

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 25. ABUSE OF PUBLIC OFFICE

Tentative Draft No. 1; May 1970

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ARTICLE 25. ABUSE OF PUBLIC OFFICE

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Section 1. Abuse of public office; definitions. As used in this Article, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Public servant" includes:

(a) A public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state;

(b) A person serving as an advisor, consultant or assistant at the request or direction of the state, any political subdivision thereof or of any governmental instrumentality within the state;

(c) A person nominated, elected or appointed to become a public servant, although not yet occupying the position; and

(d) Jurors.

COMMENTARY - ABUSE OF PUBLIC OFFICE; DEFINITIONS

The definition of "benefit" is identical to that used in Article 22, Perjury and Related Offenses. It is derived from Michigan Revised Criminal Code section 4701 (2).

The definition of "public servant" is identical to that used in Article 21, Bribery. It is derived from New York Revised Penal Law section 10.00 (15).

Section 2. Official misconduct in the second degree.

(1) A public servant commits the crime of official misconduct in the second degree if he knowingly violates any statute relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

Section 3. Official misconduct in the first degree.

(1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to harm another:

(a) He knowingly fails to perform a duty imposed upon him by law or one clearly inherent in the nature of his office; or

(b) He knowingly performs an act constituting an unauthorized exercise of his official duties.

(2) Official misconduct in the first degree is a Class A misdemeanor.

COMMENTARY - OFFICIAL MISCONDUCT

A. Summary

Section 2 states the basic offense of official misconduct. Section 3 raises the offense to first degree official misconduct if the public servant is motivated by obtaining a benefit for himself or causing injury to another. Second degree official misconduct does not require this specific intent, but does require a knowing violation of a statute relating to the actor's office.

B. Derivation

The official misconduct sections are taken from Michigan Revised Criminal Code sections 4805 and 4806.

C. Relationship to Existing Law

Misconduct in office is defined as "corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office." Perkins on Criminal Law 485 (2d ed 1969).

Misconduct in public office may take any one of three different forms:

(1) Malfesance, the doing of that which should not be done at all.

(2) Misfesance, doing in an improper manner that which would otherwise be acceptable.

(3) Nonfesance, failing to do that which should be done.

The mens rea requirement in sections 2 and 3 recognizes that inadequate performance of official duties should ordinarily be regulated by civil remedies. Criminal liability is justified only when the public servant acts with either (1) an intent to benefit himself or to harm another, or (2) with knowledge that the act violates an applicable statute. Both sections require a "knowing" violation of duty. Coverage is not intended for ordinary neglect or negligent performance of duty. The negligent performance of an official function does not imply an intent to violate a known duty. This type of misconduct is best regulated by civil service procedures and election alternatives.

Section 3 (1) (a), the "omission to act" offense, refers to a failure to perform an official nondiscretionary duty. It requires knowledge of that nondiscretionary duty, which must be one that is imposed by law, or one that is clearly inherent in the nature of the office.

A significant aspect of the proposed section on official misconduct in the first degree is its specific mens rea requirement not presently found in existing Oregon statutes relating to official misconduct. The culpability requirements in those statutes are vague and uncertain in that, for the most part, they are controlled by the nebulous term "wilfully."

There are presently Oregon statutes that deal directly or indirectly with misconduct in public office:

ORS 162.240: Prohibits the acceptance of consideration by a public official for services rendered to persons dealing with a public agency.

ORS 162.510: A general statute prohibiting unlawful acts and omissions by public officers.

ORS 162.430: Provides that any sheriff, jailer or other officer who wilfully refuses to take into custody a lawfully committed person or prisoner is guilty of a misdemeanor.

ORS 162.440: Prohibits any officer authorized to serve process from wilfully and wrongfully refusing, omitting or delaying execution of any lawful process. Punishable as a misdemeanor.

ORS 162.620: Prohibits any person having legal custody of public records from wilfully destroying, secreting or mutilating same. This statute does not refer specifically to public officials. This offense, as it relates to private parties, will be covered under section ____, Tampering with Public Records.

ORS 162.630: Requires that all public officers, excepting school district clerks, having custody of public funds as "soon as practicable" pay the same to the county or State Treasurer. This statute is designated as a felony offense with a maximum penalty of 20 years imprisonment.

ORS 162.640: Prohibits any public officer from making a profit by loaning or otherwise using public funds in his custody. Violation of the statute is a felony, punishable by imprisonment for not more than 20 years.

ORS 162.650: Prohibits the State Treasurer from making a profit out of public funds and from removing money out of the treasury depository except as authorized by law. This is a felony offense.

ORS 162.680: Prohibits Port Commissioners or public officers from making a profit by loaning or otherwise using any money in the hands of the Port Commissioners. This is a felony offense.

ORS 162.690: Prohibits school clerks, school directors, or any public officer from making a profit by loaning or using money in the hands of school clerks. This is a felony punishable by a prison term not to exceed 20 years or a \$50,000 fine, or both.

ORS 165.015: A larceny statute that prohibits any person from converting public funds to his own use.

ORS 167.515: Provides a misdemeanor penalty for any district attorney, sheriff, constable, city or town marshal or public officer who refuses or "wilfully" neglects to diligently prosecute gambling violations.

ORS 167.555 (3): Directs peace officers to confiscate and destroy prohibited gambling devices. No criminal penalty is provided for failure to discharge this duty.

ORS 169.350: Provides that a sheriff or his officer is guilty of a misdemeanor if served with a judicial paper and "wilfully" fails to act as directed.

ORS 141.730: Prohibits any officer from knowingly proceeding under an expired judicial order for interception of telecommunications, radio communications or conversations. Violation is punishable by imprisonment in the penitentiary not to exceed three years, a \$3,000 fine, or both.

ORS 141.090: Provides a misdemeanor penalty for any person who maliciously and without probable cause procures a search warrant to be executed and issued.

ORS 141.740: Prohibits confidential records relating to an application for an order for interception of telecommunications, radio communications or conversations from being released or the material therein disclosed, except by written orders of the court. The penalty is identical with that provided for in ORS 141.730.

There are many additional statutes imposing criminal liability for official misconduct in the various ORS chapters relating to Government Structure and Finances, Public Services and General Welfare, etc. An example is ORS 305.990 (4), relating to the administration of the Tax Court, which reads:

"Any public officer who neglects or refuses to perform any of the duties imposed on him by law as to the assessment, levying or collection of taxes shall be punished, upon conviction, by a fine not exceeding \$500 or by imprisonment in the county jail not exceeding one year."

All existing statutes dealing directly with official misconduct would be repealed by sections 2 and 3.

Felony offenses relating to the mismanagement or diversion of public funds for personal gain are covered by the Theft Article.

Oregon Constitution, Article VII, Section 6, provides:

"Public officers shall not be impeached; but incompetency, corruption, malfeasance or delinquency in office may be tried in the same manner as criminal offenses, and judgment may be given of dismissal from office, and such further punishment as may have been prescribed by law."

There are no reported Oregon cases discussing criminal liability for official misconduct; however, a number of cases make it clear that such liability is recognized in this state:

In Svenson v. Brix, 156 Or 236, 64 P2d 830 (1937), the court quoted with approval 2 Cooley on Torts 300 (4th ed):

"The rule of official responsibility, then, appears to be this: That if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecutions." At 242.

In Fleischner et al v. Florey et al, 111 Or 35, 224 P 831 (1924), a county treasurer was held personally accountable for public funds that had been deposited in a bank that failed. The court, in assessing the public official's responsibility, said:

"Not only our statute but public policy demands that such public official should be responsible for all public moneys received by him irrespective of whether or not he is negligent. The rule of strict accountability is the only rule which will safeguard the welfare of the public." At 41.

In Secretary of State v. Hanover Insurance Co., 242 Or 541, 411 P2d 89 (1966), the court reaffirmed the rule of strict accountability:

"A strict standard of care is applicable to custodians of public money. Oregon has never departed from this standard, and should not do so now." At 547,548.

Authorities:

CJS Officers, Section 133

1 Burdick, Law of Crime 388

134 ALR 1250

83 ALR2d 1007

Section 4. Misuse of confidential information. (1) A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he acquires or aids another in acquiring a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action.

(2) Misuse of confidential information is a Class B misdemeanor.

COMMENTARY - MISUSE OF CONFIDENTIAL INFORMATION

A. Summary

Section 4 prohibits unconscionable behavior manifested by speculation and wagering on official action which a public servant is in a position to influence, or on the basis of confidential information to which he has access for official purposes.

Section 4 does not attempt to govern the duty of a public servant with regard to an investment, perhaps antedating his public service, in an enterprise subject to official action by himself or a governmental unit with which he is associated.

B. Derivation

The section is taken from Michigan Revised Criminal Code section 4810.

C. Relationship to Existing Law

Existing Oregon law has no specific statute comparable to section 4 although there are provisions designed to reach the same type of evil.

ORS 198.110-198.990: Prohibits special service district governing boards from dealing with board members except for specified minor purchases.

ORS 279.360: Interest of public officer or employe in certain public contracts prohibited.

ORS 279.990 (4): Violation of 279.360 is abuse of a public trust. Punishable by \$5,000 fine, one year imprisonment.

ORS 332.275: Pecuniary interest in school contracts by director or employe of school district prohibited.

ORS 462.273: Prohibited interests and activities of Racing Commission and staff. ORS 462.990 (1), violation a misdemeanor.

ORS 561.170: Prohibited financial interest of Department of Agriculture officer or employe. ORS 561.990 (1), Penalty, \$200 fine.

ORS 706.285: Interest in banking transactions and business by persons occupying position in Banking Division prohibited. ORS 706.990, Penalty, \$1,000 fine, one year imprisonment.

ORS 731.228: Prohibited interests and rewards of Department of Insurance officer or employe. ORS 731.992 (2), Penalty, misdemeanor.

Section 4 is not intended to repeal the above statutes, but is meant to cover public servants not now specially provided for.

Two sections dealing with official oppression and concealing a conflict of interest were considered and rejected by the Commission.

The section on official oppression covered the public servant who, knowing that his conduct is illegal, infringes upon a citizen's personal or property right, or denies another in the exercise of any right, privilege, power or immunity. In the judgment of the Commission, most, if not all, of the conduct reached by an official oppression statute is adequately covered by the sections on official misconduct.

A considerable amount of time and attention was devoted to the area of conflicts of interest. Various approaches were considered in drafting a model conflict of interest statute applicable to all officials. Difficult problems

were encountered, both in substance and in form, e.g., when does a conflict exist, how is the prohibited interest to be qualitatively and quantitatively determined, must the conflict be actual or potential and how is this distinguished, what disclosure requirements best resolve the problem?

The Commission decided that in the absence of any substantial regulatory guidelines a conflict of interest statute should not be included in the criminal code. Oregon law is not bereft of penal sanctions directed against public officials influenced by palpable conflicts of interest. ORS 198.120, adopted by the 1969 Legislative Assembly, revised special service district law regarding conflicts of interest, consolidating within its provisions nineteen separate districts. Public servants are subject to other forms of discipline; the elected official is subject to recall, forfeiture of office and defeat at the polls; the appointed civil servant is subject to the internal rules and regulations governing his official conduct.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 243.0. Definitions.

In this Article, unless a different meaning plainly is required, the definitions given in Section 240.0 apply.

Section 243.1. Official Oppression.

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(a) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights;
or

(b) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.

Section 243.2. Speculating or Wagering on Official Action or Information.

A public servant commits a misdemeanor if, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(1) acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action; or

(2) speculates or wagers on the basis of such information or official action; or

(3) aids another to do any of the foregoing.

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 33-3. Official Misconduct

A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:

(a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or

(b) Knowingly performs an act which he knows he is forbidden by law to perform; or

(c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

A public officer or employee convicted of violating any provision of this Section forfeits his office or employment. In addition, he shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years, or both fined and imprisoned. 1961, July 28, Laws 1961, p. 1983, § 33-3.

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TEXT OF NEW YORK REVISED PENAL LAW

§ 195.00 Official misconduct

A public servant is guilty of official misconduct when, with intent to obtain a benefit or to injure or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Official Misconduct in the First Degree]

Sec. 4805. (1) A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit for himself or to cause harm to another;

(a) He knowingly commits an act relating to his office but constituting an unauthorized exercise of his official functions;

(b) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office;
or

(c) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the first degree is a Class A misdemeanor.

[Official Misconduct in the Second Degree]

Sec. 4806. (1) A public servant commits the crime of official misconduct in the second degree if:

(a) He knowingly refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office;
or

(b) He knowingly violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Official misconduct in the second degree is a Class C misdemeanor.

[Misuse of Confidential Information]

Sec. 4810. (1) A public servant commits the crime of misuse of confidential information if in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

(a) Acquires a pecuniary interest in any property, transaction or enterprise which may be affected by such information or official action;

(b) Speculates or wagers on the basis of such information or action; or

(c) Aids another to do any of the foregoing.

(2) Misuse of confidential information is a Class B misdemeanor.

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