

**BEFORE THE WASHINGTON STATE  
EXECUTIVE ETHICS BOARD**

In the Matter Of: )

Withheld )

Respondent. )

) EEB No. 05-030

) OAH No. 2006-EEB-0005

) FINDINGS OF FACT, CONCLUSIONS  
) OF LAW AND FINAL ORDER

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On February 25, 2005, the Executive Ethics Board (Board) received notification that the Respondent, Withheld an employee of the Spokane Community College (SCC), sent an e-mail that allegedly violated the Ethics in Public Service Act at RCW 42.52. The e-mail was sent to “SCC Faculty,” “SFCC Faculty” [Spokane Falls Community College] and “IEL – Corrections Ed”<sup>1</sup> regarding several bills that were before the State Legislature.

On March 10, 2006, the Board found reasonable cause to believe that a violation of RCW 42.52 occurred. A hearing (adjudicative proceeding) was scheduled. Ms. Withheld requested that an Administrative Law Judge (ALJ) preside pursuant to RCW 42.52.500.

On January 12, 2007, the Board held a hearing at the Board office in Olympia, Washington. Brian O. Watkins, ALJ from the Office of Administrative Hearings, presided over the hearing. Board members Evelyn P. Yenson, Judith K. Golberg, Trish Akana, Neil Gorrell and Kyle B. Usrey attended the hearing. Board counsel Nancy Krier, Senior Assistant Attorney General, was also present.

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<sup>1</sup> The “IEL – Corrections Ed” e-mail list was not further described, but in the hearing in this matter the e-mail recipients were described as college employees.

Board Staff was represented by Michael S. Tribble, Assistant Attorney General, who was present. The Board's Executive Director Susan Harris was also present, as were other Board staff.

Respondent, Ms. [Withheld] appeared in person, *pro se*.

As a preliminary matter, Board member Gorrell noted for the record that he was an ALJ at OAH, but had been screened from this matter at OAH. During the course of the hearing, Board member Usrey noted for the record that he was a Dean at Whitworth College in Spokane. Board member Golberg noted that she had a family member employed by a state community college. Following discussion on the record, the Respondent did not request recusal of the Board members. No conflicts with the facts of this case, or with the allegations concerning the Respondent, were identified, and the hearing proceeded.

The Board was provided copies of documents which were admitted as exhibits: Board Staff Exhibits B-1 through B-3; Respondents' Exhibits A-1 through A-8. The Respondent testified. The parties provided oral argument.

The proceedings were recorded and open to the public.

Based on the evidence presented, the Board enters the following Findings of Fact, Conclusions of Law, and Final Order:

#### FINDINGS OF FACT

1. During all times material to the allegations in the complaint, Ms. [Withheld] was a state employee, employed as an Adjunct Academic employee at SCC. She taught English courses in the English Department for several years until December 2005, when her employment ended.

2. Ms. [Withheld] admitted she sent an e-mail from her SCC computer on February 25, 2005 to "SCC Faculty," "SFCC Faculty" and "IEL – Corrections Ed." The e-mail concerned legislation pending before the State Legislature, SB 5970 and HB 2080,

regarding part-time public employees. Exhibit B-2. Among other statements, the e-mail stated:

- “You can view the bill at the following website ...”
- “Remember to contact your legislators on personal e-mail ...” (Legislators email addresses were then listed.)
- “In the e-mail, tell any of your personal problems with lack of job security. You can mention as well that this bill has no cost associated with it. Be sure to mention the bill numbers.”
- “Be sure to list your title and either where you live or where you teach. You might also include your phone ...”
- “Here is a sample letter. If you like, please modify it to fit your personal experience ...”

3. Ms. [Withheld] admitted that several SCC faculty responded to the e-mail, either through in-person contacts with Ms. Knudsen, or with responsive e-mails.

4. SCC had an Acceptable Use Policy for Technology Resources effective November 24, 1998. Exhibit B-2, page 12. While the Policy allows for occasional and limited personal use of SCC resources when there is no cost to the district when the use does not interfere with an employee’s official duties, is brief in duration, and otherwise complies with all applicable laws and regulations, the Policy specifically states that the Technology Resources shall not be used for commercial, illegal or political purposes.

5. Ms. [Withheld] did not obtain prior approval from the SCC administration to send the e-mail. SCC administration sent her an e-mail on May 10, 2005, reminding her that de minimis use does not apply to political or campaign activities, or to lobbying activities that are unrelated to official duties, that the e-mail she sent was lobbying that was unrelated to SCC’s unofficial duties, and asking her if she agreed. Exhibit B-2, page 14. She did not agree. However, Ms. [Withheld] provided no evidence that lobbying the State Legislature was within the scope of her official duties as an English instructor at the SCC.

6. Ms. [Withheld] was a Respondent in EEB Case No. 01-078, which was addressed through a Brief Adjudicative Proceeding. In that earlier case, Ms. [Withheld] admitted she used a state provided computer or state provided internet access at SCC to

send an e-mail message in April 2001 regarding community college faculty salaries and retirement plan funding to at least 30 legislative representatives. The subject of that e-mail was also the subject of several bills under active consideration by the State Legislature in 2001. In that proceeding, Ms. [Withheld] asserted the e-mail constituted allowable de minimis use under WAC 292-110-010(1)(4) (as the rule was then written) and agency (SCC) policy. She also asserted she did not commit a knowing violation of RCW 42.52.160(1). Following the Brief Adjudicative Proceeding, the Board issued an Initial Order on February 13, 2004. Exhibit B-2, pages 22 – 27. The Board's Presiding Officer found Ms. [Withheld] violated RCW 42.52.160(1). The Board's Presiding Officer found that use of state resources to lobby the State Legislature on pending legislation is an inappropriate use of state resources. The Board's Presiding Officer found that "lobbying" in that case did not obviously incorporate the action taken by Ms. [Withheld] in her 2001 e-mail message, she lacked adequate notice that even a limited use of state resources for lobbying was a violation of standards and the law, and she was excused by the facts presented and in the interests of justice. Ms. [Withheld] did not appeal that order.

7. The Board's rule at WAC 292-110-010 was amended effective April 18, 2002. The fact the rule was amended was referenced in Exhibit B-2, page 18. In addition, the Board takes notice of its rule amendments. *Washington State Register* 02-07-074. The rule as amended was in effect at the time of Ms. [Withheld] action in sending the e-mail in this case. The rule provides state employees and the public information about permitted and prohibited uses of state resources. The 2002 amendments specifically addressed lobbying. Subsection (1) provides the general principles of stewardship, and further states that "state employees may not use state resources for personal benefit or gain or for the benefit or gain of other individuals or outside organizations." Subsection (4) describes permitted uses of state agency computers, electronic mail, and the internet, and directs that use of such resources must not be prohibited under subsection (6).

Subsection (6) describes “prohibited uses” and states at (d) and (e) that the following uses of state resources are prohibited:

...

(d) Any use for the purpose of participating in or assisting in an effort to lobby the state legislature, or a state agency head. Such a use of state resources is specifically prohibited by RCW 42.17.190, subject to the exceptions in RCW 42.17.190(3);

(e) Any use related to conduct that is prohibited by a federal or state law or rule, or a state agency policy;

...

8. At the hearing on January 12, 2007, Ms. **Withheld** provided several oral and written reasons as to why she believed the February 25, 2005 e-mail was lawful or otherwise proper. The reasons were also stated in her December 27, 2006 letter to ALJ Cindy Burdue (who had previously been assigned to this case). Exhibit A-8. Those reasons included but were not limited to:

- a) Her belief that she was authorized to engage in limited use of the SCC e-mail system so long as she was not supporting an outside organization or group.
- b) Her belief that her use was de minimis, that the e-mail conformed with WAC 292-110-010, that the e-mail conformed with RCW 42.17.190 and RCW 42.17.160.
- c) Her belief that the e-mail conformed with RCW 42.52.560.
- d) Her belief that the referral by SCC to the Board was retaliatory and violated various state statutes and other laws, including her rights under the First, Fifth and Fourteenth Amendments. She provided e-mails allegedly from other SCC or public employees, describing various other activities not before the Board in this case but which she believed similar enough to support her claim of retaliation by SCC in bringing this matter to the Board’s attention. Exhibit A-3.
- e) Her belief that her prior case before the Board in EEB Case No. 01-078 indicated an approval for similar lobbying activity in the future, as she argued was provided in the order by the Board’s Presiding Officer.

### CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to RCW 42.52.360(1), which authorizes the Board to enforce RCW 42.52 with respect to employees in the executive branch of state government. The Board has jurisdiction over Ms. **Withheld** whose actions at issue occurred while a state employee. The complaint was filed in

accordance with RCW 42.52.410, the Board found reasonable cause pursuant to RCW 42.52.425, and the public hearing was conducted pursuant to RCW 42.52.430 and .500. All the required procedural notices have been given.

2. Under RCW 42.52.430(5), a violation must be established by a preponderance of the evidence.

3. RCW 42.17.190(2) provides that public agencies may not use public funds “directly or indirectly for lobbying,” except within the restrictions set forth in that statute. Those restrictions include communicating through official agency channels, on official agency business. RCW 42.17.020(31) defines “lobby” and “lobbying” each to include “attempting to influence the passage or defeat of any legislation by the legislature of the state of Washington ....”

4. RCW 42.52.160 provides:

- (1) 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) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.
- (3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.

The Board adopted a rule, WAC 292-110-010 under this statute. WAC 292-110-010 was amended effective April 18, 2002.

5. As with the prior version of WAC 292-110-010, the amended rule prohibits the use of state facilities for political purposes. The amended rule explicitly prohibits use of state resources for their personal benefit or gain, or the benefit or gain of other individuals or outside organizations. WAC 292-110-010(1). Subsection (4) of the rule specifically references use of state agency computers and e-mail. The amended rule additionally includes a specific reference to RCW 42.17.190's prohibition and limitations

on state agency lobbying activities at Subsection (6), which lists prohibited activities to include “Any use for the purpose of participating in or assisting in an effort to lobby the state legislature, or a state agency head. Such a use of state resources is specifically prohibited by RCW 42.17.190, subject to the exceptions in RCW 42.17.190(3).” Subsection (6)(e) of the rule lists as a prohibited activity “Any use related to conduct that is prohibited by a federal or state law or rule, or a state agency policy.” There is no “de minimis” or “organizational effectiveness” or other exception under the rule or the SCC Policy for political activities or lobbying activities.

6. The Board concludes the preponderance of the evidence establishes there is no provision or exception under RCW 42.17.190 that authorized the February 25, 2005 e-mail sent by Ms. [Withheld] Lobbying for the agency was not within the scope of her duties. She was not communicating through official agency channels, nor on official agency business. Her e-mail constituted unauthorized indirect lobbying.

7. The Board concludes that a preponderance of the evidence establishes that Ms. [Withheld] violated RCW 42.52.160(1) and WAC 292-110-010 in the preparation and distribution of the February 25, 2005 e-mail from her SCC computer. The e-mail constituted unauthorized lobbying under RCW 42.17.190 and was intended for the private benefit or gain of Ms. [Withheld] or others.

8. The Board concludes that a preponderance of the evidence, the statutes at RCW 42.52 and WAC 292-110-010 do not support the reasons offered by Ms. [Withheld] to authorize her lobbying activity in this case. The Board concludes the other authorities and arguments presented by Ms. [Withheld] do not sanction her lobbying activity in this case, including:

- a) RCW 42.17.160 is a lobbying registration statute, and is not applicable to the present case.
- b) RCW 42.52.560 governs communications by employee organizations and charitable organizations to state employees, is inapplicable to this case. The

statute was not enacted until 2006 and therefore was not in effect at the time of the complaint or e-mail at issue in this case. The statute also specifically references the restrictions on public agency lobbying (“Nothing in this section shall be construed to authorize any lobbying activity with public funds beyond the activity permitted by RCW 42.17.190.”)

c) Other statutes cited by Ms. [Withheld] including RCW 49.44.160, RCW 49.44.170, provisions of Chapter 28B.10 RCW and provisions of Chapter 28B.52 RCW, are also inapplicable to this case. There is no evidence of “retaliation” by SCC under these statutes or the evidence presented by Ms. [Withheld]. The e-mails allegedly from other SCC employees about other activities not at issue in this case were not verified by any other witnesses, nor supported by any other evidence, and discussed alleged activities not at issue in this case.

d) The Board must presume state statutes are constitutional and cannot rule on Ms. [Withheld] constitutional claims. However, the Board also recognizes that similar claims to constitutional entitlement by public employees to public agency resources such as e-mail systems for political activities have been rejected by the courts, such as in *Herbert v. Washington State Public Disclosure Commission*, 136 Wn.App. 249, 148 P.3d 1102 (2006).

9. In calculating the amount of the penalty for the violation of the State Ethics Act by Ms. [Withheld] the Board is taking into full consideration the record in this case, and the Findings of Fact and Conclusions of Law. The Board is also taking into consideration that while no penalty was assessed in the prior action<sup>2</sup>, Ms. [Withheld] participation in that action placed her on notice of the restrictions on public employees’ use of public agency resources to lobby, and the SCC policy specifically.

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<sup>2</sup> EEB Case No. 01-078.

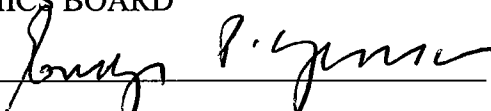


**ORDER**

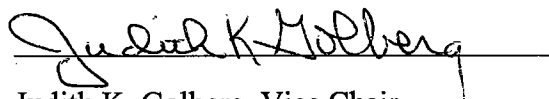
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that Ms. Withheld pay a penalty in the amount of \$1,000. Payment is due within 30 days of the date of this order.

DATED this 9<sup>th</sup> day of March, 2007.

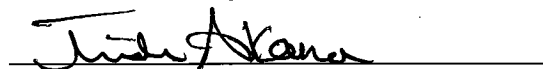
WASHINGTON STATE EXECUTIVE  
ETHICS BOARD



Evelyn P. Yenson, Chair



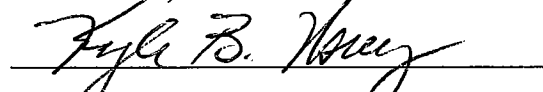
Judith K. Golberg, Vice Chair



Trish Akana, Member



Neil Gorrell, Member



Kyle B. Usrey, 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 **10 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.

**CERTIFICATION OF MAILING**

This certifies that a copy of the above Final Order was served upon the parties by depositing a copy of same in the United States mail, postage prepaid, addressed to the following:

Withheld  


Michael Tribble  
Assistant Attorney General  
P O Box 40100  
Olympia, WA 98504-0100

Nancy Krier  
Senior Assistant Attorney General  
P.O. Box 40110  
Olympia, WA 98504-1001

Brian O. Watkins  
Administrative Law Judge  
Office of Administrative Hearings  
2420 Bristol Ct. SW, Third Flr.  
P O Box 42489  
Olympia, WA 98504-2489

State of Washington    )  
  ) ss.  
County of Thurston    )

I certify that I have this day served a copy of this document upon all parties in this proceeding, as listed, by mailing a copy thereof, properly addressed and postage prepaid, to each party to the proceeding or his or her attorney or agent.

Olympia, Washington, this 13<sup>th</sup> day of March, 2007.  
