

BEFORE THE WASHINGTON STATE  
EXECUTIVE ETHICS BOARD

In the Matter of:

Diane Avery

Respondent.

No. 2016-076

STIPULATED FACTS,  
CONCLUSIONS OF LAW AND  
AGREED ORDER

THIS STIPULATION is entered into by Respondent, DIANE AVERY, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through KATE REYNOLDS, Executive Director, pursuant to chapter 42.52 RCW, chapter 34.05 RCW, and WAC 292-100-090(1). The following stipulated facts, conclusions of law, and agreed order will be binding upon the parties if fully executed, and if accepted by the Board without modification(s), and will not be binding if rejected by the Board, or if the Respondent does not accept the Board's proposed modification(s), if any, to the stipulation. This stipulation is based on the following:

**A. STIPULATED FACTS**

1. On October 14, 2016, the Executive Ethics Board (Board) received an anonymous complaint alleging Diana Avery (Ms. Avery), Bridge Engineer for the Washington State Department of Transportation (WSDOT), may have violated the Ethics in Public Service Act by using state resources for her personal benefit and gain in support of her two outside business activities; as Realtor for Van Dorm Realty and personally owned business, Precision Home Designs ( PHD).

2. Ms. Avery is a Bridge Engineer that has worked for the WSDOT for thirteen years and was in that position for all times pertinent to the investigation.

3. A review of Ms. Avery's hard drive revealed the following personal folders located at C:\user\Avery\documents\ PHD Invoices. The folder contained 319 files and 14 folders. The documents consist of PDF images of CAD drawings, Excel spreadsheet showing PDH projects billed for 2015 and 2016, and invoices to customers of PHD. Details of the PHD Invoice folder is shown below:

1. Casabella
  - a. Contains 8 PDF records of CAD drawings (May 18 and September 7, 2016).
2. Combs
  - a. Daigle duplex folder containing 11 PDF records of CAD Drawings (March 17, 2016).
  - b. Four individual PDF records of CAD drawings and one PDF invoice for \$817.00 (January 23, 2015).
3. Garage Plus CAD
  - a. Contains two folders containing 84 files (April 27 through May 4, 2016).
  - b. Files consist of PDF records of CAD drawings, actual CAD drawing in .dwg format, and images.
4. Hans
  - a. 9 PDF records of CAD drawing (June 5 through July 20, 2015).
5. Janet S
  - a. Nine PDF record of CAD drawings (October 16 through December 2, 2014).
6. Jody Miller
  - a. Six PDF record of CAD drawings (June 20 through July 18, 2016) and two pictures (June 20, 2016).
7. Opdahl
  - a. Four PDF records of CAD drawings (October 24, 2016).
8. ROCHESTER
  - a. 16 PDF records of CAD drawings and ten JPG images (November 2 through November 17, 2015).
9. Rydalch
  - a. One PDF record of a photo and three JPG images (February 3, 2016).
10. Ziemiek
  - a. Eleven JPG images, one PDF record of a CAD drawing, two PDF picture images (October 12, 2015), and one PDF images of the home listing from www.matrix.nwml. (Diane Avery – Van Dorm Realty, Inc. February 3, 2016 at 11:20 am)

**Individual files located within the PHD Folder**

1. 25 PDF records of CAD Drawings.
2. Three CAD drawing in DWG format.

3. 32 invoices to 32 different clients of PHD in word (.docx) format (October 12, 2015 through May 11, 2016).
4. 32 invoices to 32 different clients of PHD in PDF format, same as above (October 12, 2015 through May 11, 2016).
5. Two tax documents, one (fw9.pdf) PDF format for PHD, unsigned and one fw9, signed by Avery (August 12, 2015).
6. Excel Spread sheet with two years earning data for PHD. Last modified on October 7, 2016 at 11:16 am by Avery.
7. One proposal for work, Opdahl proposal.docx. Last modified on June 16, 2016 at 10:24 am by Avery.
8. Miscellaneous PDF documents related to home construction.

**Downloads** – Folder containing 21 files

1. Fifteen PDF documents related to the selling of her old house and the purchasing of a new house. (July 20 through October 23, 2016) All modifications (date/time) to these document occurred during work hours.
2. Opdahlfloorplans.zip files containing three PDF CAD drawing. (October 24, 2016 at 1:50 pm).
3. Updatedplanswithelevation.zip files containing four PDF CAD drawings. (October 5, 2016 at 10:35 am).
4. Whitewellspdf.zip files containing three PDF CAD Drawings and a PDF invoice for \$4,940 (August 7, 2016 at 9:52 am).

**My Received Files** – containing two files

1. PDF of a CAD Drawing (March 14, 2016 at 1:24 pm).
2. A PNG Image of an MLS web page (June 10, 2016 at 2:49 pm).

**Budget** – containing 19 files and one folder.

1. Old folder – 10 excel spreadsheets regarding personal budgets (September 25, 2014 through August 25, 2016), four JPG images of a questionnaire for “DietMaster Pro” (January 2, 2016 at 10:48 am), and a PNG image of Transformation Fitness document (February 12, 2016 at 9:44 am).
2. One PDF document for an MLS listing for a single family home (April 30, 2016).
3. One excel “Joint Budget” document (October 25, 2016 at 11:42 am).

**Ken pdf** – containing 10 files

1. Eight PDF documents identified as “ken invoice” (February 8 through May 25, 2016).
2. One excel document identified as “ken invoice” excel.xlsx (September 22, 2016).

**New Loan** – containing 26 files and one folder.

1. Inspection 809 – Folder, contains three pdf documents regarding the home inspection of 809 N. 6<sup>th</sup> Ave. Ms. Avery’s planned to purchase. (July 12, 2016 at 9:41 am)
2. Thirteen PDF documents related to bank, retirement, Deferred Comp accounts, 2015 US tax return, earnest money deposit, JPG images tax and W-2 documents, four

excel spread sheets showing saving and checking account balances (July 12, 2016 at 8:12 am through 1:40 pm)

**Taxes** – contains 32 files.

1. PDF records of tax returns going back to 2007 were stored on her work computer and other miscellaneous document commonly required for a home loans.

### **Outlook Emails**

Board staff reviewed 7,364 Outlook emails sent/received by Ms. Avery on her computer for the period of January 1, 2014 through October 26, 2016. Board staff identified 22 emails sent/received by Ms. Avery related to PHD. Eight emails were found related to the real-estate industry. All of the emails had PDF attachments of CAD drawings and three of the emails had PDF images of invoices for payment of services provided by Ms. Avery. Seventeen emails were related to real estate. In addition, Board staff identified 239 emails that were personal in nature and not work related.

In addition to the Outlook emails, 22 G-mail webmail fragments<sup>1</sup> were located for the period of June 10, 2015 through June 13, 2016. Of the 22 G-mail fragments, four were identified to be related to invoices for payment of services by PHD. All 22 G-mails were sent/received during the normal working hours of Ms. Avery.

4. Ms. Avery indicated in her response to Board staff that she has owned PHD since 1994 and has been a real estate agent with Van Dorm Realty since May of 2015. Ms. Avery further indicated that she got her real estate license as a hobby and has only sold three houses for the time she has been with Van Dorm Realty.

5. Ms. Avery indicate in her response to Board staff that she uses an entirely different CAD program to work on home design and does not use that CAD program at her WSDOT Office.

6. Ms. Avery indicated in her response to Board staff that she has occasionally been asked to print residential engineering drawings and calculations to help new engineers in the office who are studying for their PE license.

7. Ms. Avery further indicated in her response to Board staff that during the times pertinent to this investigation she was in the process of purchasing a new home and that most of the

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<sup>1</sup> Web fragment are fragments of the message; it also identifies the sender /receiver and the times the message was received/sent.

real estate documents found are related to that process. She also indicated that it was her understanding that “de minimis use” allowed her to use state resources on her breaks and lunch period and that she works eight hours per day, Monday through Friday, so there were times when she would check her personal email at work.

8. Three of the 17 Outlook emails regarding real estate mentioned above were related to the sale of her old home and the purchase of her new home.

9. Ms. Avery’s direct supervisor indicated in response to Board staff that they are not located in a position within the office to see Ms. Avery’s computer screen but on one occasion sometime last summer (2016) they saw what appeared to be a MLS (Multiple Listing Services) website opened on her computer screen. They indicated that they contacted her about it and she told them that she was in the middle of selling her home and purchasing another and because she was a real estate agent she was handling the transaction herself. Ms. Avery’s supervisor stated that they discussed and emphasized that she should not use state resources for outside business. The supervisor indicated that since that discussion with Ms. Avery they have not seen obvious non-work related website up on her computer screen.

10. The supervisor indicated in their response to Board staff that during Ms. Avery’s recent performance evaluation in December of 2016, they again discussed her outside business and that state resources should not be used. The supervisor indicated that Ms. Avery acknowledged that she knew she should not be using state resources for her outside business and assured them that she was not.

## **B. CONCLUSIONS OF LAW**

1. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from using state resources for their benefit. 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.

2. Based on the stipulated facts above, Ms. Avery used state resources for a personal benefit in violation of RCW 42.52.160.

3. The Board is authorized to impose sanctions for violations to the Ethics Act pursuant to RCW 42.52.360. The Board has set forth criteria in WAC 292-120-030 for imposing sanctions and consideration of any mitigating or aggravating factors.

### **C. AGGRAVATING AND MITIGATING FACTORS**

In determining the appropriateness of the civil penalty, the Board reviewed the criteria in WAC 292-120-030. In the matter at hand, it is an aggravating factor these types of violations significantly reduce the public respect and confidence in state government employees and they were continuous in nature.

### **D. STIPULATION AND AGREED ORDER**

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Diane Avery and over the subject matter of this complaint.

2. Under RCW 34.05.060, the Board can establish procedures for attempting and executing informal settlement of matters in lieu of more formal proceedings under the Administrative Procedures Act, including adjudicative hearings. The Board has established such procedures under WAC 292-100-090.

3. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein, subject to Board approval.

4. Diane Avery agrees that if any or all of the alleged violations were proven at a hearing, the Board may impose sanctions, including a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000,

or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

5. Diane Avery further agrees that the evidence available to the Board is such that the Board may conclude she violated the Ethics in Public Service Act. Therefore, in the interest of seeking an informal and expeditious resolution of this matter, the parties agree to entry of the stipulated findings of fact, conclusions of law and agreed order.

6. Diane Avery waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or her acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2).

7. If the Board accepts this stipulation, the Board agrees to release and discharge Diane Avery from all further ethics proceedings under chapter 42.52 RCW for any allegations arising out of the facts in this matter, subject to payment of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the stipulation. Diane Avery in turn agrees to release and discharge the Board, its officers, agents and employees from all claims, damages, and causes of action arising out of this complaint and this stipulation.

8. If the Board accepts this stipulation, it does not purport to settle any other claims between Diane Avery and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future. No other claims of alleged violations are pending against Diane Avery at this time.

9. If the Board accepts this stipulation, it is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

10. If the Board rejects this stipulation, or if Diane Avery does not accept the Board's proposed modification(s), if any, this matter will be scheduled for an administrative hearing before the Board. If an administrative hearing is scheduled before the Board, Diane Avery waives any objection to participation by any Board member at the hearing to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Diane Avery understands and agrees that this stipulation as well as information obtained during any settlement discussions between the parties shall not be admitted into evidence during the administrative hearing, unless otherwise agreed by the parties.

11. Diane Avery agrees to pay a civil penalty in the amount of four thousand dollars (\$4,000) associated with the improper use of public resources, RCW 42.52.160. The Board agrees to suspend one-thousand, five-hundred dollars (\$1,500) on the condition that Diane Avery complies with all terms and conditions of this Stipulation and Order and commits no further violations of RCW 42.52 for a period of two years from the date this agreement is executed.

12. The non-suspended portion of the civil penalty in the amount of two-thousand five-hundred dollars (\$2,500) is payable in full to the Washington State Executive Ethics Board within forty-five (45) days after this stipulation is signed and accepted by the Board, or as otherwise agreed to by the parties.

## **II. CERTIFICATION**

I, Diane Avery, hereby certify that I have read this stipulation in its entirety, that my counsel of record, if any, has fully explained the legal significance and consequence of it. I further certify that I fully understand and agree to all of it, and that it may be presented to the Board without my appearance. I knowingly and voluntarily waive my right to a hearing in this matter and if the Board accepts the stipulation, I understand that I will receive a signed copy.



*Diane M Avery* 4/25/17  
DIANE AVERY Date  
Respondent

Presented by:

*K. Reynolds* 5/2/17  
KATE REYNOLDS Date  
Executive Director

**II. ORDER**

Having reviewed the proposed stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

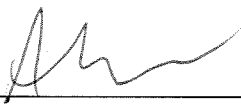
ACCEPTED in its entirety;

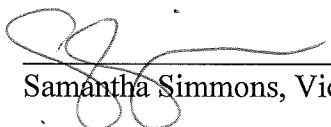
REJECTED in its entirety;


MODIFIED. This stipulation will become the order of the Board if the Respondent approves\* the following modification(s):

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\_\_\_\_\_

DATED this 12<sup>th</sup> day of May, 2017

  
\_\_\_\_\_  
Anna Dudek Ross, Chair

  
\_\_\_\_\_  
Samantha Simmons, Vice-Chair

  
\_\_\_\_\_  
Lisa Marsh, Member

  
\_\_\_\_\_  
John Ladenburg, Sr., Member

  
\_\_\_\_\_  
Shirley Battan, Member

\* I, Diane Avery, accept/do not accept (circle one) the proposed modification(s).

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Diane Avery, Respondent                      Date