all the time for the use of a public auditorium before nonemployees have had an equal opportunity to seek use of the same space, or by using their access to a public bulletin board to occupy the entire space with favored campaign material and leaving no space available for opposing material (or material relating to other matters).

7. Public agencies may conduct research into the likely results of the passage of a ballot proposition. Indeed, where the passage of the proposition would directly affect the agency's duties, an agency might be remiss for *not* conducting such research activity. However, it must be clear that the research is being conducted with the purpose of gathering the facts, is directly related to the ordinary conduct of the agency's business, and is not designed to support or oppose a candidate or ballot measure.[10] I recommend that agencies avoid conducting research or assembling statistical data, which they expect to be requested for use in connection with a campaign, unless they are satisfied that they would have undertaken the same research or statistical efforts for independent reasons, such as planning for contingencies.

8. Public agencies and public employees may supply public records in response to requests made by the supporters or opponents of candidates or ballot propositions. An agency should treat all campaigns fairly and equitably in responding to requests for public records. This is especially sensitive and important, of course, in agencies headed by elected officers who are up for reelection in the near future.

---

[10] The Public Disclosure Commission has wrestled with similar questions for many years, especially in the area of material generated by school districts concerning the possible effect of passage or defeat of a school district levy proposition. The principles developed by the PDC in response to these cases may prove instructive to other agencies. As noted earlier, the ethics boards have also developed their own case law and advisory opinions, and these also might provide answers to questions about public resources.

9. Where two or more measures relate to the same subject, agencies may publish factual information showing the comparative effects of the measures, just as they could publish factual information showing the expected effect of a single measure. However, the agency may not use public facilities or property to favor one proposition over the other, any more than it could urge passage or defeat of both measures.

V. SOME HYPOTHETICAL QUESTIONS ABOUT CAMPAIGN ISSUES, AND SOME SUGGESTIONS ABOUT THE ANSWERS

Following are some hypothetical questions which might be asked about the ethics laws and some comments in response. Assistant attorneys general should remember that their role is to advise state agencies and not individual officers and employees. AAGs can tell individuals what the position of the Attorney General and the agency might be on an issue, but they should remind employees that our office does not provide personal advice and that our office would represent the agency and the public interest in any litigation. If there were a complaint filed with the Executive Ethics Board against a state employee, the employee should expect to secure personal counsel on the matter or appear without counsel. Employees have to make their own personal decisions concerning ethics law compliance. In questionable cases, they should think about conferring with private counsel.

1. I serve by appointment on a commission which governs a state agency. I serve part time and receive no compensation except for attending commission meetings. The other day, I attended a fund raiser in support of an initiative measure which would, if approved, put the commission on a much more solid financial footing. I attended at my own expense and made a contribution to the campaign, which was properly reported. During the announcements, the announcer, specifically against my request, introduced me to the crowd as "Vice Chair of the X Commission". I quickly pointed out that I was attending as a private citizen. Was the use of my title a use of a "public facility or property"?

Unlike paper or ink or time, an officer's title cannot be measured or "expended" in any meaningful way. Knowledge that a particular candidate or ballot proposition is supported by "Commissioner X" may lend some weight or dignity to a campaign event or advertisement, or it may not. Thus, while it may be prudent to avoid using a position or title, primarily to avoid any implication that the agency or its officers are "officially" supporting a particular candidate or proposition, the mere identification of a person by stating his/her title or position would not seem to be a "use" of public facilities. However, it was wise for you to point out that you were attending in your private capacity in order to prevent any misunderstanding on that point.[11]

2. The head of my agency, Q, is an elected executive officer who is a candidate for public office again this year. A close friend wants to support Q, both with financial contributions and volunteering time. I do not know the address or telephone number of Q's campaign office. Would

[11] As noted earlier, EEB Advisory Opinion 00-08 concluded that any employee's use of a title "must be accompanied by a disclaimer" that the employee is not speaking for the agency.

it be all right to send an office voice-mail or e-mail to Q, passing along my friend's name and suggesting that Q forward this information to the campaign?

Remember that voice-mail and e-mail are both office property and facilities. While forwarding the information to Q seems a small thing, it involves both you and Q (Q involuntarily) in the use of office facilities for campaign activity. On your own time, take the steps to find out how to put your friend directly in touch with the campaign without using office facilities. If you don't want to be involved even that much, suggest that your friend contact the campaign directly. A third possibility would be to pass the information along using your own paper and stamp and Q's home address.

3. Everyone in my work unit is a strong opponent of Ballot Measure B. We have all been involved in the anti-B campaign, and we have been careful not to use either our state time or any agency facilities, such as paper, computers, or copy machines, in our campaign work. We need to have a campaign meeting next weekend, and the organizers are having trouble finding a place for the meeting. Our agency has a large conference room which is not ordinarily open to the public, but which will not be in use during the weekend. Can we offer the use of the room for the campaign meeting?

Although office space is not "consumed" when used for a meeting (small amounts of heat and light notwithstanding), the use of a space not ordinarily available to the public leaves the definite impression that the campaign is benefiting from its use of a public space. The fact that your work unit is all involved in the campaign reinforces this unfortunate impression. In my opinion, using this particular space would violate RCW 42.52.180. If the conference room is generally open to the public, however, and is scheduled for the campaign on the same basis as anyone else could schedule it, the answer might be different. It still might be prudent to have the meeting somewhere else, just to avoid any question about misuse of public facilities.

4. I am the regional office manager for a state agency and I supervise about 50 employees. My close friend D is running for state senator. May I invite all my office to a Saturday morning event at my home where they can meet D and will have the opportunity to contribute to the campaign?

Extreme caution is advised. For the obvious points first, avoid the use of office space, office paper, e-mail, voicemail, or any other office facility for the invitations. Employee mailing lists are also public facilities which should not be used for campaign purposes. Perhaps you know the phone numbers and addresses by heart, or can use publicly available sources, such as telephone and e-mail directories, to get the necessary information. Even then, remember that you supervise all of these employees. Will one or more misunderstand why they are invited to a campaign fund raiser at your home? Will they conclude, no matter how you protest otherwise, that they stand to gain your favor if they support D, or to lose your favor if they don't? Even if this is not strictly a violation of RCW 42.52.180, do you want to raise these issues?

5. My coworker and I have strongly different political philosophies. During the last presidential election campaign, she wore a large button promoting a candidate I find repugnant, and she placed the candidate's picture in her workstation next to the pictures of her husband and her cat. Would it be appropriate for me to ask our supervisor to ban such overt displays this year?

Ethical and policy considerations must always be balanced against free speech rights and the legitimate interest of any employee in expressing her views and in arranging her personal space. The courts and the ethics agencies have recognized that campaign buttons on clothing are a personal expression and do not violate the ethics statute.[12] The use of personal assigned space in a work-station probably meets the same requirement. The answer might be different if an employee were using publicly visible space, such as a wall, window, or reception desk, which could leave the impression that the campaign is favored by the agency or its leadership and is more than one employee's personal choice. Some agencies restrict the information that may be displayed in individual work stations.

6. Initiative J would, if approved by the people, repeal the tax that supports 90% of my agency's activities. The legislature might replace some of the money if the tax were repealed, but it is virtually certain that our agency's budget would be severely reduced. Can we use staff time and agency resources to assemble and publish a sheet that would just "show the facts"—that is, that enactment of Initiative J would effectively end all of the popular programs my agency is involved with?

As noted earlier, agencies can anticipate ballot measures by preparing contingency plans or by researching the possible effects of a measure for planning purposes. Your proposal goes considerably beyond that, though. The major flaw in your logic is to characterize as a "fact" your predicted outcome of the legislative session, should the initiative be approved. The legislature is legally free to replace the agency's funding, no matter how unlikely that outcome is. Therefore, it is simply not a "fact" that the agency's programs would be eliminated. It is only speculation. There seems little purpose for the agency to indulge in such speculation, except to influence the election results. Perhaps the agency could publish a true "fact sheet" which, for instance, lists the current programs administered by the agency with their current budget. Perhaps the material also could point out the current source of the agency's budget without speculating what would happen if that funding source disappeared.

VI. CONCLUSION

In closing, it is important to remember that the public is generally very sensitive to the use of public facilities or property on ballot propositions and takes accusations of violations very seriously. Officers and employees who try to bump up against the "line" that divides lawful from unlawful conduct in this area may find, even if their conduct is eventually judged lawful, that their questionable activity has incited a public backlash against the very position they were attempting to advocate. As a result, public employees should walk a careful line to assure that the public is fully and adequately informed about the consequences of voting on a particular measure, without making unlawful use of public money or property to influence the result of the vote. State agencies and

---

[12] For reasons going beyond ethics, public agency employers have been held to have a limited right to restrict employees in some limited circumstances from wearing political buttons or engaging in political activities. *Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999) (transit authority could probably regulate wearing of political buttons by transit employees while in contact with public, but not at other times); *Horstkoetter v. Dep't of Pub. Safety*, 159 F.3d 1265 (10th Cir. 1998) (upheld statute prohibiting state troopers from displaying political signs on their personal property, but interpreted statute to not permit removal of signs placed by troopers' spouses on jointly owned property).

officers should consult closely with legal counsel on all activities relating to matters before the voters, and they should use utmost skill and care in expressing any comments on such matters.

Violations of RCW 42.52 by executive branch employees are now within the jurisdiction of the Executive Ethics Board. Employees with questions in this area should contact:

Melanie deLeon, Executive Director
1110 Capitol Way South
PO Box 40149
Olympia, WA 98504-0149
(360) 664-0871

Senior Counsel Jerald Anderson serves as legal advisor to the Board.

JKP/bw

Attachments

RCW 42.52.180

RCW 42.52.180 Use of public resources for political campaigns. (1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) This section shall not apply to the following activities:

(a) Action taken at an open public meeting by members of an elected legislative body to express a collective decision, or to actually vote upon a motion, proposal, resolution, order, or ordinance, or to support or oppose a ballot proposition as long as (i) required notice of the meeting includes the title and number of the ballot proposition, and (ii) members of the legislative body or members of the public are afforded an approximately equal opportunity for the expression of an opposing view;

(b) A statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry. For the purposes of this subsection, it is not a violation of this section for an elected official to respond to an inquiry regarding a ballot proposition, to make incidental remarks concerning a ballot proposition in an official communication, or otherwise comment on a ballot proposition without an actual, measurable expenditure of public funds. The ethics boards shall adopt by rule a definition of measurable expenditure;

(c) Activities that are part of the normal and regular conduct of the office or agency; and

(d) De minimis use of public facilities by state-wide elected officials and legislators incidental to the preparation or delivery of permissible communications, including written and verbal communications initiated by them of their views on ballot propositions that foreseeably may affect a matter that falls within their constitutional or statutory responsibilities.

(3) As to state officers and employees, this section operates to the exclusion of RCW 42.17.130. [1995 c 397 § 30; 1994 c 154 § 118.]

Effective date–Captions–Severability–1995 c 397: See RCW 42.17.960 through 42.17.962.

WAC 292-110-020

WAC 292-110-020 Working hours. (1) RCW 42.52.180(1) provides that no state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Facilities of an agency includes use of state officers or state employees during working hours. The purpose of the rule is to define the term "working hours" for officers and employees of the executive branch of state government. The prohibition in RCW 42.52.180(1) only applies during working hours. Nothing in RCW 42.52.180(1) or this rule prohibits a state officer or state employee from assisting in a campaign during non-working hours. An officer or employee who assists in a campaign during non-working hours may not use any facilities of an agency.

(2) Some state officers and state employees occupy positions that have fixed schedules with the same beginning and ending times. For officers and employees with fixed schedules, working hours are the hours between the starting and ending times of their positions. Officers and employees with fixed schedules may not assist in a campaign during these fixed working hours, unless they are on a lunch break under section four of this rule or on annual leave under section five of this rule.

> Example 1: An employee works for an agency open to the public during the hours of 8:00 a.m. to 5:00 p.m. The employee is in a position with a fixed schedule of Monday through Friday 8:00 a.m. to 5:00 p.m. The employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. The employee may not assist in a campaign during these hours unless the employee is on a lunch break or on annual leave. The employee may assist in a campaign before 8:00 a.m. or after 5:00 p.m. Monday through Friday or on Saturday or Sunday.

> Example 2: An employee works for an agency open to the public during the hours of 8:00 a.m. to 5:00 p.m. Although the agency is open during the hours 8:00 a.m. to 5:00 p.m., the employee is in a position with a fixed schedule of Monday through Thursday 3:00 p.m. through 12:00 a.m. The employee's working hours are 3:00 p.m. to 12:00 a.m. Monday through Thursday. The employee may not assist in a campaign during these hours unless the employee is on a lunch break or on annual leave. The employee may assist in a campaign before 3:00 p.m. or after 12:00 a.m. Monday through Thursday or anytime on Friday, Saturday or Sunday.

(3) Some state officers and state employees occupy positions that do not have fixed schedules with the same starting and ending times. For officers and employees who do not have fixed schedules, working hours are defined as either:

(a) The hours set forth in any policy on working hours adopted by an agency. Agencies have flexibility in determining working hours for the officers and employees to meet their unique needs so long as the time considered to be working hours is clearly established. If an agency

does not adopt a working hours policy, working hours shall be 8:00 a.m. to 5:00 p.m. Monday through Friday when state agencies are generally open to the public; or

(b) The work schedule for an officer or employee approved by the agency, if it is different from the agency policy or, if the agency has not adopted a policy, 8:00 a.m. to 5:00 p.m. Monday through Friday.

Example 3: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. Although the agency is open to the public at these times, the work of the agency goes on twenty-four hours a day. The agency has adopted a working hours policy that divides working hours into three shifts: the day shift (8:00 a.m. to 5:00 p.m.); swing shift (3:00 p.m. to 12:00 a.m.) and midnight shift (12:00 a.m. to 9:00 a.m.). An employee without a fixed schedule is assigned to the swing shift (3:00 p.m. to 12:00 a.m.) Monday through Friday. Since the employee does not have a fixed schedule, the employee sometimes comes to work before 3:00 p.m. and sometimes after 3:00 p.m. Similarly, the employee may leave work before or after 12:00 a.m. This employee's working hours are 3:00 p.m. to 12:00 a.m. Monday through Friday. The employee may not assist in a campaign during these hours unless the employee is on a lunch break or on annual leave. The employee may assist in a campaign before 3:00 p.m. or after 12:00 a.m. Monday through Friday or on Saturday or Sunday.

Example 4: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. The agency has not adopted a policy on working hours. An employee without a fixed schedule usually works 8:00 a.m. to 5:00 p.m. Since the employee does not have a fixed schedule, the employee sometimes comes to work before 8:00 a.m. and sometimes after 8:00 a.m. Similarly, the employee may leave work before or after 5:00 p.m. Since the agency has not adopted a policy on working hours, this employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. The employee may not assist in a campaign during these hours unless the employee is on a lunch break or on annual leave. The employee may assist in a campaign before 8:00 a.m. or after 5:00 p.m. Monday through Friday, or on Saturday or Sunday.

Example 5: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. Although the agency is open to the public at these times, the work of the agency goes on twenty-four hours a day. The agency has adopted a working hours policy that divides working hours into three shifts: the day shift (8:00 a.m. to 5:00 p.m.); swing shift (3:00 p.m. to 12:00 a.m.) and midnight shift (12:00 a.m. to 9:00 a.m.). An employee without a fixed schedule is assigned to the day shift (8:00 a.m. to 5:00 p.m.) Monday through Friday. However, the agency has approved a different work schedule for this employee. Instead of the usual day shift of 8:00 a.m. to 5:00 p.m., the employee works 7:00 a.m. to 4:00 p.m. Since the employee does not have a fixed schedule the employee, sometimes comes to work before 7:00 a.m. and sometimes after

7:00 a.m. Similarly, the employee may leave work before or after 4:00 p.m. This employee's working hours are 7:00 a.m. to 4:00 p.m. Monday through Friday. The employee may not assist in a campaign during these hours unless the employee is on a lunch break or on annual leave. The employee may assist in a campaign before 7:00 a.m. or after 4:00 p.m. Monday through Friday, or on Saturday or Sunday.

(4) Working hours do not include state legal holidays unless the officer's or employee's work schedule requires the officer or employee to work on a state legal holiday.

(5) Working hours do not include the time approved and designated for an officer's or employee's lunch break. A lunch break is between 12:00 p.m. and 1:00 p.m., unless the agency has designated a different time in a working hour s policy or has approved a different lunch break as part of an officer's or employee's work schedule. If an officer or employee engages in campaign activity during the lunch break, the officer or employee may not make use of any of the facilities of the agency.

Example 6: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. The agency has not adopted a policy on working hours. An employee without a fixed schedule usually works 8:00 a.m. to 5:00 p.m. Since the employee does not have a fixed schedule, the employee sometimes comes to work before 8:00 a.m. and sometimes after 8:00 a.m. Similarly, the employee may leave work before or after 5:00 p.m. Since the agency has not adopted a policy on working hours, this employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday with a lunch break between 12:00 p.m. and 1:00 p.m. The employee may assist in a campaign during the employee's lunch break between 12:00 p.m. and 1:00 p.m.

(6) Working hours do not include the time in official leave status if the leave has received advance documented or written authorization. An officer or employee on leave may assist in a campaign.

Example 7: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. The agency has not adopted a policy on working hours. An employee without a fixed schedule usually works 8:00 a.m. to 5:00 p.m. Since the employee does not have a fixed schedule, the employee sometimes comes to work before 8:00 a.m. and sometimes after 8:00 a.m. Similarly, the employee may leave work before or after 5:00 p.m. Since the agency has not adopted a policy on working hours, this employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. On Friday the employee receives advance written authorization to be on leave for five days, Monday through Friday of the next week. The employee may assist in a campaign during this leave.

Example 8: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. The agency has not adopted a policy on working hours. An employee without a fixed schedule usually works 8:00 a.m. to 5:00 p.m. Since the employee does not have a fixed schedule the employee sometimes comes to work before 8:00 a.m. and sometimes after 8:00 a.m. Similarly, the employee may leave work before or after 5:00 p.m. Since the agency has not adopted a policy on working hours, this employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. In this agency employees without fixed schedules take leave during a month and then get written authorization for the leave at the end of the month. An employee takes leave Monday through Friday and assists in a campaign. At the end of the month the employee obtains written authorization for the leave. The employee has assisted in a campaign during working hours since the employee did not obtain written authorization prior to taking leave to assist in a campaign. To assist in a campaign while on leave, the employee must obtain written authorization prior to going on leave.

(7) The definition of working hours also includes any time an officer or employee is actually working. For an officer or employee with a fixed schedule, working hours includes overtime when the officer or employee is working additional hours other than those in the fixed schedule. For an officer or employee without a fixed schedule, working hours include any time the officer or employee is working.

Example 9: An employee works for an agency that is open to the public 8:00 a.m. to 5:00 p.m. Monday through Friday. The agency has not adopted a policy on working hours. An employee without a fixed schedule usually works 8:00 a.m. to 5:00 p.m. Since the employee does not have a fixed schedule, the employee sometimes comes to work before 8:00 a.m. and sometimes after 8:00 a.m. Similarly, the employee may leave work before or after 5:00 p.m. Since the agency has not adopted a policy on working hours, this employee's working hours are 8:00 a.m. to 5:00 p.m. Monday through Friday. On a Monday the employee works from 8:00 a.m. to 9:00 p.m. Even though the employees working hours are 8:00 to 5:00 the time spent working between 5:00 p.m. and 9:00 p.m. are working hours because the employee is working for the agency during this time.

(8) The governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, commissioner of public lands, and the insurance commissioner are state officers in the executive branch subject to RCW 42.52.180. These officers are elected to office and hold office for a term of four years and until their successors are elected and qualified. Since these officers are elected to a term of office, they do not have working hours and may assist in a campaign at any time. However, if these officers do assist in a campaign, they may not make use of any facilities of an agency except as provided in RCW 42.52.180(2).

[Statutory Authority: RCW 42.52.180(1) and 42.52.360(2)(b). 96-22-030, § 292-110-020, filed 10/30/96, effective 11/30/96.]

WAC 292-110-030

WAC 292-110-030 Measurable expenditure. (1) RCW 42.52.180(1) provides that no state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Facilities of an agency include, but are not limited to, use of stationery, postage, machines and equipment, use of state employees during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

(2) RCW 42.52.180(2) sets forth exceptions to the prohibition in RCW 42.52.180(1). The exceptions include a statement by an elected official in support of or in opposition to any ballot proposition at an open press conference or in response to a specific inquiry without an actual measurable expenditure of public funds (RCW 42.52.180(2)(b)); activities that are part of the normal and regular conduct of the office (RCW 42.52.180(2)(c)); and de minimis use of public facilities by state-wide elected officials incidental to the preparation or delivery of permissible communications initiated by the official regarding the official's views on a ballot proposition that may foreseeably affect a matter that falls within the official's constitutional or statutory responsibilities (RCW 42.52.180(2)(d)).

(3) Elected officials regularly expend public funds to respond to inquiries from the media, constituents and other persons on matters unrelated to ballot propositions. RCW 42.52.180(2)(b) permits elected officials to respond to such inquiries regarding ballot propositions without an actual measurable expenditure of public funds. For purposes of RCW 42.52.180(2)(b) measurable expenditure means an expenditure or separately identifiable cost or specific portion of a cost incurred by the agency beyond the normal and regular expenditures or costs incurred by the agency in responding to inquiries from the media, constituents and other persons on matters unrelated to ballot propositions.

> Example 1: A state-wide elected official conducts a press conference in state office space. During the conference the official is asked about a ballot proposition. The subject of the ballot proposition does not fall within the normal and regular conduct of the official's agency nor within the official's constitutional or statutory responsibilities. The official replies to the question explaining his or her opinion on the ballot proposition and the reason for the opinion. It is not an ethical violation to reply to such an inquiry. The use of state office space, during the time the official answers the question about the ballot proposition, does not result in a measurable expenditure of public funds. This is because the expenditure or cost of the office space during this period is not a separately identifiable cost.
>
> Example 2: A state-wide elected official receives a letter from a constituent asking for the official's position on a ballot proposition. The subject of the ballot proposition does not fall within the normal and regular conduct of the official's agency nor within the official's constitutional or statutory responsibilities. The official replies by letter explaining his or her opinion on the ballot proposition and

the reason for the opinion. In the course of preparing the reply the official has the assistance of staff and uses office space, equipment, stationery and postage. It is not an ethical violation to reply to such an inquiry. There is no measurable expenditure of public funds because the agency has not incurred a cost beyond the normal and regular costs incurred by the agency in responding to inquiries from the media, constituents and other persons on matters unrelated to ballot propositions.

Example 3: A state-wide elected official received a letter from a constituent asking for the official's position on a ballot proposition. The subject of the ballot proposition does not fall within the normal and regular conduct of the official's agency nor within the official's constitutional or statutory responsibilities. The official replies by letter explaining his or her opinion on the ballot proposition and the reason for the opinion. In the course of preparing the reply the official has the assistance of staff and uses office space, equipment, stationery and postage. The official sends copies of the reply to other individuals on the agency mailing list. This is an ethical violation. While it is permissible to reply to the constituent who inquired about the official's position (Example 1), it is improper to send copies of the response to others. There is a measurable expenditure of public funds because the cost of the paper and postage for the additional copies is a separate identifiable cost beyond the normal and regular costs incurred by the agency in responding to inquiries from the media, constituents and other persons on matters unrelated to ballot propositions.

Example 4: A state-wide elected official writes a letter to the editor of a newspaper stating the official's position on a ballot proposition. The subject of the ballot proposition does not fall within the normal and regular conduct of the official's agency nor within the official's constitutional or statutory responsibilities. In the course of preparing the letter the official has the assistance of staff and uses office space, equipment, stationery and postage. This is an ethical violation. The official has used the facilities of the agency and the exception in RCW 42.52.180(2)(b) does not apply because the official is not responding to an inquiry.

[Statutory Authority: RCW 42.52.180(2)(b) and 42.52.360(2)(b). 96-22-029, § 292-110-030, filed 10/30/96, effective 11/30/96.]