



State of Washington
PUBLIC DISCLOSURE COMMISSION

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Memo

To: Commissioners
From: Sean Flynn, General Counsel
Date: January 20, 2023
Re: Declaratory Order Petition – Blue Wave

The Commission has scheduled a hearing for January 26, 2023, on the petition for a declaratory order by Blue Wave concerning “whether the ‘fundraising freeze’ in RCW 42.17A.560 applies to state employees who decide to run for office.” PDC staff prepared an initial memo on this petition for the Commission in December, regarding the issue presented and the criteria for evaluating a petition under the Administrative Procedure Act (APA), and PDC rules. This memo reviews that process and presents further analysis of the procedural and legal issues with recommendations for the Commission.

APA Criteria

The “legislative freeze” period (prohibiting campaign fundraising leading up to and including the legislative session) applies to any “state official or a person employed by or acting on behalf of a state official or state legislator.” RCW 42.17A.560. The question here is whether the freeze is limited to the state official’s candidate campaign, or does it also prohibit an employee in the office of a state official from fundraising for their own campaign. The petition requests that the Commission determine that the freeze does not apply to an employee’s own campaign activities.

Under the APA, a petition must present facts and reasons to show: (1) Uncertainty necessitating resolution exists; (2) An actual controversy arises from the uncertainty so that an order will not be merely an advisory opinion; (3) The uncertainty adversely affects the petitioner; and (4) The adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested.

The petition does not appear to meet the APA criteria for a declaratory order petition. The petition does not present any specific facts or actual controversy identifying a particular person whose campaign may be affected by the alleged uncertainty in the law, but rather points to past examples of persons who became candidates for state office while employed in the office of a state official. Staff had advised the petitioner of this issue, and while the petitioner has submitted an additional written statement in response to the Commission’s discussion at the public meeting on December 8, 2022, the petitioner has not provided any additional facts or specificity to the petition.

The petition merely raises a purely legal question of interpretation. Therefore, there are no specific adverse effects alleged which the Commission can weigh against other potential harm. In essence, the petition seeks an advisory opinion of the Commission to make a general legal determination of general application, which is what the declaratory order process expressly attempts to avoid.

Consideration of Legal Issue Presented

While staff's position is that a declaratory order is not the appropriate mechanism to address the legal question presented here, the question itself raises an important issue of interpretation that the Commission may want to consider in a separate context. The law prohibits any "state official or a person employed by or acting on behalf of a state official or state legislator" from soliciting or accepting contributions during the legislative freeze period.

On its face, the law applies to both state officials and their employees, though it is not expressly clear whether, or to what extent, employees are included in the prohibition in regards to their own campaigns. While one interpretation could assume that the law only prohibits an employee assisting with the state official's campaign, the law does not expressly include such a limitation. As discussed at the December meeting, staff has provided informal advice in the past that certain employees, like a legislative assistant position, would be covered by the freeze in regards to the assistant's own campaign, based on the nature of the employment relationship. The following provides some analysis of the policy considerations of this interpretation.

As often cited, the Fair Campaign Practices Act is intended to be liberally construed to promote the intent of the law. This is particularly true where the law is the product of a citizen's initiative with broad popular support. The legislative freeze prohibition was created by Initiative 134 in 1993, as part of a larger reform to impose limits on political campaign activities, with the intent, in part, to "restore public trust in government institutions and the electoral process." See Laws of Washington 1993 ch. 2 sec. 2. The legislative freeze serves this intent by restricting a state official's access to contributions during a time when that official is more susceptible to influence in relation to the legislative session, when policy is made.

As applied to employees of state officials, the policy becomes more relevant the closer the employee's connection is with the state official. For example, the potential influence of an employee without direct interaction with the official or the decision-making policy of that official's office would be far less than an employee who works directly with the state official. A legislative assistant may fall into the latter category because they are directly involved in the business of their legislator.

This distinction of proximity to a state official as related to influence is recognized in related contexts. The professional staff of the legislature and the governor's office are required to complete personal financial affairs statements along with state officials. RCW 42.17A.705. Furthermore, the State Ethics Act defines state officials as including "employees of the state who are engaged in supervisory, policy-making, or policy-enforcing work," as distinguished from other state employees. RCW 42.52.010(20). (That definition does not directly apply to Chapter 42.17A RCW.) In both instances, the law recognizes that certain classes of employees have positions that have influence and therefore share some of the public responsibility as the ultimate decision-maker.

The distinction between professional or policy level employees and other employees of a state official may be worth greater consideration by the Commission through other means than the declaratory order process, such as legislation, rulemaking, or interpretation. Such possible consideration of these alternatives is beyond the scope of this memo and left to the discretion of the Commission, although staff stands ready to advise as needed at the Commission's request.