



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

June 12, 2014

Senator Brian Boquist
900 Court Street NE S305
Salem OR 97301

Dear Senator Boquist:

You asked a series of questions about the replacement of and the rules governing the Chief Clerk of the House of Representatives and the Secretary of the Senate. We answer your questions in the order asked. Although your questions are written as academic and hypothetical inquiries, we note at the outset the recent resignation of Chief Clerk Ramona Line at the request of Speaker Tina Kotek. We believe your interest in these questions stems from the circumstances surrounding Ms. Line's resignation. Accordingly, where appropriate and to the extent permitted by confidentiality requirements, we answer your question in the context of Ms. Line's specific circumstances before addressing your more generic inquiry.

- 1. Under what authority can the Speaker or President terminate or demand the resignation of the elected Clerk or Secretary when he or she was elected by the House or Senate?**

Ms. Line has served for many years in the position of Chief Clerk, which requires that the person serving as clerk be elected by majority vote of the House of Representatives. The election of the Chief Clerk is one of the tasks that occurs when the House organizes and members are sworn in to office. Ms. Line was duly elected to the position on January 14, 2013. Ms. Line, however, retired effective June 30, 2013. On June 28, 2013, Ms. Line voluntarily executed a letter of understanding that provided, in part, that Ms. Line would serve as a "retired limited-duration employee." A Personnel Action Request form (PA) was completed and signed by Speaker Kotek on July 10, 2013. The PA provides that Ms. Line was "Retired 6/30/2013. Reappointed 07/01/2013—Retired Limited Duration date: July 1, 2014 or to be determined by Speaker of the House."

The Rules of the House of Representatives provide that the Speaker shall enforce all rules and laws applicable to the House and further provide that the Speaker may establish those rules of employment that are deemed necessary. House rules further provide that rules of employment are "available" in the *House Procedures and Personnel Handbook*, and finally that employees serve at the pleasure of the appointing authority.¹ The *House Procedures and Personnel Handbook* incorporates the Legislative Branch Personnel Rules. In other words, the Legislative Branch Personnel Rules (LBPR) are incorporated into and become a part of the House rules. Under LBPR, a limited duration employee is not entitled to discretionary corrective action, including sanctions.² Instead, a limited duration employee may be terminated by the appointing authority or a designee

¹ Rules of the House of Representatives—Seventy-seventh Legislative Assembly, HR 7.10 (1) and 15.01.

² LBPR 9 (Applicability).

of the appointing authority.³ Under Ms. Line's employment contract, the Speaker is the appointing authority.

To summarize, one effect of Ms. Line's voluntarily retiring and executing an employment contract under which she was a limited duration employee was that she was an at-will employee who could be terminated for any reason.

The more general answer to your question that would apply under circumstances that do not involve a voluntary retirement and subsequent employment in limited duration status is as follows. The Chief Clerk is elected by majority vote of, and serves at the pleasure of, the body and may be removed only by a majority vote of the members.⁴ The Speaker is the designee of the House, which is the appointing authority of the Chief Clerk.⁵ The Speaker is charged with enforcing all rules, laws and regulations applicable to the body.⁶ The Speaker has authority to establish rules of employment for employees of the House.⁷ While the Speaker does not ordinarily have the authority to remove the Chief Clerk, the Chief Clerk is also an employee of the House who is subject to all applicable rules, regulations and laws that the Speaker has the authority to enforce.

The Secretary of the Senate is elected by the members of the Senate and serves at the pleasure of the body until the convening of the next organizational session of the Legislative Assembly.⁸ If the Secretary vacates the office while the Senate is not in session, the President of the Senate may appoint an acting Secretary to serve until the next regular or special session or meeting of the Senate to consider executive appointments, at which time the members of the Senate shall elect a Secretary of the Senate.⁹ Given the authority of the President to appoint an acting Secretary of the Senate, it follows that the President, as the appointing authority of an acting Secretary, also has the authority to discipline or terminate an acting Secretary. The President of the Senate also has ongoing authority to appoint staff for the offices of the President and the Senate.¹⁰ Employees of the Senate serve at the pleasure of the appointing authority and may be terminated by the President under the President's authority as the appointing authority of such employees.¹¹ The ability of the President to terminate the Secretary is therefore dependent on the manner in which the Secretary was selected.

2. If a vote of the Senate or House constitutes the appointing authority for the Secretary or Clerk, what would be the procedure to remove such a person for whatever reasons?

The answer to your question in the context of the resignation of Ms. Line is discussed in our answer to question 1, above. More generally, when the House or the Senate elects a Chief Clerk or Secretary, the body is acting as the appointing authority. The Chief Clerk and the Secretary serve at the pleasure of the body. In both the House and the Senate, the procedure for removal would be by a majority vote of the members of the House or the Senate.¹²

³ LBPR 9 (1).

⁴ HR 7.01 and 15.05.

⁵ HR 7.10 and 15.01.

⁶ HR 7.10.

⁷ HR 15.01.

⁸ Rules of the Senate for the Seventy-seventh Oregon Legislative Assembly, SR 15.01.

⁹ *Id.*

¹⁰ SR 15.05.

¹¹ *Id.*

¹² See HR 15.05 and SR 15.01.

3. What are the Laws and Rules of both chambers for investigating elected officials such as the Clerk, Secretary, Senators or Representatives?

A starting point in answering this question is to note that for purposes of most legal authorities in this state, the Chief Clerk of the House and the Secretary of the Senate are considered public officials or public employees but are not considered elected officials. The issue of why the Chief Clerk and the Secretary are not considered elected officials is discussed in detail in our answer to questions 7 to 9, below.

Oregon Statutes

ORS 171.450 to 171.465 set out the procedure to investigate a member of the Legislative Assembly for a complaint brought against that member by an elector for interference in the election process. The Secretary of State is directed to "conduct an investigation to determine whether there is probable cause to believe that the alleged violation occurred, and that it was both deliberate and capable of having some possible effect upon the election." If there is a finding of probable cause, the Secretary of State must report the findings to either the Chief Clerk of the House or the Secretary of the Senate, and the findings are a public record.¹³ The findings are then reviewed by an appointed credentials committee in the appropriate house of the Legislative Assembly. The committee may make recommendations for action to its house.¹⁴ ORS 171.450 to 171.465 do not, by their terms, apply to the Chief Clerk or the Secretary.

ORS chapter 244 provides ethics laws that apply to all public officials. The Chief Clerk of the House and the Secretary of the Senate are public officials for purposes of ORS chapter 244.¹⁵ The Oregon Government Ethics Commission is charged with both issuing advisory opinions addressing compliance with the ethics laws and conducting investigations into allegations of violations of ORS chapter 244.¹⁶ ORS chapters 246 to 260 provide the laws under which state Representatives and Senators seek nomination, campaign for office and are elected. The Secretary of State investigates written complaints of election law violations under ORS chapters 246 to 260.¹⁷ Finally, the Attorney General, pursuant to direction by the Governor, may undertake any investigation or prosecution of any violation of law over which a circuit court has jurisdiction.¹⁸

House and Senate Rules

House Rule 15.01 (1) permits the Speaker of the House to adopt personnel rules as necessary and provides that those rules be made available in the *House Procedures and Personnel Handbook*, which has the force of rule. House Rule 20.01 (Policy on Harassment-Free Workplace) provides that the formal and informal procedures provided for in LBPR 27 apply and, in the case of recommended action arising from a formal complaint against a Representative, sets out the procedure to conduct an investigation and report findings to the floor for approval by a two-thirds majority before final action is taken against the Representative. Complaints against House personal staff members or other House employees, however, are made under LBPR 27. Senate Rule 18.01 adopts the LBPR as the personnel rules of the chamber, as well. The relevant LBPR provisions are discussed below.

¹³ ORS 171.460 (1).

¹⁴ ORS 171.465.

¹⁵ ORS 244.020.

¹⁶ ORS 244.260 and 244.280.

¹⁷ ORS 260.345.

¹⁸ ORS 180.070.

Mason's Manual of Legislative Procedure

House Rule 2.01 adopts *Mason's Manual of Legislative Procedure* to use when the Oregon Constitution or the House rules do not apply. Senate Rule 2.01 states "*Mason's Manual of Legislative Procedure* shall apply to cases not provided for by the Oregon Constitution, the Senate Rules, custom of the Senate or statute."

Mason's permits a legislative body "to regulate the conduct of its members and may discipline a member as it deems appropriate."¹⁹ *Mason's* details the investigation of charges against a member of a legislative house²⁰ and gives the house the "power to investigate the charge."²¹ To begin an investigation or inquiry into the conduct of a member, all that is required is "[a] common understanding or belief concerning improper conduct."²² Under *Mason's*, a Chief Clerk of the House or a Secretary of the Senate is considered a legislative officer.²³ *Mason's* permits a legislative body to select its legislative officers and to remove those officers without notice or hearing.²⁴ Regarding the power of the presiding officer of a house, *Mason's* charges the presiding officer with the enforcement of "all laws and regulations applicable to the body."²⁵ Thus, the presiding officer is authorized to begin an investigation into the conduct of a member or a legislative officer in an effort to enforce applicable laws and regulations.

Legislative Branch Personnel Rules

LBPR 9 (Corrective Action and Discharge) applies to all legislative branch employees who are not members of the Legislative Assembly and sets forth the general policy of the legislative branch to "provide employees, through corrective action, the opportunity to mitigate conduct, performance or behavior that may interfere with the accomplishment of the goals and objectives of the Legislative Branch." Significantly, however, two factors limit LBPR 9's application to the circumstances applicable to Ms. Line. First, as discussed above, LBPR 9 (2) does not apply to limited duration status employees.²⁶ Second, LBPR 9 (2) expressly reaffirms that each legislative employee is an at-will employee; an appointing authority is merely to "strive to provide employees, through corrective action, the opportunity to mitigate conduct." Thus, LBPR 9 (2) is aspirational in the sense that it does not afford protection to an employee who is terminated before being given an opportunity to mitigate conduct through corrective action.²⁷ The LBPR does not mention investigation of the employee but it is likely that a supervisor would need to investigate behavior of an employee before beginning corrective action.

LBPR 27 sets out the procedure used to initiate a complaint and investigation of workplace harassment against a Senator or Representative or any employee of the legislative branch. LBPR 27 establishes both informal and formal complaint processes, and permits a complainant to choose how to proceed. Most importantly, note that LBPR 27 is the procedural rule used by a member or legislative employee to assert a complaint of workplace harassment against a colleague, coworker or supervisor. An appointing authority, however, would typically use LBPR 9 to investigate and correct inappropriate workplace behavior. LBPR 27 establishes different procedures depending on the formality of the complaint being made and based on who is the subject of the complaint. In the

¹⁹ Section 561 (1), *Mason's Manual of Legislative Procedure* (2010 ed.).

²⁰ Section 564, *Mason's*.

²¹ Section 564 (1), *Mason's*.

²² Section 564, *Mason's*.

²³ Section 584, *Mason's*.

²⁴ Section 586 (1), *Mason's*.

²⁵ Section 575 (1)(l), *Mason's*.

²⁶ LBPR 9 (Applicability).

²⁷ Examples of corrective action authorized by the rule include sanctions in writing, warnings, salary reductions, suspensions, demotions and work plans.

case of a formal complaint against a member, an independent investigator is appointed. The independent investigator conducts an investigation and reports findings to a committee on conduct appointed by the presiding officer of the chamber in which the subject of the complaint is a member. If the subject of the complaint is the Chief Clerk or Secretary of the Senate, the procedures are modified. The independent investigator reports the investigator's findings to the presiding officer, the Human Resources Director and the Legislative Counsel. Those persons review the investigator's report and make recommendations to the appointing authority on final action to be undertaken.

4. Under what authority are legislative employees denied their constitutional access to their elected State Senators and State Representatives?

As a starting point, it must be noted that the constitutional rights established under the federal and state constitutions are limited in nature and not absolute. Constitutional jurisprudence has long established that these rights are not absolute and may be limited by reasonable time, place and manner restrictions. For example, the freedom of religion established by these constitutions does not authorize the practice of human sacrifice even if such a practice is in accordance with the tenets of a given religion. Similarly, freedom of speech does not allow for the unrestricted exercise of such a right, as the age-old example of there being no right to yell fire in a crowded theater illustrates.

A part of the terms and conditions of employment for all legislative employees is a voluntary agreement to abide by the rules of the legislative branch. These include limitations on the permissible advocacy activities of employees. A person who accepts employment with the legislative branch voluntarily agrees to not exercise certain rights while on the job during working hours that a private citizen is free to exercise. By ensuring that the nonpartisan employees of the body do not interfere with the policy decisions that are made by the members, this term of employment contributes to the efficient and effective functioning of the Legislative Assembly. The Chief Clerk is an employee of the House and subject to House rules (discussed below) and custom and practice, which require the Chief Clerk to refrain from taking positions in favor of or against legislation. Other nonpartisan legislative staff are under similar restrictions. *See, e.g.,* ORS 173.240 and 173.740 (requiring staff of Legislative Counsel and Legislative Administration to refrain from taking positions for or against legislation). Such circumstances are analogous to those of a person who voluntarily surrenders the protections of most of their constitutional rights and submits themselves to the jurisdiction of the Uniform Code of Military Justice upon joining the United States Armed Services. The rationale behind the restriction is the national necessity to maintain good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.²⁸

42 U.S.C. 1983 allows any person to seek a remedy in court for a violation of federal constitutional or statutory rights conferred upon the person. Section 1983 grants this protection to public employees, including limited duration status employees. The elements of a section 1983 claim are three: (1) a person (2) must act under color of state law (3) to deprive the plaintiff of a right secured by the United States Constitution or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988). The State of Oregon is not a "person" subject to suit under section 1983, but a state official may be sued in a personal capacity or in an official capacity for actions taken under color of state law. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). In order to be liable, the state official must have acted under color of state law. Generally, one acts under color of state law when the deprivation being alleged is attributable to the exercise of a right or privilege attributable to the state or a rule of conduct imposed by the state and the deprivation is caused by a government

²⁸ *Manual for Courts-Martial United States*, Preamble, Paragraph 3 (2008).

actor. *Lugar v. Edmundson Oil Co.*, 457 U.S. 922, 937 (1982). The termination of public employment may constitute the deprivation of a public employee's "property" right secured by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Jordan v. City Council of Lake Oswego*, 49 Or. App. 31, 35 (1980). The termination may also constitute the deprivation of a public employee's liberty right, also secured under the Due Process Clause. *Brady v. Gebbie*, 859 F.2d 1543, 1553 (9th Cir. 1988). Accordingly, under the right circumstances, a public employee who is terminated could successfully bring a section 1983 claim and obtain either damages or injunctive relief for being deprived of property or liberty interests secured by the Due Process Clause.

Applying the standards set forth in the preceding paragraph to the circumstances of Ms. Line's resignation, however, we conclude that a section 1983 claim alleging deprivation of Ms. Line's rights would be unsuccessful. First, Ms. Line voluntarily resigned and was not terminated. A voluntary action cannot itself constitute a deprivation of rights. We note that under certain circumstances, a resignation can be treated as a discharge if the resignation is, in effect, forced by the employer. *McGanty v. Staudenraus*, 321 Or. 532, 551-552 (1995). Whether Ms. Line's resignation was legally voluntary or constructively a termination is a factual determination that can be decided only by taking into account all of the facts and circumstances. Solely for the sake of argument, however, if we were to treat Ms. Line's resignation as a termination, there still would not be a basis for successfully bringing a section 1983 claim. The Speaker is a government official who could be subject to suit under section 1983. Similarly, the Speaker was acting under color of state law because she was exercising the Speaker's rights under Ms. Line's employment contract. Thus, the first two elements of a section 1983 claim are satisfied. Under the terms of her employment contract, Ms. Line served at the pleasure of her appointing authority. An employee who serves at the pleasure of an appointing authority has no property interest in continued employment under the Due Process Clause. *Schmidt v. Jackson County Juvenile Dept.*, 49 Or. App. 349, 354 (1980). A terminated public employee is deprived of a constitutionally protected liberty interest if the employer disseminates an allegedly false and defamatory impression of the employee and does not provide the employee the opportunity to clear their name through a hearing or other formalized process. *Vanelli v. Reynolds School District*, 667 F.2d 773, 777-778 (9th Cir. 1982). Ms. Line has the opportunity to have such a hearing. LBPR 27 establishes a formal hearing process by which any employee may assert that the legislative branch, or an employee or officer of the legislative branch, has created an intimidating, hostile or abusive work environment. An arbitrary or unjustified termination of employment would, we believe, constitute an intimidating, hostile or abusive work environment for purposes of LBPR 27. Upon the filing of a formal complaint under LBPR 27, an independent investigator is appointed to investigate the complaint. The investigator undertakes the investigation and ultimately makes findings and recommendations to the persons who received the complaint, who review and either concur or modify the investigator's recommendations and then report those findings to the appointing authority. The appointing authority must consider the recommendations within 10 days of receipt, and may implement or modify the recommendations, or take no further action. We conclude that LBPR 27's formal complaint and investigation process is an adequate procedure to ensure Ms. Line's liberty interest is protected. Ms. Line would have one year from the date of her resignation to file a formal complaint under LBPR 27.

- 5. What employment forms exist that Legislative Counsel approved that force employees of the Legislature to contractually abandon their constitutional and statutory rights when becoming employed by the Legislature inclusive of all employees in the entire body?**

There are no employment forms applicable to employees of the Legislative Assembly that have been approved by the Legislative Counsel. However, Employee Services does provide a New Employee Orientation for all new hires that includes a discussion of legislative rules, procedures

and advisories that specifically address the rules related to political activity by employees. Newly hired employees are required to sign an acknowledgement that they have been advised of the policies and procedures and that they are responsible for "conducting . . . [themselves] . . . in accordance with the limits of these rules."²⁹ The packet of information provided to a new hire also includes a summary of Legislative Branch Personnel Rules that includes a section on political activity by employees.

6. If legislative employees are legally allowed access to their elected officials are there rules or statutes for declaring potential conflicts of interest by legislative employees?

For clarity, we are rewording this question to read, "How do legislative employees address conflicts of interest?" Under Oregon law, a conflict of interest for a public official exists when an action, decision or recommendation by a public official would or potentially could have a private pecuniary benefit or detriment to the public official or certain persons related to the public official.³⁰ For purposes of the conflict of interest statutes and as relevant to this opinion, a public official is "any person who, when an alleged violation of [ORS chapter 244] occurs, is serving the State of Oregon."³¹ A legislative employee is a public official for purpose of conflict of interest rules. A public official who is not a judge or a member of the Legislative Assembly must notify the public official's appointing authority in writing of the actual or potential conflict of interest and ask the appointing authority to "dispose of the matter giving rise to the conflict" or direct an individual without a conflict of interest to deal with the matter.³² In other words, the public official must refrain from taking an action or making a decision or recommendation if the public official is faced with an actual or potential conflict of interest. As you know, legislators may dispose of conflicts of interest by declaring publicly the nature of the conflict before voting, but the rule for legislators is an exception to the general rule requiring the public official to notify the official's appointing authority and refrain from participating in the decision giving rise to the conflict. If the public official will not be faced with undertaking an action, decision or recommendation that gives rise to the conflict of interest, however, no actual or potential conflict exists. As the Legislative Assembly acts or makes decisions or recommendations through voting and legislative staff do not engage in voting, legislative staff are not ordinarily faced with conflict of interest issues.

- 7. Please provide explanation of the application of ORS 260.432 and ORS 171.725 to Senators, Representatives, the Clerk, the Secretary, and all legislative employees?**
- 8. How do ORS 260.432 and ORS 171.725 presently apply to the elected Clerk and Secretary, and employees of Representatives and Senators, and other legislative employees who are not elected?**
- 9. What was the application of ORS 260.432 and ORS 171.725 during the 2007 Regular Session since at least one of them has been amended since 2007?**

In questions 7 through 9, you ask us to explain the application of ORS 260.432 and ORS 171.725 to Senators, Representatives, the Secretary of the Senate, the Chief Clerk of the House and all other legislative employees. You ask for an explanation of the statutes both as they apply currently and as they applied during the 2007 regular legislative session. We have provided answers to those questions with regard to each statute, below. To the extent the reason for your interest in these statutes stems from the recent resignation of Ms. Line, however, we do not believe that either statute has significant relevance to Ms. Line's situation. ORS 260.432 has no bearing at

²⁹ See Employee Services New Employee Orientation Packet checklist and acknowledgement form (available from the Employee Services office of the Legislative Administration Committee).

³⁰ ORS 244.020 (1), (12).

³¹ ORS 244.020 (14).

³² ORS 244.120 (1)(c).

all on Ms. Line's circumstances, and ORS 171.725 only supplies contextual meaning to HR 15.20, as described in our answer to question 10, below.

Current application of ORS 260.432

The prohibitions against political advocacy in ORS 260.432 (1) and (2) apply to the Chief Clerk of the House and Secretary of the Senate, employees of Representatives and Senators, and other legislative employees who are not elected, but do not apply to Representatives or Senators.

ORS 260.432 (1) prohibits any person from requiring a public employee to promote or oppose any political committee, candidate, measure or initiative, referendum or recall petition. ORS 260.432 (2) prohibits public employees from using work time to promote or oppose any political committee, candidate, measure or initiative, referendum or recall petition. The term "measure" for purposes of ORS 260.432 does not include a bill or resolution that is being considered by the Legislative Assembly. Instead, a measure is any proposed legislation that is being submitted to voters for approval or rejection. A legislative referral is a measure for purposes of ORS 260.432 only after the proposal has passed both legislative chambers.³³

ORS 260.432 (5)(b) defines "public employer" to include any board, commission, committee, department, division or institution in the legislative branch of state government. Under that definition, employees of Representatives and Senators and other legislative employees who are not elected are all employees of public employers and thus qualify as public employees subject to the prohibitions in the statute.

The prohibitions in ORS 260.432 (1) and (2) also apply to the Chief Clerk of the House and the Secretary of the Senate, but do not apply to Senators or Representatives. Under ORS 260.432 (5)(a), an elected official is specifically excluded from the definition of "public employee" for the purposes of ORS 260.432 (1) and (2). Senators and Representatives are clearly elected officials and thus exempt from the statute. Whether the Chief Clerk and Secretary are also exempt is a slightly more difficult question; the Chief Clerk and the Secretary are employees of the Legislative Assembly, but could also arguably be "elected officials" given that they are elected by the bodies that they serve pursuant to the rules of those bodies. See HR 7.01 and 15.05; SR 15.01 (1). Whether the term "elected official" is meant to encompass public employees that are also elected to serve in their roles by a legislative body, rather than by the electorate as a whole, is a matter of statutory construction.

In construing the meaning of the statutory term "elected official," we discern the intent of the Legislative Assembly by examining the statutory text in context. *PGE v. BOLI*, 317 Or. 606, 610-612 (1993). The term "elected official" is not defined or otherwise used in ORS chapter 260 and has not been interpreted by Oregon courts in this context. However, the term appears in the context of a chapter of the Oregon Revised Statutes dedicated to the election laws of the State of Oregon. Without exception, those statutes otherwise utilize the term "elect" in all its variants to refer to election by the voters. See, e.g., ORS 260.005 (7) (defining "elector" as an individual qualified to vote under Article II, section 2, of the Oregon Constitution); ORS 260.005 (19) (defining "public office" as "any national, state, county, district, city office or position, except a political party office, that is filled by the electors"). (Emphasis added.) See also *Young v. State*, 177 Or. App. 295, 300 (noting, in the context of Oregon's employment laws, that "the employment relationship between an elected official and the state, to the extent one exists, is achieved through the intermediate event or instrumentality of the official's election to office by the voters."). In that context, we conclude that the term "elected official" in ORS 260.432 is intended to refer to officials who have been elected by

³³ ORS 260.005.

the voters. Therefore, the exemption in ORS 260.432 (5)(a) exempts Senators and Representatives from the prohibitions in ORS 260.432 (1) and (2), but *not* the Chief Clerk of the House or the Secretary of the Senate.

Note that, although members of the Legislative Assembly are exempt from ORS 260.432 (1) and (2), a member may not involve a public employee's work time in any activities that could be construed to aid in the advocacy by the member. ORS 260.432 (4) gives some clarification as to what may be construed as advocacy by providing that nothing in the statute prevents an employee of the legislative branch from explaining the vote of a member of the Legislative Assembly on certain acts or proposals of the Legislative Assembly that have been referred to the voters. So, for example, if a member of a Senator's legislative staff answered a constituent telephone call regarding a proposed amendment to the Oregon Constitution that has been referred to the voters,³⁴ the staffer would be prohibited under ORS 260.432 (2) from advocating a particular political position regarding the proposed amendment, but under ORS 260.432 (4) would not be prohibited from providing a factual explanation to the constituent on how the Senator voted on the proposed amendment when it was before the Legislative Assembly.

Also recall that the prohibitions against political advocacy in ORS 260.432 (2) do not apply to purely legislative action. Although other statutes will apply certain limitations, ORS 260.432 does not prohibit public employees from influencing, attempting to influence or advocating a particular legislative action, such as introduction of an amendment to a bill. Finally, note that employees who are part-time public employees and part-time campaign staff are subject to the restrictions of ORS 260.432 only when working for the state. An individual who is paid both as a public employee and as a campaign employee, however, must be careful not to overlap the duties of each employment. For example, the individual should not use a state computer for campaign employment work duties even if the individual is being paid as a campaign employee for those work duties. The individual also should not complete campaign work during work hours when the individual is being paid to work for the state.

Application of ORS 260.432 during the 2007 legislative session

ORS 260.432 applied in substantially the same manner during the 2007 legislative session as it applies today. The statute was amended by sections 7 and 8, chapter 589, Oregon Laws 2007, to add to the exemption from the term "public employee" "a person appointed as a director to the board of a pilot education service district under section 11, chapter 828, Oregon Laws 2005," and to sunset that exemption on June 30, 2012. The exemption was allowed to sunset, but then amended back into the statute by section 2, chapter 13, Oregon Laws 2013. The 2007 and 2013 amendments, taken together, served only to add a specific exemption to the statute that is not relevant to your questions.

ORS 260.432 was also amended by sections 15 and 16, chapter 9, Oregon Laws 2010, to add the current clarifying material contained in subsection (4) of the statute—providing that employees of the legislative branch may explain the vote of a member of the Legislative Assembly on certain acts or proposals of the Legislative Assembly that have been referred to the voters. Nothing in ORS 260.432 prior to 2010 would have prohibited employees of the legislative branch from providing the type of factual explanations to constituents that are specifically allowed by subsection (4) of the current statute; the 2010 amendments merely added clarity as to what activities legislative branch members can and cannot engage in during work hours under the statute. For purposes of this opinion, we conclude that ORS 260.432 applied to the Chief Clerk of the House and the Secretary of the Senate, employees of Representatives and Senators, and

³⁴ See ORS 260.432 (4)(c); Article XVII, section 1, of the Oregon Constitution.

other legislative employees who are not elected officials in substantially the same manner during the 2007 legislative session as it does today.³⁵

Current application of ORS 171.725

You also asked what the current application of ORS 171.725 is to Senators, Representatives, the Secretary of the Senate, the Chief Clerk of the House and all other legislative employees. ORS 171.725 is the definitional statute for the laws regulating lobbying in Oregon. The statute does not contain any substantive law limiting or guiding the parties listed in your request in their lobbying activities per se. That said, it is important to note that all of the parties you listed would qualify as both "legislative officials" and "public officials" as those terms are defined in ORS 171.725 for purposes of the lobbying regulations. ORS 171.725 (8) also defines "lobbying" for purposes of the lobbying regulations as:

influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the goodwill of legislative officials.

Although a comprehensive explanation of the lobbying regulations is outside the scope of this opinion, we will note that, under the remaining lobbying regulations, legislative officials acting in an official capacity are exempted from requirements to register as lobbyists and file statements of expenditures. They are prohibited from receiving consideration from anyone other than the State of Oregon for acting as a lobbyist in Oregon. ORS 171.735; 171.740; 171.745; 171.756.

To the extent your interest in ORS 171.725 is in how the statute bears on the circumstances surrounding Ms. Line's resignation as Chief Clerk, the answer is that ORS 171.725 has no direct bearing on those circumstances, but does supply contextual evidence of what is meant by "lobbyist" and "lobbying" in HR 15.20. Accordingly, see our response to question 10, below.

Application of ORS 171.725 during 2007 legislative session

ORS 171.725 applied in substantially the same manner during the 2007 legislative session as it does today. ORS 171.725 has been amended once since the 2007 session, by section 6, chapter 877, Oregon Laws 2007. That amendment clarified the definition of lobbying in subsection (8) of the statute to read:

(8) "Lobbying" means influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of [others] **executive officials or other persons** to influence or attempt to influence legislative action or attempting to obtain the goodwill of legislative officials.

"Executive officials" would already have fit within the reference to "solicitation of others" that existed in the statute prior to 2007. The amendment therefore simply provided added clarity to what was meant by solicitation of "others" and, in our evaluation, did not change the intended

³⁵ We also reviewed amendments to the definitions that apply to ORS chapter 260, which are found in ORS 260.005. None of the defined terms that were amended affect the application of ORS 260.432.

practical application of the statute. ORS 171.725 has not otherwise been amended since the 2007 legislative session.

10. Please provide an opinion on the meaning of House Rule 15.20 and any peer rule in the Senate.

HR 15.20 (1) and (2) have no relationship to the circumstances surrounding Ms. Line's resignation, and therefore are not addressed. Subsection (3) provides in pertinent part that "[n]o personnel employed by the House of Representatives shall for the duration of such employment serve as a lobbyist or be employed by a lobbyist." The House rules do not define "lobbyist." In interpreting a statute, words used in the statute are given their plain and ordinary meaning, unless a statutory definition applies. *State v. Couch*, 341 Or. 610, 617-618 (2006) (relying on both dictionary and statutory definitions). We believe the same analytical framework used to interpret statutes should be used to interpret provisions of the House rules. The plain and ordinary meaning of the term "lobbyist" is "one who lobbies," and the plain and ordinary meaning of "lobby" is "to conduct activities aimed at influencing public officials and [especially] members of a legislative body on legislation."³⁶ Although not directly applicable to the House rules, the statutory definitions of "lobbyist" and "lobbying" provide contextual evidence of what the term means in the House rules, as well. "Lobbyist" means a public official who lobbies and "lobbying" means "influencing, or attempting to influence, legislative action."³⁷ ORS 171.735 provides that the substantive laws governing lobbyist registration and expenditure reporting requirements (ORS 171.740 and 171.745) do not apply to "[a]ny legislative official acting *in an official capacity*." (Emphasis added.) This statute does not apply directly to the House rules, but an implicit exception to the lobbying prohibition for lobbying by legislative officials acting in an official capacity must be read into the rule because partisan staff—legislative assistants, for example—regularly engage in lobbying on behalf of their caucuses or members. However, nonpartisan staff of the House of Representatives, hired for purposes other than to assist caucuses or members, may not lobby in support of or opposition to legislation. House Rule 15.20 (3) means that no person who is employed by the House of Representatives in a nonpartisan position, during the time of that employment, may attempt to influence a government official to make a decision for or against any legislative action.

There is no provision in the Senate rules that is comparable to HR 15.20 (3). Senate Rule 18.01 adopts by reference the Legislative Branch Personnel Rules. Accordingly, our discussion of the applicability of Legislative Branch Personnel Rules under question 3, above, would be equally applicable here.

11. Please provide an opinion on the meaning of HR 15.20 and the Senate rule from 2007 given the ORS and definitions were amended in law after the 2007 Session.

HR 15.20 has not changed since 2007. Accordingly, our answer to question 10 applies equally in response to this question.

The 2007 Senate Rules also did not contain any provision comparable to HR 15.20 (3).

³⁶ *Merriam-Webster's Collegiate Dictionary* (10th ed., 2000).

³⁷ ORS 171.725.

12. **Is it the opinion of Legislative Counsel that Representatives and Senators are required by "rules" to refuse to provide constituent services to any employee of the legislative branch except peer Representatives and Senators because they are exempt elected officials under Oregon Revised Statutes?**

No. There are no rules or laws that require a Senator or Representative to refuse to provide constituent services to any person.

13. **Are there penalties under the law for the destruction or theft of Legislative records placed into the State or Legislative archives for retention by Representatives and Senators?**

Yes. ORS 162.305 establishes the crime of tampering with public records. For purposes of this statute, "public records" includes all legislative records, regardless of whether the record is confidential or restricted in use.³⁸ Tampering with public records means a person knowingly, and without lawful authority, destroys, mutilates, conceals, removes, makes a false entry in or falsely alters a public record. Tampering with public records, except for records of the Oregon State Lottery, is a Class A misdemeanor, punishable by imprisonment for up to one year and by a fine of up to \$6,250.³⁹

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel



By
Charles J. Cheek
Senior Deputy Legislative Counsel

³⁸ ORS 162.225 (4).

³⁹ ORS 162.305.



STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

February 1, 2009

Senator Peter Courtney
President of the Senate
900 Court Street NE S201
Salem OR 97301

Re: Meaning of "Potential Conflict of Interest".

Dear President Courtney:

You have asked whether your casting a vote in favor of Senate Bill 338 and Senate Bill 5562 at the January 28, 2009, floor session without declaring a potential conflict of interest in advance of the vote constitutes a violation of Senate rules and state law requiring such a declaration when a public official's actions constitute a potential conflict of interest. We conclude that such a declaration was not necessary in this case, because we believe your vote on these bills does not create a potential conflict of interest.

Facts

You are an employee of Western Oregon University (WOU), a public university and a subdivision of the Oregon University System.¹ The Oregon University System is a state agency, a part of state government. Senate Bills 338 and 5562 are inter-related bills that, in part, authorize the issuance of bonds and other borrowings and direct the expenditure of the debt proceeds to fund certain capital construction and improvement projects, including projects at WOU. Under the terms of the bills and under the Oregon Constitution, the debt proceeds may not be used to pay employee salaries. Both bills were voted out of the Senate during the January 28, 2009, floor session. You voted in favor of both bills, but failed to declare a potential conflict of interest in advance of your vote.²

Law

The Rules of the Senate provide that when a senator is involved in a potential conflict of interest as defined in ORS 244.020, the senator shall announce, on the Senate floor or in the committee meeting, the nature of the potential conflict prior to voting on the issue giving rise to the potential conflict.³

¹ You are currently on unpaid leave from Western Oregon University, for the duration of the 2009 legislative session.

² We note that you had declared a potential conflict of interest in advance of the Ways and Means General Government Subcommittee on Capital Construction and Information Technology vote to refer these measures to the full Ways and Means Committee.

³ Rule 3.33 (1) of the Rules of the Senate (2009).

ORS 244.020 sets forth defined terms for purposes of the government ethics laws of Oregon. This statute sets forth the definition of "potential conflict of interest" and two ancillary definitions that are significant to our analysis: "business" and "business with which the person is associated".

In relevant part, the definition of "potential conflict of interest" is as follows:

(11) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated....

The definition of "potential conflict of interest" contains the phrase "business with which the person is associated", a term that itself is defined in ORS 244.020 (3) as follows, in relevant part:

(3) "Business with which the person is associated" means:

(d) For public officials required to file a statement of economic interest under ORS 244.050, any business listed as a source of income as required under ORS 244.060 (3).

Finally, the definition of "business with which the person is associated" uses within it another defined term, "business", that is defined in ORS 244.020 (2) as follows:

(2) "Business" means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official or a relative of the public official is associated only as a member or board director or in a nonremunerative capacity.

Analysis

Our analysis turns on the meaning of "potential conflict of interest" in ORS 244.020 (11). In determining the meaning of a statute, the primary task is to discern the intent of the legislature, and the primary analysis undertaken in determining that intent is the text of the statutory provision in question and the context of that statutory provision.⁴ The context of a statute means other provisions in the same statute and related statutes.⁵

In order for there to be a potential conflict of interest, three elements must be satisfied: (1) there must be an action or decision by a person acting in a capacity as a public official; (2) the action or decision must have the potential effect of a private pecuniary benefit or detriment;

⁴ *PGE v. BOLI*, 317 Or. 606, 610 (1993).

⁵ *Id.*

and (3) the private pecuniary benefit or detriment must be received by the person, the person's relative or a business with which the person or person's relative is associated.

The first element appears to be satisfied. Your votes on SB 338 and 5562 constitute actions or decisions and your actions in voting for the bills constitute you acting in the capacity of a public official.

The next element needed for there to be a potential conflict of interest is to have a "private pecuniary benefit or detriment". In this context, "private" means "apart from the state" or "intended for the use of a particular person or group [and] not freely available to the public."⁶ Senate Bills 338 and 5562 authorize the state to borrow moneys and transfers a portion of the borrowed moneys to WOU. Because WOU is a public institution and a subdivision of the State of Oregon, the act of voting on the legislation does not confer a private pecuniary benefit. The benefit – funds for capital construction and improvements – do not become a private pecuniary benefit until WOU in turn spends the funds on contractors, materials and related costs in which the recipients are private parties. That decision, however, is a different action or decision from the one at issue here, namely your vote on SB 338 and 5562. Your voting on the bills does not generate any private pecuniary benefit and cannot, because the scope of the decision made in SB 338 and 5562 is to transfer certain funds to WOU and those funds cannot constitute a private pecuniary benefit until WOU makes an independent decision to transfer the funds to private entities to carry out the capital construction projects. As an example, it would be a different result if you were voting on a bill that directly affected the salaries of administrators at WOU. In that case, a private pecuniary benefit or detriment could result.

The third element is that the pecuniary benefit or detriment potentially could accrue to a specific person named in the statute, namely you as the public official who is taking the action or decision at issue here – voting on SB 338 and 5562 – or a business with which you are associated.⁷ We conclude that neither you nor WOU satisfy the criteria to be the person named by the statute. Because you are an employee of WOU, you receive a pecuniary benefit from WOU: your salary and benefits. However, your salary and benefits are not, and may not be altered by the act of voting on SB 338 and 5562. The terms of the bills and the debt provisions of the Oregon Constitution govern how debt proceeds must be spent; public employee salary and benefits are not among the allowable uses of the proceeds.⁸ Thus, you could not receive any direct pecuniary benefit or detriment as a result of voting.

As you do not stand to receive a pecuniary benefit or detriment, the only other person named in the statute as the person who could receive a pecuniary benefit or detriment that would give rise to a potential conflict of interest is a business with which you are associated. In our view, WOU is not a business with which you are associated because it is not a "business" under ORS 244.020 (2). We assume for purposes of this analysis that you list WOU as a source of income on your statement of economic interest and therefore, if WOU is a business, it constitutes a business with whom you are associated for purposes of determining if there is a potential conflict of interest. We conclude that WOU does not, however, meet the definition of "business" in ORS 244.020 (2). That definition provides a list of different types of entities, plus

⁶ Webster's Third New International Dictionary (2002).

⁷ For simplicity we assume that neither your relatives nor any business with which your relatives are associated are at issue in these circumstances.

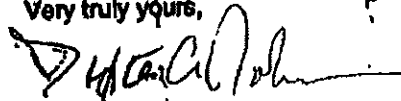
⁸ See section 7, Article XI of the Oregon Constitution (general debt limitation); and section 8, SB 338-A (2009) (continuously appropriating debt proceeds for construction, remodeling, expansion and renovation of facilities at WOU).

"self-employed individuals and any other legal entity operated for economic gain." The juxtaposition of "self-employed individuals" next to "any other legal entity operated for economic gain" makes it clear that to be a "business" under ORS 244.020 (2), the entity must be operated for economic gain. The Government Ethics Commission has interpreted "business" as excluding government agencies because they are not operated to create profit.⁹ WOU is a subdivision of a government agency and is not operated for economic gain, and therefore is not a business under ORS 244.020 (2). Because WOU is not a business, it cannot be a business with which you are associated, as defined in ORS 244.020 (3). Because WOU does not meet the definition of business with which you are associated, it follows that the acts of voting in favor of SB 338 and 5562 are incapable of giving rise to a potential conflict of interest. Simply put, there is no private pecuniary benefit or detriment arising out of the legislation that accrues to the benefit of a business with which you are associated, because WOU is a public institution that does not operate for economic gain and is incapable of receiving a private pecuniary benefit.

We finally note that the remedies available to anyone asserting a Senator's failure to declare a potential conflict of interest are limited to those set forth in the Rules of the Senate. A complaint may not be filed with the Government Ethics Commission for two constitutional reasons. First, members of the Legislative Assembly are not subject to civil process during a session of the Legislative Assembly.¹⁰ Second, the Speech and Debate Clause prohibits a legislator from being questioned about any statement made in any venue other than the Legislative Assembly.¹¹

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,



Dexter A. Johnson
Legislative Counsel

⁹ Gov't Standards and Practices Commission Staff Opinion 04S-003 (2004) (interpreting earlier version of ORS 244.020 (2) definition of business). Note that Government Ethics Commission staff opinions are not binding precedent.

¹⁰ Section 9, Article IV of the Oregon Constitution.

¹¹ *Id.*