

State of Wisconsin \ Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: May 18, 2011

TO: Members of the Public

FROM: Government Accountability Board

SUBJECT: Complaints Arising from Budget Repair Bill Dispute
Case No. 2011-GAB-01

SUMMARY

The Government Accountability Board has received numerous complaints related to recent events and the actions of various state public officials involved in the debate regarding Governor Scott Walker's budget repair bill. Over the course of several weeks in February and March, Board staff was inundated with telephone calls and email messages complaining about tactics used by officials on either side of the debate, and requesting that the Board take action to enforce procedural rules and penalize elected officials for perceived unethical conduct. The Board has reviewed each of these complaints.

While the complaints characterized various actions of public officials as morally or politically "unethical," the Board's role is to enforce the specific provisions of the Ethics Code for State Public Officials, as well as the campaign finance, elections, and lobbying laws. It is not to pass judgment on political actions or political positions.

Pursuant to §5.05(2m)(c)4., Wis. Stats., if the board reviews a complaint and fails to find that there is a reasonable suspicion that a violation of the laws under the Board's jurisdiction has occurred or is occurring, the board shall dismiss the complaint. In determining whether an investigation of the many complaints received by the Board related to the budget repair bill controversy was warranted, the Board accepted the allegations contained in the complaints as true. For the reasons stated, the Board has dismissed each of the complaints described below due to lack of reasonable suspicion that a violation of any law administered by the Government Accountability Board has occurred.

COMPLAINTS AND DISPOSITIONS

1. A series of allegations was made in a complaint filed by the Democratic Party of Wisconsin (DPW) against Governor Scott Walker on March 7, 2011. Many individual citizens and organizations filed complaints with similar allegations. These complainants are summarized as follows:

- A. Allegation: Governor Walker participated in a telephone call with an individual who falsely represented himself to be David Koch. Mr. Koch is a contributor to conservative causes. An organization headed by Mr. Koch contributed \$43,000 directly to the Walker gubernatorial campaign and \$1 million to the Republican Governors Association, which spent \$3.4 million on television ads in support of the Walker campaign. During the telephone call, the Koch impersonator asked how he could help the effort to support the Governor's proposed budget repair bill. Governor Walker responded that some Republican legislators would benefit from advertisements being run in their districts in support of the bill. The statement allegedly constitutes a request to initiate political disbursements in coordination with the Governor's campaign, in violation of the oath of independent disbursements and §11.06(7)(c), Wis. Stats.

Board's Finding: Section 11.06(7)(c), Stats., prohibits a committee which files an oath of independent disbursements from acting in cooperation or consultation or in concert with any candidate or agent or authorized committee of a candidate who is supported by the committee or benefits from a disbursement of the committee. In this instance, Governor Walker was not speaking with a representative of a committee or organization making independent disbursements, but with an individual who falsely represented himself as someone speaking on behalf of such an organization. Taking all facts alleged as true, the Board found that the complaint failed to establish reasonable suspicion that a violation of §11.06(7)(c), Stats., occurred, and the Board dismissed this allegation.

- B. Allegation: Governor Walker participated in the telephone call with the individual falsely representing himself to be David Koch while he was in the Governor's Office in the Capitol building. The telephone call, therefore, constituted a violation of §11.36(4), Stats., which prohibits any person from remaining in any state building for the purpose of requesting a political contribution.

Finding: The Governor's statement, at most, is a suggestion that his agenda and supportive legislators would benefit from issue advertising. The Governor did not request monetary or in-kind political contributions. Taking all facts alleged as true, the Board found that the complaint failed to establish reasonable suspicion that a violation of §11.36(4), Stats., occurred, and the Board dismissed this allegation.

- C. Allegation: During the telephone call with the individual falsely representing himself to be David Koch, Governor Walker stated that he has the Attorney General's office "looking into" strategies to force the return to the State of Democratic Senators, who had left the State in order to deny the required quorum for Senate action on the budget repair bill. The statement allegedly constituted a misuse of the independently elected office of Attorney General for primarily political motivations.

Finding: Taking all facts alleged as true, the Board found that the Governor's statement regarding the Attorney General's role and involvement in the political debate did not establish reasonable suspicion that a violation of a specific provision of the Ethics Code for State Public Officials occurred. The statement estab-

lishes nothing more than the Governor speculating about possible support for his agenda from another constitutional officer and seeking legal advice from the State's lawyer about possible legal options and strategies to advance the Governor's proposed agenda. Accomplishing a goal of his legislative agenda does not confer a personal financial benefit on Governor Walker, and the Ethics Code does not prohibit officials from engaging in activity that might be perceived as political, provided that the office is not used in a specific way to support a campaign effort, such as by organizing a fundraising event or issuing campaign communications. Therefore, the Board dismissed this allegation.

- D. Allegation: During the telephone call described above, Governor Walker stated that he consulted with staff members and Cabinet officials to consider "planting" troublemakers to incite violence in peaceful protests at the Capitol, and that he decided not to do so only because such a tactic might scare the public into thinking that he should settle the dispute to avoid problems. The Governor's statement allegedly constitutes a conspiracy to recklessly endanger public safety in violation of §§939.31 and 947.01, Stats.

Finding: Taking all facts alleged as true, the Board found that the Governor's statement did not constitute a violation of a specific provision of the Ethics Code for State Public Officials or any other law under the Board's jurisdiction, and dismissed this allegation. No evidence suggests that the Governor actually encouraged or organized others to incite violence at any protests, and any alleged violations of the criminal statutes cited are within the purview of local law enforcement and prosecutors, not the Board. Notably, the Dane County District Attorney announced that his office had investigated this allegation and found no grounds for prosecution under the criminal statutes.

- E. Allegation: During the telephone call described above, Governor Walker stated that he was preparing to issue layoff notices to 5,000 – 6,000 public sector employees in an attempt to "ratchet up" the political pressure on Democratic Senators to return to the State and allow a vote on the budget repair bill. This statement allegedly constituted a threat against, and intimidation of public sector employees for political purposes, and is an unfair labor practice in violation of §111.84, Stat.

Finding: Taking all facts alleged as true, the Board found that the Governor's statement did not establish reasonable suspicion that a violation of a specific provision of the Ethics Code for State Public Officials or any other law under the Board's jurisdiction has occurred. Alleged violations of the employment relations provisions of Chapter 111 are matters to be resolved pursuant to that Chapter, and not by the Board. Authorizing layoff notices would not result in a personal and financial benefit to Governor Walker that is prohibited by the Ethics Code.

- F. Allegation: During the telephone call described above, the individual falsely representing himself to be David Koch offered to pay for the Governor to fly to California, where he would be "shown a good time." Governor Walker responded by stating that it would "be great." This offer and the Governor's response allegedly constituted a violation of §19.45(2), which prohibits a state

official from using his public position or office to obtain financial gain or anything of substantial value for the private benefit of the official or the official's immediate family.

Finding: Governor Walker's response was not an acceptance of something of value because there was no offer actually made by Mr. Koch, only an imaginary offer made by the individual representing himself as David Koch. Furthermore, no such actual trip has been offered to, or taken by, the Governor. Taking all facts alleged as true, therefore, the Board found that the complaint did not establish reasonable suspicion that a violation of §19.45(2), Stats., occurred, and dismissed this allegation.

2. In addition to the allegations included in the complaint filed by the Democratic Party of Wisconsin, the Board received the following complaints against Governor Walker, his administration, and Republican legislators related to events surrounding the budget repair bill dispute:

- A. Allegation: Citizens for Responsibility and Ethics in Washington (CREW), and several others, alleged that Governor Walker and Senate Majority Leader Scott Fitzgerald misused state resources by ordering the Wisconsin State Patrol to visit the homes of Democratic Senators, and by issuing orders that the State Patrol detain Democratic Senators if they were located in Wisconsin and transport them to the Capitol to participate in Senate business. The complaints noted that the Superintendent of the State Patrol is Stephen Fitzgerald, the father of Senator Fitzgerald, and that State troopers cannot take part in any dispute between an employer and employee over wages or working conditions.

Finding: The CREW complaint essentially asserted that the involvement of the State Patrol in attempting to locate and detain Senate Democrats is a violation of §19.45(5), Stats., which prohibits state public officials from using or attempting to use their public position to influence or gain unlawful benefits, advantages or privileges for themselves or for others. The Department of Transportation issued a response to the CREW complaint which is attached as Exhibit A. The response of the State Patrol notes that it possesses broad latitude in its authorized duties, including protecting the safety of State officials and assisting local law enforcement.

Taking all alleged facts as true, the Board found that the complaints regarding the use of the State Patrol did not establish a reasonable suspicion that a violation of §19.45(5), Stats., occurred, or that the directives given to the State Patrol constituted an unlawful benefit. The State Patrol was not asked to intervene in a labor dispute, but rather in a search for legislators who were intentionally absent from the Senate's floor session. The Senate possesses broad authority to compel attendance of absent Senators pursuant to Article IV, §7 of the Wisconsin Constitution, which authorizes each house of the Legislature "to compel the attendance of absent members in such manner and under such penalties as it may provide." Given the broad language of this provision, and the broad latitude of the State Patrol's duties, the Board found that its actions did not confer an unlawful benefit upon Governor Walker and Senate Majority Leader Scott Fitzgerald.

- B. Allegation: The Board received several complaints regarding the adoption and implementation of Senate rules by Majority Leader Scott Fitzgerald and Republican Senators in the absence of Democratic Senators, including threatening to withhold paychecks of Democratic Senators, terminating public testimony at a committee hearing and debate on the Assembly floor, changing voting rules, convening a floor session prior to the announced time, and failing to provide adequate notice of a conference committee meeting under the Open Meetings Law.

Finding: The Board found that allegations regarding the rules of the Senate were not within the jurisdiction of the Board. Article IV, §8 of the Wisconsin Constitution provides that each house of the Legislature may determine the rules of its own proceedings, and punish its members for contempt and disorderly behavior. The Board has no authority to second-guess or oversee the reasonableness of the Senate's rules or their implementation, unless those rules violate statutory provisions of the Ethics Code, campaign finance regulations, or lobbying laws. Legislative actions taken by the majority of the Senate do not constitute use of a public office for a personal and financial benefit. In addition, whether or not those actions were influenced by political motivations does not convert them to campaign activities. Therefore, taking all alleged facts as true, the Board found that these allegations fail to establish reasonable suspicion that a violation of the Ethics Code has occurred, and dismissed the complaints.

- C. Allegation: The Board received a number of complaints alleging that Governor Walker and the Secretary of the Department of Administration had unlawfully restricted public access to the Capitol building, as a method of terminating protests and demonstrations regarding the Governor's budget repair bill.

Finding: The Board found that this allegation did not fall under the Board's jurisdiction to enforce the specific provisions of the Ethics Code for State Public Officials. As demonstrated by the civil case brought in Dane County Circuit Court, whether or not public access to the Capitol was properly restricted is a constitutional question, and not an issue of enforcing the Ethics Code. Access to the Capitol building was restricted pursuant to official policies of the Department of Administration, which provided no personal financial gain to any of the state public officials involved. Taking all alleged facts as true, therefore, the Board found that these allegations failed to establish reasonable suspicion that a violation of the Ethics Code has occurred, and the dismissed these complaints.

- D. Allegation: The Board received various complaints that elected officials have used the budget repair bill debate to advance political motives. For instance, some complaints argued that the fourteen Democratic Senators violated their oaths of office by hiding out in Illinois as a political maneuver. Others have complained about Senator Fitzgerald's public comments that the elimination of most collective bargaining rights for public employees will make it more difficult for President Obama's 2012 re-election campaign in Wisconsin.

Finding: This category of complaints was aimed at political tactics of elected officials. The Board noted that the oath of office does not prohibit a legislator

from being absent during the floor session. An alleged violation of the oath of office is also not a basis for enforcement under the Ethics Code, without some violation of a specific provision of the Ethics Code. The Ethics Code also does not prohibit elected officials from speaking about potential political consequences of legislative action, or even from using the public office for political advantage. Taking all alleged facts as true, therefore, the Board found that these complaints did not establish a reasonable suspicion that such political tactics and statements violated the Ethics Code.

3. The Board received several complaints regarding the fourteen Senate Democrats who left the State:

Allegation: The Senate Democrats unlawfully used funds from their respective campaign accounts, or gifts from supporters, to pay for lodging and meal expenses during their stay in Illinois.

Finding: In response to verbal inquiries, Board staff had issued an informal opinion to the Senate concluding that, while the Ethics Code prohibited Democratic Senators from accepting gifts to pay for their food and lodging, campaign funds could be used for such purposes. The staff's guidance was based on recognition that the decision of Senate Democrats to leave the State involved at least some political purpose which supported the use of political contributions. In addition, staff noted that the Elections Board and Government Accountability Board have consistently interpreted the term "political purpose" broadly, to include activities which may have both an official state purpose as well as a purpose to affect the outcome of future elections. The Board formally affirmed the staff's informal opinion regarding the Senate Democrats use of campaign funds for lodging and living expenses during their stay in Illinois. Therefore, taking all alleged facts as true, the Board found that these allegations failed to establish reasonable suspicion that a violation of the Ethics Code or campaign finance laws has occurred, and dismissed the complaints.

CONCLUSION

The Government Accountability reviewed the complaints and made the findings described above. The Board also directed staff to make a written public announcement of the Board's findings regarding these matters. In summary, the complaints involved allegations which are outside the jurisdiction of the Board, did not include evidence of a violation of the laws the Board administers, and/or involved the use of political tactics and strategies which are resolved at the ballot box rather than by use of the enforcement tools available to the Board. Due to the high volume of similar complaints, and the public interest in the resolution of the complaints, the Board is issuing this public statement regarding its findings in these matters, not only to conclude the complaint process, but also as a method of educating the public regarding the Board's jurisdiction and enforcement responsibilities.