

REPORT  
HOUSE  
RULES:  
SANDERS  
2-4-97

# Alaska State Legislature

## House of Representatives



Official Business

COMMITTEE ON RULES

State Capitol, Rm. 204  
Juneau, Ak 99801-1182  
(907) 465-3764

FEB 04 1996<sup>7</sup>

### REPORT OF THE RULES COMMITTEE ON IN RE SANDERS (H 96-02)

#### I BACKGROUND

On April 19, 1996, a complaint was filed with the Select Committee on Legislative Ethics concerning Representative Jerry Sanders. The Committee determined that it was in proper form and contained allegations which, if true, articulate violations of the Ethics Act. Thereafter, on July 24, 1996, the Committee issued a resolution defining the scope of its investigation against Representative Sanders.

On September 23, 1996, the Committee found probable cause to believe Representative Sanders violated the Ethics Act and issued formal charges, alleging violations of AS 24.60.030(a)(2), AS 24.60.030(a)(5), and AS 24.60.030(b). Representative Sanders was served with a copy of the charges, along with a Summons requiring him to file an Answer within 10 days. Representative Sanders elected to not file an Answer.

The Committee held public hearings concerning Representative Sanders' case on November 14, 1996 and November 15, 1996. Mr. Michael White was the Hearing Officer, and the Committee was represented by counsel. Representative Sanders was represented by Mr. Lester Syren. Representative Sanders appeared telephonically, but on numerous occasions, when asked about the details of the case, asserted his rights under the Fifth Amendment.

On November 15, 1996, the Committee issued a formal written opinion, finding that Representative Sanders violated the aforementioned sections of the Ethics Act and recommending a total of seven sanctions.

## II

### THE ETHICS COMMITTEE'S FACTUAL FINDINGS

The Ethics Committee's findings of fact may be summarized as follows: On January 29, 1996, the Republican Party conducted a Presidential Straw Poll in Alaska. Subsequently, Representative Sanders sent a letter to approximately 239 constituents who had participated in the poll.

The letter in question stated as follows:

I would like to take this opportunity to thank you for your participation in the first presidential straw poll to be held in Alaska. Not only have we broken new ground historically, politically we have gained prestige on the national level.

It was exciting to learn that District 19's participation was among the strongest areas to go out and cast a vote for a presidential candidate. With the inclement weather to deal with, I really appreciate the interest shown by my fellow Republicans.

Seeing a lot of you in the halls of the polling station within my district was indeed a pleasure. If I didn't get a chance to talk with you, please accept my apology.

I have always held in high regard those people who will go that "extra mile" to do what is needed. Taking the time out of your busy schedule to fulfill your civic duty is greatly appreciated.

The mailing was made with the assistance of Representative Sanders' staff and required \$76.48 in postage, which was charged to his Juneau Mailroom Account. This account was funded by transfers from Representative Sanders' accountable office account. As stated in its written decision: "The Committee finds that the act of preparing and sending the letter used public funds (the accountable office allowance) for postage; used public facilities and equipment (the state computer in his office) and used public resources (the staff time of his employees)."

III  
THE ETHICS COMMITTEE'S CONCLUSION OF LAW

With respect to Count 1, the Committee found as follows:

The Committee finds, by clear and convincing evidence, that this letter does not have a legislative purpose. It concerns a function of a political party on a national level, the effort to influence the choice of the Republican nominee for President. It was sent to active members of Rep. Sanders' political party, in his district, in a year he was running for election. Legislators may use public funds, facilities and staff to communicate with constituents if that communication has a connection to a legislative purpose. This letter has a political, not a legislative purpose. The Committee finds that Rep. Sanders' use of public funds, facilities and equipment and staff time was for a nongovernmental purpose, and for his private benefit (campaign good will) and for the benefit of another person (the Republican Party). Under AS 24.60.030(a)(2), any one of these purposes is a violation." (emphasis in original).

With respect to Count 2, the Committee found that, although the letter was not for the purpose of political fundraising, it was for the purpose of political campaigning. Accordingly, the Committee determined that AS 24.60.030(a)(5) was violated.

With respect to Count 3, the Committee determined that Representative Sanders required his staff to perform duties related to producing and mailing the letter, which it found was a political party or campaign activity. The Ethics Committee therefore concluded that Representative Sanders violated AS 24.60.030(b).

IV  
THE ETHICS COMMITTEE'S RECOMMENDATIONS

Having determined that Representative Sanders was guilty of violating AS 24.60.030(a)(2), AS 24.60.030(a)(5), and AS 24.60.030(b), the Ethics Committee then determined that Representative Sanders had not been cooperative and considered the issue of sanctions. With respect to the issue of whether or not Representative Sanders cooperated, the Ethics Committee stated:

"...[T]he Committee finds, upon reviewing the pleadings and correspondence in the case since the probable cause

determination, a pattern of delaying and obstructing tactics (including lack of compliance with the Hearing Officer's orders) which constitutes a lack of cooperation which was inappropriate."

The recommended sanctions are summarized as follows:

- (1) That Representative Sanders be stripped of any committee chair positions he may hold; and
- (2) That he be required to elect a "non-accountable" option for his office account; and
- (3) That he be required to reimburse LAA \$76.48 in postage and 8 hours compensation for a Range 21 employee (\$207.44); and
- (4) That he be required to make a full, complete, and public apology on the floor of the House; and
- (5) That he adopt and file in his office a written policy for his employees concerning the use of government time; and
- (6) That he attend ethics training with his staff; and
- (7) That he be restricted from using legislative funds for out-of-state travel.

## V

### THE RULES COMMITTEE'S FINDINGS OF FACT

The House Rules Committee concurs with the Ethics Committee's factual findings in a number of respects. Specifically, the Rules Committee finds as follows: First, on January 29, 1996, the Republican Party held a presidential Straw Poll in Alaska. Second, on March 5, 1996, Representative Sanders caused a letter to be sent to approximately 239 people in his House District who participated in the Straw Poll. Third, this letter was on Representative Sanders' letterhead and was marked "official business". Fourth, the letter was prepared in Representative Sanders' legislative office in Juneau with the assistance of his legislative staff during normal working hours. Fifth, the content of the letter is as set forth above. Sixth, the mailing utilized postage charged to Representative Sanders' postage account at the Capitol Building, which account was funded by transfers from Representative Sanders' accountable office account. Seventh, the actual cost of postage for this mailing was \$76.48.

In addition to the above findings of fact, the Rules Committee, *after having had the advantage of hearing Representative Sanders' testimony first hand*, makes the following findings of fact: First, on all relevant dates, Representative Sanders was not a declared candidate for reelection. Second,

on all relevant dates, Representative Sanders had not commenced normal and usual campaign or election related activities. Third, on all relevant dates, Representative Sanders had not decided whether or not to stand for reelection. Fourth, the letter in question was not intended by Representative Sanders as a campaign tool or as a mechanism for personal benefit, or for the benefit of any other person. Fifth, the letter in question was motivated by a desire to complement his constituents for participating in the public process, as well as a desire to encourage future participation in the public process.

VI  
RULES COMMITTEE CONCLUSIONS OF LAW

A  
Count 1

Count 1 alleges a violation of AS 24.60.030(a)(2), which states, in relevant part, as follows:

"A legislator or legislative employee may not...(2) use public funds, facilities, equipment, services, or another government asset or resource for a nongovernmental purpose or for the private benefit of either the legislator, legislative employee, or another person..."

A strict and literal reading of this statute indicates that a prima facie case for violating AS 24.60.030(a)(2) includes the following elements:

1. The alleged perpetrator must be a legislator or legislative employee; and
2. There must be the use of public funds, facilities, equipment, services, or another government asset; and
3. There must be:
  - a. A nongovernmental purpose; or
  - b. Private benefit of the alleged perpetrator or another person.

All three elements must be satisfied by clear and convincing evidence before the statute is violated.

In this case, there is no question that elements 1 and 2 are satisfied by clear and convincing evidence. The third element, however, is much more problematic. As indicated above, it can be satisfied in one of two ways---if there is a nongovernmental purpose, or if there is private benefit of either the actor or another. Each of these alternatives will be examined in turn. What

complicates analysis is the utter lack of definitions for such key terms as "nongovernmental" and "benefit".

Was there a nongovernmental purpose? The word "purpose", in this context, is synonymous with "intent" or "motive". In the opinion of the Rules Committee, and it so finds, there is insufficient evidence from which it can be concluded that there was a nongovernmental purpose. As indicated above, the Rules Committee found that the purpose of the letter, and Representative Sanders' motive, was to honor and encourage participation in the public process. This is a governmental purpose and is entirely proper.

The Ethics Committee characterized the letter as having a political and not a legislative purpose. It based this conclusion on several facts: First, it concerned the activities of a political party. Second, it was sent to active members of Representative Sanders' political party. Third, it was sent to people in his district in an election year. With all due respect, the Rules Committee draws a different conclusion with respect to Representative Sanders' purpose, or motive.

As admitted by counsel for the Ethics Committee in his final argument at the conclusion of Representative Sanders' ethics hearing:

"Representative Sanders was given every opportunity to tell his side, to tell us what happened, why he sent that letter, what was his intent, what was the official or the legitimate legislative purpose to send that letter? You're going to have to infer that now, because I can't tell you what his purpose was, what was in his mind and he wouldn't tell you and his staff wouldn't tell you, so you're going to have to draw the inferences from the evidence or the lack of the evidence... (emphasis added)

And when you review the evidence, look at the exhibits. Look at Exhibit 6, that's the letter. That's the letter. Read that letter and say, what's the legitimate State purpose for that letter."

Thus, the Ethics Committee had no direct evidence concerning Representative Sanders' motive in sending the letter. It was limited to the inferences that could be drawn from the letter itself. While it was entirely permissible for the Ethics Committee to draw inferences from the letter, its ability to assess motive was not enhanced by any direct evidence. The Rules Committee was not similarly handicapped, and consequently, as previously discussed, the Rules Committee found that Representative Sanders' motive was to advance a governmental purpose. Accordingly, the Rules Committee specifically finds that Representative Sanders did not violate AS 24.60.030(a)(2) by having a nongovernmental purpose in sending the letters.

The Ethics Committee also found that AS 24.60.030(a)(2) was violated because Representative Sanders realized a private benefit, which it characterized as "campaign good will". The Rules Committee rejects this conclusion. As indicated, Representative Sanders, at the time in question, was not a declared candidate, was not engaging in normal campaign activities, and had not even decided whether he was going to run in the next election. There was no campaign to which "good will" could attach.

The Rules Committee notes that "good will" is to be expected when legislators do a good job. To avoid good will, legislators would have to shun their responsibilities and neglect their constituents. Good will is, quite simply, a normal byproduct of the conscientious discharge of our duties, the very duties that were entrusted to us by our constituents. Furthermore, discharging these duties oftentimes requires a significant expenditure of public resources, well outside the statutory exceptions pertaining to nominal investments.

The Rules Committee rejects any construction of AS 24.60.030(a)(2) which equates the private "benefit" of legislators to "good will". If we can not do our jobs; if we can not help our constituents; and, if we can not uphold the trust that was placed in us for fear that we might incur some "good will", we might as well fold up our tents and go home. Such a construction of the statute yields ludicrous results. It therefore follows that the Rules Committee wholly rejects the Ethics Committee's conclusion that AS 24.60.030(a)(2) was violated on the theory that Representative Sanders' letter generated campaign good will, or any other type of good will.

The Ethics Committee also found that Representative Sanders' letter violated AS 24.60.030(a)(2) because it was for the private benefit of a third person, the Republican Party. The Ethics Committee's decision on this issue was articulated summarily, without an adequate specification of its rationale or the specific benefit flowing to the Republican Party. The Rules Committee rejects this conclusion. After having examined the evidence, it does not find from even a preponderance of evidence, let alone by clear and convincing evidence, that the Republican Party realized any benefit from the letter.

In summary, with respect to Count 1, the Rules Committee finds that Representative Sanders acted with a governmental purpose, that he did not realize a private benefit, and that no private party realized a benefit. Therefore, Representative Sanders did not violate AS 24.60.030(b)(2).

**B**  
**Count 2**

In Count 11, the Ethics Committee determined that Representative Sanders' violated AS 24.60.030(a)(5). This statute reads as follows:

"A legislator or legislative employee may not...(5) use or authorize the use of state funds, facilities, equipment, services or another government asset or resource for the purpose of political fund raising or campaigning..."

The Ethics Committee determined that Representative Sanders' letter constituted the use of state resources for the purpose of campaigning, in violation of the statute. The Rules Committee does not agree. As noted, Representative Sanders had not yet commenced his campaign. Also, as noted, his purpose was to encourage participation in the public process. Specifically, he was not motivated by a desire to advance his then nonexistent personal campaign, nor that of the Republican Party. He did not act with that purpose, and thus, Representative Sanders did not violate AS 24.60.030(a)(5).

**C**  
**Count 3**

The Ethics Committee found, by clear and convincing evidence, that Representative Sanders violated AS 24.60.030(b) by requiring his staff to participate in political party activities and campaigning. AS 24.60.030(b) states:

"A legislative employee may not on government time assist in political party or candidate activities, campaigning, or fund raising. A legislator may not require an employee to perform an act in violation of this subsection."

Again, the Rules Committee disagrees. The letter in question was not campaigning, and it was not a political party activity. It was an effort by Representative Sanders to encourage participation in the public process. Representative Sanders did not violate AS 24.60.030(b).

**VII**  
**RULES COMMITTEE'S RECOMMENDED SANCTIONS WITH RESPECT TO**  
**ALLEGED VIOLATIONS CONTAINED IN COUNTS 1, 2, AND 3**

Having determined that Representative Sanders did not violate the statutes he was formally charged with violating, there is no occasion for the imposition of sanctions with respect to *those* charges.

**VIII**  
**RULES COMMITTEE'S CONCLUSION REGARDING REPRESENTATIVE**  
**SANDERS' COOPERATION WITH THE ETHICS COMMITTEE**

AS 24.60.170(k) provides, in relevant part, as follows:

Following the hearing, the committee shall issue a decision stating whether or not the subject of the complaint violated this chapter, and explaining the reasons for the determination. The committee's decision may also indicate whether the subject cooperated with the committee in its proceedings. If the committee finds a violation, or lack of cooperation by the subject, the decision shall recommend what sanctions, if any, the committee believes are appropriate." (emphasis added)

The Rules Committee construes this statute as creating an independent legal duty to cooperate with the Ethics Committee, the violation of which may be grounds for the imposition of sanctions, regardless of the disposition of the original charges. The Ethics Committee determined that Representative Sanders did not cooperate with it. The Rules Committee concurs with that assessment. Accordingly, appropriate sanctions may, but need not, be assessed for failure to cooperate.

In articulating this conclusion, the Rules Committee is troubled by the lack of statutory guidance as to what constitutes a lack of cooperation. In that regard it must be emphasized that it is not the Rules Committee's position that mounting a vigorous defense constitutes a lack of cooperation. Similarly, representation by counsel and good faith procedural or evidentiary tactics do not constitute a violation of this statutory duty. In addition, the good faith exercise of constitutional rights may not be construed as a "lack of cooperation".

IX  
RULES COMMITTEE'S RECOMMENDATIONS  
REGARDING APPROPRIATE SANCTIONS

The Rules Committee makes the following observations: First, the sanctions recommended by the Ethics Committee, for the most part, were predicated upon a finding that Representative Sanders improperly used state money and resources to improperly benefit himself or for improper purposes; and, the sanctions were specifically tailored to punish this specific type of offense and to act as a prophylactic measure to ward off future violations of this type. Second, those specific offenses are no longer relevant to determining proper sanctions. Third, any assessment of sanctions must specifically pertain to the violation actually committed by Representative Sanders---a failure to cooperate with the Ethics Committee. That is to say, there must be a logical nexus between the offense of failure to cooperate and the sanction or sanctions assessed by the House against Representative Sanders. Fourth, taking into consideration Representative Sanders' beliefs about the weaknesses of the Ethics Committee and the Ethics Code, as well as the natural pressures and concerns generated by all political campaigns, the Rules Committee understands, *but does not excuse or condone*, Representative Sanders' actions with respect to the Committee. Finally, sanctions may properly relate to the twin goals of deterring Representative Sanders from failing to cooperate with the Ethics Committee in the future, as well as deterring others from committing this violation. With these considerations in mind, the Rules Committee makes the following recommendations to the full House concerning sanctioning Representative Sanders for failure to cooperate.

- (1) It is recommended that the Ethics Committee's recommendations concerning sanctions not be adopted. As noted, they relate to three alleged violations which did not occur.
- (2) Representative Sanders should be ordered to pay a \$1,000 fine to LAA before the end of the current legislative session; and
- (3) Representative Sanders should not be permitted to travel out of Alaska utilizing state funds during the 1997 calendar year; and
- (4) Representative Sanders should be ordered to utilize the nonaccountable office account procedure; and
- (5) Representative Sanders should be ordered to attend ethics training if he has not already done so; and

- (6) Representative Sanders should be ordered to post a copy of the Ethics Act in his legislative offices.

X  
CONCLUSION

The Ethics Committee recommends that Representative Sanders be sanctioned as discussed in the previous section. In addition, it must be noted that, although the Rules Committee disagrees with the conclusions reached by the Ethics Committee, this disagreement is based on factual and legal considerations. This opinion is not based upon a finding that any member of the Ethics Committee acted other than honorably. The Rules Committee had the benefit of evidence not before the Ethics Committee, and its disagreement concerning the law is just that, an intellectual disagreement, which is something which occurs in courts thousands of times a day among honorable people. Nevertheless, the Rules Committee does disagree with the Ethics Committee's findings and recommendations and respectfully urges the full House to act consistent with the recommendations contained herein.

Finally, it may be noted that, during the course of reviewing In Re Sanders, H 96-02, the Rules Committee identified a number of troublesome issues concerning the Ethics Act. The Rules Committee determined that resolution of these issues is outside the scope of the task assigned to it. However, the Rules Committee also concluded that it would be remiss if it failed to inform the full House of its concerns. Accordingly, attached hereto is a short document outlining areas which the Committee believes warrant study. It is recommended that this document be forwarded to an appropriate body for consideration.

Dated this \_\_\_\_ day of February, 1997 in Juneau, Alaska.

-----  
Representative Pete Kott  
Chair  
House Rules Committee

-----  
Representative Gail Phillips

-----  
Representative Brian Porter

-----  
Representative Al Vezey

-----  
Representative Bill Williams

-----  
Representative Kim Elton

-----  
Representative Irene Nicholia

# Alaska State Legislature

## House of Representatives



Official Business

### COMMITTEE ON RULES

State Capitol, Rm. 204  
Juneau, Ak 99801-1182  
(907) 465-3764

#### RULES COMMITTEE'S CONCERNS REGARDING THE ETHICS ACT

The Rules Committee, in evaluating the Ethics Committee's recommendations in In Re Sanders, H 96-02, identified a number of issues concerning the Ethics Act which it concluded warrant additional study. As stated in the body of its written recommendations to the full House regarding In Re Sanders, the Rules Committee does not purport to resolve these very difficult and complex issues, but rather seeks to apprise the full House of its concerns. It is recommended that this matter be referred to an appropriate body for further action. With that in mind, the issues are as follows:

1. Are key terms in the Act sufficiently defined?
2. Does a lack of definitions make it difficult for people governed by the Act to know what conduct is prohibited? If so, is the Act subject to challenge on Due Process grounds?
3. Does a lack of definition of "cooperated with the committee" act to chill the right to mount a full, vigorous, and robust defense to charges?
4. Generally does a lack of definitions make the act so vague as to chill the right to freedom of speech?
5. Is the Act so broad as to sweep within its coverage speech which is constitutionally protected?
6. At ethics hearings, should the Committee be required to call as witnesses those individuals who file ethics complaints?
7. Constitutional considerations aside, is the Act good public policy?
  - (a) Does it prohibit conduct which properly may be performed by legislators?
  - (b) Are there sufficient safeguards in place as to encourage confidence that the Ethics Committee will generate fair and unbiased decisions?

- (c) Are there adequate provisions to guard against actual conflicts of interest?
  - (d) Should the Act contain additional provisions to foster public and legislative confidence in the process by guarding against the appearance of impropriety?
  - (e) Should normal rules of procedure and evidence govern proceedings before the Ethics Committee?
  - (f) At the Ethics Committee level, should there be more of a separation of the traditional functions of the police, prosecutor, judge, and jury? Alternatively, is fairness and due process guaranteed through legislative review of the decisions of the Ethics Committee?
  - (g) Is the Ethics Committee too vulnerable to being used as a political football, and if so, should there be some sort of moratorium on the acceptance of complaints during defined periods before elections?
- (8) Such recommendations and concerns as the Ethics Committee has or may articulate.