

ADVISORY OPINION

APPROVAL DATE: February 13, 2009

NUMBER: 09-04

STATUS: **Archived 2017**

Use of State Resources for Union Mailings

Question:

Can a Collective Bargaining Agreement (CBA) require a state agency to include printed information supplied by a Union into the worker's pay envelopes, particularly a flyer regarding legislative initiatives?

Short Answer:

No. There is no de minimis use for the following activities: conducting an outside business; political or campaign activities; commercial uses like advertising or selling products; lobbying that is unrelated to official duties; solicitation on behalf of other persons unless approved by the agency head; and illegal or inappropriate activities.

Background: During a previous arbitration of the Service Employees International Union (SEIU) Healthcare 775 NW's CBA, an arbitrator included the following passage:

Access to Pay Envelopes

The Employer agrees to include information provided by the Union in pay envelopes sent to individual providers, subject to the following conditions:

- A. The Union shall provide such materials to the Department no later than thirty (30) calendar days prior to the first day upon which the Union requests that the materials be included in pay envelopes mailed to individual providers;
- B. Except by consent of the Employer, the size and weight of such materials to be included in the pay envelopes for any pay period shall not exceed two pieces of printed materials, one of which may be no larger than 8.5" x 11" and no heavier than 20 lb. weight, and the other of which may be a pre-printed #10 (or smaller) return envelope of standard weight;
- C. The subject matters and contents of any materials provided shall be in conformance with RCW 42.52.160 and RCW 42.52.180;
- D. The Union agrees to reimburse the Department any increase in postage costs arising from the inclusion of the Union materials.

Applicable Statutory Language:

RCW 42.52.560, Communications from an employee organization or charitable organization — Distribution by state employee.

(1) Nothing in this chapter prohibits a state employee from distributing communications from an employee organization or charitable organization to other state employees if the communications do not support or oppose a ballot proposition or candidate for federal, state, or local public office. Nothing in this section shall be construed to authorize any lobbying activity with public funds beyond the activity permitted by RCW 42.17.190.

(2) "Employee organization," for purposes of this section, means any organization, union, or association in which employees participate and that exists for the purpose of collective bargaining with employers or for the purpose of opposing collective bargaining or certification of a union.

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

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

(2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

WAC 292-110-010(6), Use of state resources, which states in pertinent part:

(c) Any use 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. Such a use of state resources is specifically prohibited by RCW [42.52.180](#), subject to the exceptions in RCW [42.52.180\(2\)](#);

(d) Any use for the purpose of participating in or assisting in an effort to lobby the state legislature, or a state agency head. Such a use of state resources is specifically prohibited by RCW 42.17.190, subject to the exceptions in RCW 42.17.190(3);

RCW 42.52.070 Special privileges states:

Except as required to perform duties within the scope of employment, no state officer or state employee may use his or her position to secure special privileges or exemptions for himself or herself, or his or her spouse, child, parents, or other persons.

RCW 42.52.180, Use of public resources for political campaigns states in pertinent part:

(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.

Prior Board Advice

In Advisory Opinion (AO) 02-01, The Board held that state agencies may not authorize in a written collective bargaining agreement union use of state facilities that would directly conflict with the Ethics Act. On July 13, 2001, the Board held a public discussion with agency, union, and oversight body representatives who provided information on public employee collective bargaining. Between September 2001 and February 2002, the Board reviewed and circulated among interested parties several drafts of this advisory opinion.

Under AO 02-01, the Board advised that a union was a “person” under RCW 42.52.010(14) and that that union business was a private interest. The Board further advised that while a union was a private association, state labor law fully recognized that public agencies were authorized and in many instances required, to collectively bargain with a union on behalf of state employees. Collective bargaining frequently involved more than a “de minimis” use of state resources, particularly state paid time, during working hours, of agency personnel.

The Board generally advised that use of state paid time and resources for the exclusive purposes of negotiation and administration of collective bargaining agreements would not violate the Ethics Act, but this advice would not apply to all agreements between a union and a state agency. In the event of a dispute, the Board would determine whether or not a violation of RCW 42.52.160 occurred on a case by case basis.

In AO 00-09, the Board advised that state agencies do not have the authority to execute provisions in a written collective bargaining agreement that directly conflict with the Ethics Act. Conduct that may directly conflict included, but was not limited to, a use of state resources to support or oppose a ballot initiative or a candidate to public office; a use of state resources for union activities that are not reasonably related to the negotiation and administration of collective bargaining agreements, such as union organizing, internal union business, or advocating for a union in a certification, union shop, or other election, except as authorized under statute or rules; and a use of state resources to lobby the legislature on matters of interest to the union.

Analysis

The Act contains a strong presumption against an individual state officer or employee using public resources to promote private interests. Allowing any entity, including a union, to use state resources to provide general informational material to state employees may violate the Ethics Act under several provisions:

Use of state resources. The Act prohibits the use of state resources for private benefit or gain, except in the course of official duties. If a state agency facilitates a union's use of state facilities, state postage rates and state employees to address and stuff general informational materials into worker envelopes, the union is using state resources for a private benefit or gain.

Special privileges. In AO 00-11, the Board advised that state employees making decisions whether to permit a private business to use state facilities to provide information about its products must be careful not to favor some businesses over others. RCW 42.52.070 prohibits employees from using their positions to "secure special privileges" for another person. For example a violation of RCW 42.52.070 could occur if an employee permits one business to use agency facilities and not another.

If an agency includes general union materials into their mailings, that agency may be providing a special privilege to that entity that other organizations or unions do not have. If an agency provides this service to one entity, it would have to open this service to all other similarly situated organizations.

Political or campaign purposes. The Act prohibits the use of state resources or facilities for campaign purposes. The term "facilities of an agency" includes, but is not limited to the 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.

The Ethics Act prohibits even de minimis use of state resources for political purposes. There is no de minimis use for the following activities: conducting an outside business; political or campaign activities; commercial uses like advertising or selling products; lobbying that is unrelated to official duties; solicitation on behalf of other persons unless approved by the agency head; and illegal or inappropriate activities.

Opinion:

Using state resources, even de minimis use, to assist an organization to promote a specific legislative agenda is also prohibited by the Act. Further, allowing one non-state organization to place materials in worker's paychecks without allowing the same access to all violates the Act by providing this organization with a special privilege and personal benefit or gain.

Approved by the Executive Ethics Board on February 13, 2009.