

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

) EEB Case No. 04-063

)
) FINAL ORDER

██████████
)
) Respondent.
)
_____)

I.
APPLICABLE PROCEDURAL ISSUES

- I.1. On January 13, 2006, the Executive Ethics Board (Board) found reasonable cause to believe that the Respondent, ██████████ violated the Ethics in Public Service Act while employed by the Washington State Department of Transportation (WSDOT). Notice of the Reasonable Cause Determination and the right to request a hearing was served upon ██████████ by certified mail. (Attachment 1, pages 1-24).
- I.2. On February 8, 2006, the Board received a hearing request from ██████████ indicating that he would not be represented by an attorney, and that he was not asking for assignment of an Administrative Law Judge (ALJ) to the hearing. ██████████ request did not respond to the allegations that he used state resources to (1) create and/or work on 154 personal documents and, (2) to conduct an outside business. (Attachment 1, pages 25, 26).
- I.3. The Board requested assignment of an Administrative Law Judge (ALJ). A hearing date of May 12, 2006 was requested. Accordingly, a pre-hearing conference between the ALJ and the parties, including ██████████ was scheduled for May 9, 2006. It was later discovered that ██████████ was unavailable for the May 12 hearing date, so the pre-hearing conference was continued to July 19, 2006, and ALJ Cindy Burdue was assigned to the case. On May 26, 2006, ██████████ was notified in writing by ALJ Brian Watkins of the July 19, 2006 pre-hearing conference date and was given a phone number and instructed to call into the Office of Administrative Hearings on that date at 10:00AM. The notice provided to all parties, including ██████████ contained the statement that parties who failed to participate in the hearing may be held in default. (Attachment 1, page 27-36).
- I.4. The pre-hearing conference was held by telephone before Judge Burdue on July 19, 2006. ██████████ did not appear. The Board's prosecutor moved for an order of default. Judge Burdue ordered ██████████ in default based on his failure to appear for the pre-hearing

conference, and his failure to file a response to the Board's Reasonable Cause Determination. (Attachment 1, pages 37-40).

- I.5. The Default Order sent by Judge Burdue to all parties instructed [REDACTED] that he had until August 1, 2006 to file a written request to vacate the Default Order. [REDACTED] was instructed that any motion to vacate the Default Order must include his response to the Board's Reasonable Cause Determination. The Default Order cautioned [REDACTED] that if he did not file a motion to vacate the Default Order and response to the Board's Reasonable Cause Determination by August 1, 2006, that the Default Order would stand and that after August 1, 2006, the Board would be free to proceed in its enforcement action without further notice to [REDACTED] (Attachment 1, page 38).
- I.6. Subsequent to the mailing of Judge Burdue's Default Order it was discovered that the Order had erroneously been dated May 21, 2006. Judge Burdue issued a Corrected Default Order on July 27, 2006. The Corrected Order contained the same instruction to [REDACTED] on how to request that the Default Order be vacated. The Corrected Order also contained the statement: **"AS SPECIFIED IN THE ORIGINAL ORDER, APPELLANT MAY CURE THE DEFAULT BY SENDING A LETTER REQUESTING A HEARING BY TELEPHONE TO EXPLAIN WHY HE MISSED THE HEARING ON JULY 19, 2006, ALONG WITH HIS RESPONSE TO THE BOARD'S DETERMINATION OF REASONABLE CAUSE, BY AUGUST 1, 2006 (THE DATE SPECIFIED IN THE ORIGINAL ORDER). IF APPELLANT DOES NOT DO SO, THE BOARD WILL PROCEED WITHOUT APPELLANT'S PARTICIPATION."** (Attachment 1, pages 41-45).
- I.7. Judge Burdue received a fax from [REDACTED] on July 27, 2006 which contained his Motion to Vacate the Default Order. The Motion did not contain a response to the Board's Determination of Reasonable Cause. Nor did [REDACTED] serve a copy of the Motion on the Board's prosecutor or on the counsel to the Board. By letter dated July 28, 2006, Judge Burdue reminded [REDACTED] once again of the requirement to file a written response to the Board's Reasonable Cause Determination no later than August 1, 2006. Judge Burdue's letter restated that unless [REDACTED] filed a response to the Reasonable Cause Determination by August 1 that the Default Order will stand and there will be no further hearings. Judge Burdue's letter also reminded [REDACTED] of the requirement to serve his Motion upon the Board's prosecutor and counsel to the Board, and to do so immediately. [REDACTED] did not serve the Motion on the Board's prosecutor or on the counsel to the Board. (Attachment 1, pages 46, 47).
- I.8. In a letter dated August 4, 2006 to the parties, Judge Burdue described a voice mail message she received from [REDACTED] on August 3, 2006. In that message, [REDACTED] stated that he had not checked his post office box in a timely way and had not received her July 28, 2006 letter. [REDACTED] asked if it was too late to respond to the Board's Reasonable Cause Determination. Judge Burdue's letter explained that, given that [REDACTED] was sent three sets of instructions between July 21 and July 28, 2006 stating the actions he must take by August 1, 2006 to seek vacation of the Default Order, she was not inclined to allow any further time for [REDACTED] to respond. Judge Burdue left the

Board with the option of allowing [REDACTED] additional time to respond. (Attachment 1, pages 48, 49).

- I.9. As of August 7, 2006, [REDACTED] had not served either his Motion to Vacate or his response to the Board's Determination of Reasonable Cause upon the Board's prosecutor. (Attachment 1, pages 50-51).
- I.10. On August 7, 2006, the Board's prosecutor filed Notice of Intent to Proceed Without Respondent's Further Participation. (Attachment 1, pages 50, 51).
- I.11. On August 11, 2006, Judge Burdue issued an Order Affirming and Finalizing Order of Default Issued July 21, 2006 (as corrected on July 27, 2006). (Attachment 1, pages 52-54).

HAVING REVIEWED THE REPORT OF INVESTIGATION AND EXHIBITS, the pleadings and correspondence filed in this matter, and the attachments accompanying this Order at its presentation, the Board hereby enters the following:

II. FINDINGS OF FACT

- II.1. On September 23, 2004, the Executive Ethics Board received a referral from the State Auditor's Office alleging that [REDACTED] used his state computer to pursue personal interests and non-work-related activities. The Board reviewed this referral and initiated a complaint on January 14, 2005 (Attachment 2).
- II.2. When the complaint in this matter was filed, and at all times material hereto, the Washington State Department of Transportation (WSDOT) employed [REDACTED] as a Technician 3 in the Environmental Engineering Programs Division Materials Lab. (Attachment 3 pages 81, 81).
- II.3. A review of [REDACTED] WSDOT computer revealed at least 154 personal documents, including, but not limited to, sports journals; food diary and weight charts; song lists and lyrics; real estate journal; financial planning documents; check register; home inspection checklist; book lists and reports; personal letters, and a letter to express support for a gas tax increase. (Attachment 3, pages 6-76, 96-123)
- II.4. The review of [REDACTED] WSDOT computer also revealed his use of state resources to support at least two outside businesses unrelated to his state employment. (Attachment 3, pages 96-103, 120-123). The documents were created during the period April 2001 to May 2004. (Attachment 4).
- II.5. [REDACTED] resigned his job with WSDOT effective June 3, 2004. (Attachment 3, pages 78, 83).

- II.6. The WSDOT issued a written reprimand to [REDACTED] on August 23, 2004 regarding his conduct in this matter. Additionally, a memo, also dated August 23, 2004, which contained a recommendation against rehiring [REDACTED] was placed in his personnel file. (Attachment 3, pages 91-94).
- II.7. On January 13, 2006, the Board found reasonable cause to believe that [REDACTED] violated the Ethics in Public Service Act while employed by WSDOT. Notice of the Reasonable Cause Determination and the right to request a hearing was served upon [REDACTED] by certified mail. (Attachment 1, pages 1-24).
- II.8. [REDACTED] failed to answer the Board's finding of reasonable cause and was found, by Administrative Law Judge Cindy Burdue, to be in default. [REDACTED] was given the opportunity to cure the Order of Default. He failed to do so. (Attachment 1).

III. APPLICABLE LAW

- III.1. RCW 42.52.160(1) states:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

- III.2. WAC 292-110-010(6)(a) explicitly prohibits the private use of state resources by state employees for the purpose of conducting an outside business or private employment.

IV. CONCLUSIONS OF LAW

- IV.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over [REDACTED] and over the subject matter of this complaint.
- IV.2. A state officer or employee is prohibited under RCW 42.52.160 from using state property "under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee or another."
- IV.3. Based on Finding of Fact II.3, [REDACTED] used state resources in violation of RCW 42.52.160.
- IV.4. WAC 292-110-010(6)(a) explicitly prohibits the private use of state resources by state employees for the purpose of conducting an outside business or private employment.
- IV.5. Based on Finding of Fact II.4, [REDACTED] used state resources in violation of WAC 292-110-010(6)(a).

IV.6. The Executive Ethics Board is authorized to impose sanctions for violations of the Ethics Act pursuant to RCW 42.52.360.

V.

AGGRAVATING AND MITIGATING FACTORS

V.1. In determining the appropriateness of the civil penalty, the criteria in WAC 292-120-030 has been reviewed. In the case at hand, it is a mitigating factor that [REDACTED] resigned his employment with WSDOT, and received a written reprimand from WSDOT and a recommendation that he not be rehired by WSDOT.

VI.

ORDER AND JUDGMENT

VI.1. Based on the foregoing Findings of Fact and Conclusions of Law, we, the Executive Ethics Board, hereby find that [REDACTED] has violated RCW 42.52.160(1) and WAC 292-110-010(6)(a), and order him to pay a civil penalty in the amount of
\$2,000.00

VI.2. Payment of the civil penalty of \$2,000.00 shall be made to the Executive Ethics Board within forty-five (45) days of this Order.

DATED this 8 day of September, 2006.

Trish Akana
Trish Akana, Chair

Approved via telephone
Evelyn Yenson, Vice-Chair

Absent
Paul Zellinsky, Member

Judith Golberg
Judith Golberg, Member

Neil Gorrell
Neil Gorrell, Member

APPEAL RIGHTS
RECONSIDERATION OF FINAL ORDER – BOARD

- a. Any party may ask the Executive Ethics Board to reconsider a **Final Order**. The request must be in writing and must include the specific grounds or reasons for the request.
- b. The request must be delivered to Board office within **20 days** after the postmark date of this order.
- c. The Board is deemed to have denied the request for reconsideration if, within 20 days from the date the request is filed, the Board does not either dispose of the petition or serve the parties with written notice specifying the date by which it will act on the petition. (RCW 34.05.470).
- d. The Respondent is not required to ask the Board to reconsider the **Final Order** before seeking judicial review by a superior court. (RCW 34.05.470).

FURTHER APPEAL RIGHTS – SUPERIOR COURT

- a. A **Final Order** issued by the Executive Ethics Board is subject to judicial review under the Administrative Procedure Act, chapter 34.05 RCW. See RCW 42.52.440. The procedures are provided in RCW 34.05.510 - .598.
- b. The petition for judicial review must be filed with the superior court and served on the Board and any other parties within **30 days** of the date that the Board serves this **Final Order** on the parties. (RCW 34.05.542(2)). A petition for review must set forth:
 - (1) The name and mailing address of the petitioner;
 - (2) The name and mailing address of the petitioner's attorney, if any;
 - (3) The name and mailing address of the agency whose action is at issue;
 - (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;
 - (5) Identification of persons who were parties in any adjudicative proceedings that led to the agency action;
 - (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;
 - (7) The petitioner's reasons for believing that relief should be granted; and
 - (8) A request for relief, specifying the type and extent of relief requested.

RCW 34.05.545.

- c. Service is defined in RCW 34.05.010(19) as the date of mailing or personal service.

ENFORCEMENT OF FINAL ORDERS

- a. If there is no timely request for review or reconsideration, this Initial Order becomes a **Final Order**. The Respondent is legally obligated to pay any penalty assessed.

- b. The Board will seek to enforce a **Final Order** in superior court and recover legal costs and attorney's fees if the penalty remains unpaid and no petition for judicial review has been timely filed under chapter 34.05 RCW. This action will be taken without further order by the Board.