BEFORE THE WASHINGTON STATE EXECUTIVE ETHICS BOARD

In the Matter Of:	)	
	)	No. 2006-EEB-001
[redacted]	)	
Respondent.	)	
	)	FINAL ORDER
	)	
	)	
	)	

The above-captioned matter is an adjudicative proceeding before the Executive Ethics Board that was heard by the Office of Administrative Hearings and from which a Corrected Initial Order dated May 2, 2006 was issued.

The matter came before the Board on the Board's May 16, 2006 Request for a Review of the Corrected Initial Order pursuant to WAC 292-100-170(a) and WAC 292-100-175.

The Corrected Initial Order is attached and incorporated by reference.

Having considered the Corrected Initial Order, the Request for Review, and the files and records herein, the Board enters the following:

ORDER

The Corrected Initial Order is hereby adopted as the Board's Final Order, with one correction to Conclusion of Law 28, replacing the word "four" violations with "two" violations in the last line. Therefore, Conclusion of Law 28 reads as follows:

> 28. In accordance with WAC 292-120-030(5), each act which violates a provision of the statute or applicable regulations constitutes a *separate* violation. Therefore, because Respondent sent two separate email messages, each one a *separate* violation of RCW 42.52.160, and each one in violation of WAC 292-110-010(6), we conclude that Respondent has committed two violations of the Ethics in Public Service Law.

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In all other respects, the Initial Order is adopted as the Final Order of the Board.

DATED this 8 day of September, 2006.

WASHINGTON STATE EXECUTIVE ETHICS BOARD

Trish Akana, Chair

Approved Via Telephone
Evelyn Yenson, Vice Chair

Paul Zellinsky, Board Member

Judy Goldberg, Board Member

Neil Gorrell, Board 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.

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:

[redacted]
c/o Lawrence R. Schwerin
18 W. Mercer St. #400
Seattle, WA 98119-3971

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

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Senior Assistant Attorney General
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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 12th day of September, 2006.

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EXECUTIVE ETHICS BOARD

IN THE MATTER OF: [redacted] Respondent	**DOCKET NO:** 2006-EEB-0001 **CORRECTED INITIAL ORDER**

This Order is CORRECTED on this 2nd day of May, 2006, in the following ways:

1. **Persons Present:** Michael Tribble, Assistant Attorney General, and Linda Moran, Assistant Attorney General, both present in person, representing the Executive Ethics Board. These names were omitted in the original Initial Order.

2. Spelling corrections are made to the following names: Paul Zellensky; Ruthann Bryant; and Judy Golberg.

3. **PETITION FOR REVIEW OF INITIAL ORDER: Corrections at the end of Order, PLEASE NOTE TIME CHANGES for Review.**

No Other Corrections or Changes are made to the Initial Order issued on April 25, 2006. The time for Review will run from the date corrected Initial Order is issued, May 2, 2006.

Hearing: This matter came before the Executive Ethics Board, and Cindy L. Burdue, Administrative Law Judge, on April 19, 2006, at Olympia, Washington, pursuant to proper notice to all interested parties.

Persons Present:

In Person:

Respondent, [redacted] and her representative, Lawrence Schwerin, Attorney at Law;

The following members of the Executive Ethics Board: Vice Chair, Evelyn Yenson; Judy Golberg; and Neil Gorrell. Also present were Susan Harris, Executive Director of the Board, and Ruthann Bryant, Administrative Officer.

The Board was represented by Michael Tribble, Assistant Attorney General; also present was Linda Moran, Assistant Attorney General.

By Telephone:

Executive Ethics Board member Paul Zellinsky, appeared via telephone.

STATEMENT OF THE CASE:

The statute at issue is RCW 42.52, the Ethics in Public Service Act, along with the regulations which interpret that law. On June 10, 2005, the Executive Ethics Board (Board) issued a determination that there was reasonable cause to believe that Respondent's actions, described below, were in violation of that Act. On December 2, 2005, Respondent filed a response and request for a hearing, along with a request for an Administrative Law Judge.

The essential facts in this case are not disputed. The "Relevant Facts," stated on Pages 1-3 of the Board's Determination are supported by the evidence in the record. I adopt those Findings and further find as stated below.

Evidence Considered:

Respondent presented sworn testimony; Respondent's proposed witness, Lynn Maier, was unable to testify due to the need to leave for an appointment within half an hour of the commencement of the hearing.

The Board did not present witnesses, relying on the documents and Exhibits in evidence, and argument of counsel.

Exhibits R-1 through R-4 of Respondent, and the Pre-Hearing Memorandum of Respondent, were admitted without objection.

Exhibits B1- B-13 of the Board were admitted without objection.

ISSUES:

1. Did the two email messages, sent by Respondent on January 15, 2003, from her worksite computer at the Department of Retirement Systems, to 179 employees who were members of the Washington Association of Public Employees union, violate RCW 42.52.160, the Ethics in Public Service Act; WAC 292-110-010; and/or the agency's internal policies?

2. Were Respondent's actions, stated in Issue 1, protected as Union activity, under State law or the Collective Bargaining Agreement between the agency and the union?

RESULT:

1. Yes, Respondent's actions, stated in Issue 1, constituted violations of RCW 42.52.160; WAC 292-110-010, and the agency's internal policies.

2. No, Respondent's actions, stated in Issue 1, were not protected by the Collective Bargaining Agreement or State law.

Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law, and Initial Order:

FINDINGS OF FACT:

1. Respondent was employed by the Department of Retirement Systems (DRS) from September, 2001, to September, 2005. At all times pertinent to this matter, in January, 2003, Respondent was the job representative for the Washington Public Employees Association (WPEA) member employees of the DRS, as well as the chapter president of the WPEA.

2. In January, 2003, Respondent was aware of the DRS policies regarding employee use of electronic media, in general. (Exhibits B-3, page 1; B-11; B-4, pages 5-7; and B-6, pages 2, 4) She was also aware of the provisions of the Collective Bargaining Agreement (CBA) between the DRS and WPEA in effect in January, 2003. (Exhibit R-1)

3. In January, 2003, Respondent was aware of the Executive Ethics Board Advisory Opinion No. 02-01, regarding employee use of State facilities to conduct union activities. (Exhibit B-4, pages 3-4) Respondent had also been instructed by the DRS in the prohibitions against use of public facilities or staff time "in connection with" political campaigns, including campaigns on ballot propositions. (Exhibit B-4, pages 6-7) Finally, the DRS had also instructed Respondent about the Ethics in Public Service Act (RCW 42.52) and WAC 292-110-110, regarding and defining "*de minimus*" use of state resources. (Exhibit B-4, page 5)

4. On January 15, 2003, Respondent received an email communication from a WPEA employee, asking Respondent for her ideas on how to alert members to proposed legislation which was to be discussed among stakeholders in five days. (Exhibit B-2, pages 2-4, from Marion Gonzales) This email had attached to it an email from Lynn Maier at the WPEA, asking Ms. Gonzales for help in arranging a meeting with the DRS members to get input on a "proposal," which was outlined in the message. (Exhibit B-2, pages 3-4)

5. In response to the email message from the WPEA, Respondent forwarded the message to a list of 179 DRS employees, using the DRS employee distribution list to do so. Respondent added her own message asking that members let the WPEA representative know their thoughts on the proposed legislation, ("where you stand"), or whether they could attend a meeting to discuss the proposal with a WPEA employee. (Exhibit B-2, pages 1-2)

6. Respondent sent a second email message to the 179 DRS employee members of WPEA on January 15, 2003, at 3:50 p.m. That message asked for the employees to respond indicating whether they would be attending a meeting the next day at WPEA

headquarters. (Exhibit B-2, pages 4-6) A link to the WPEA web page was included so employees could look up directions to the WPEA for that meeting.

7. Respondent did not inform any superior at DRS that she intended to send out the email message to 179 employees prior to sending either message on January 15, 2003. Respondent instead asked the WPEA representative who sent her the original message, twice, if it would be acceptable for Respondent to send the email to the 179 DRS member employees, and was apparently told that it would be acceptable.

8. Respondent did not credibly explain in her testimony why she believed that the WPEA representative had the authority to grant Respondent permission to send the email message to DRS employees without DRS approval or prior knowledge. The WPEA representative did not have authority to authorize Respondent to send the email messages, under either the Collective Bargaining Agreement between the WPEA and DRS, or under DRS policies. Respondent knew, or should have known, that the WPEA did not have such authority.

9. DRS policy prohibits an employee from use of state resources for personal benefit or to benefit another person. (Exhibit B-11, page 2, #5) The agency policies state "Political Activities are Limited," and prohibit use of state resources for "political campaigns." (Exhibit B-11, page 3) DRS has established an email policy, which allows "occasional but limited personal use of state email" if the subject matter is not related to activities which are prohibited, the email is brief in duration and frequency, and it does not distract from the conduct of state business, or interfere with the performance of official duties. (Exhibit B-11, page 6) The DRS policy goes on to specifically state that email may not be used to "promote personal political beliefs" or to "support, promote, or solicit for any outside organization or group," unless provided for by law, or authorized by an agency head or designee. (Exhibit B-11, page 7) DRS policy for email forbids the employees to use the employer's distribution list of addresses for their personal use. (Exhibit B-11, page 6)

10. Some of the 179 DRS employees who received Respondent's email message responded with lengthy messages in return, many of which addressed the substantive issue of the proposal in detail. (Exhibit B-9, pages 1-15) These messages were written during normal working hours at the DRS, between 8:00 a.m. and 5:00 p.m., and primarily between January 15 and 17, 2003.

11. The DRS investigation of Respondent's actions, adopted by the Board, revealed that the email messages sent by Respondent on January 15, 2003, generated "about 665 emails being opened and read by individuals either receiving or sending messages related to the 'Potential Bill.'" (Exhibit B-8, pages 1-3)

12. Some of the employees who received the email messages were alarmed or confused by the information about the proposed merging of DRS with another state agency. The DRS Director was required to send email messages to all employees to allay their concerns. (Exhibit B-9, page 12)

13. The DRS Director issued a Letter of Reprimand to Respondent on April 24, 2003, based on her sending the email messages on January 15, 2003. (Exhibit B-1) After Respondent filed a union grievance, the DRS agreed to remove the Reprimand letter from Respondent's personnel file until such time as the Executive Ethics Board action has been completed. The agreement calls for the DRS to either destroy the letter or to return the letter to Respondent's personnel file, based on the disposition of the case by the Board. (Exhibit R-2, page 4)

14. Respondent contends that she was authorized to send the email messages from her DRS computer, on DRS work time, using the DRS distribution list of addresses, based on the fact that she was engaged in the "maintenance," or "administration" of the Collective Bargaining Agreement, or conducting business relative to the "relationship between the parties." Respondent relies on Section 2.9 of the Collecting Bargaining Agreement for her position. (Exhibit R-1, page 4) Respondent also relies on Section 2.10 of that CBA as authority for her to send email messages from work, on work time, to all DRS employee members of the union. (Exhibit R-1, page 5) Further, Respondent relies on Article 5 of the CBA, Section 5.1 and 5.2, under "Agreement Administration" for her authority to send the email messages from work, without any notice to, or approval from, the DRS. (Exhibit R-1, pages 7-8)

CONCLUSIONS OF LAW:

1. Jurisdiction to hear this matter exists under RCW 42.52.500, RCW 34.05, and WAC 292-100.

2. RCW 42.52.160 is applicable here, and this provision prohibits a state officer or employee from using state property "under the officer's or employees' official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another." The Board has held, in its advisory capacity, that a union is a "person" under RCW 42.52.010(14), and that union business is a "private interest." Advisory Opinion 01-01A

3. WAC 292-110-010(6) is also applicable. This regulation prohibits the private use of state resources for the purposes of supporting, promoting the interest of, or soliciting for an outside organization or group, assisting in a campaign for the promotion or opposition to a ballot proposition, participating in or assisting in an effort to lobby the state legislature or a state agency head, or any use related to conduct that is prohibited by law or rule or a state agency policy.

4. Respondent urges that her activities were protected by the Collective Bargaining Agreement, and relies on the state appellate court's statement that union activity does not solely benefit the union, but can further the employer's interests. See, Respondent's Pre-Hearing Memorandum, page 3, citing Ackley-Bell v. Seattle School Dist., No. 1, 87 Wn.App. 158, 940 P.2d 685 (1997).

5. The Ackley-Bell court determined that a State employee who was injured while engaged in a union meeting to develop proposals for collective bargaining was covered

by the state's workers' compensation laws, on the basis that the employee was engaged in "collective bargaining" when injured. Thus, the union meeting, although held prior to formal collective bargaining, was in furtherance of the employer's interests, and the employee was therefore eligible for workers' compensation benefits. The Court noted that the statute involved, RCW 41.56, was enacted to promote the "continued improvement of the relationship between public employees and their employers."

6. The Ackley-Bell case is not on point for the analysis in the instant case. It does not deal with the Ethics in Public Service Act, which has entirely different purposes and public policies behind it than does the workers' compensation law. Thus, while an employee engaged in pre-collective bargaining meetings with the union may be serving the employer's interests sufficiently to warrant coverage by the state's workers' compensation laws, an employee who uses state resources for furtherance of union interests cannot automatically be said to have been serving the interests of her employer in so doing, nor is that the primary dispositive question here.

7. The cited statute and regulation; the Board's Advisory Opinion 02-01; and the employer's internal policies all define the parameters of union activity within the Ethics Law. Thus, each of these must be examined in light of Respondent's actions. However, as Respondent alleges her actions were protected by the Collective Bargaining Agreement (CBA), the analysis will begin with that agreement.

8. The portions of the Collective Bargaining Agreement upon which Respondent relies are Sections 2.9, 2.10, 5.1, and 5.2. (Exhibit R-1, pages 4, 5, and 7)

9. Section 2.9 of the CBA states that reasonable work time and equipment may be used by WPEA job representatives and chapter officers "when needed to conduct official business relative to the maintenance of the collective bargaining agreement and relationship between the parties. *Association activities including, but not limited to, recruitment and the circulation of petitions shall be carried out during break times and using materials supplied by the WPEA.*" (Emphasis added) (Exhibit R-1, page 4)

10. Respondent's actions were not authorized or protected by Section 2.9 of the CBA. The section allows use of reasonable work time and equipment when needed to conduct business relative to *maintenance* of the CBA, and "relationship between the parties." Sending email messages to inquire as to members' opinions about proposed legislation which might affect the state agency, and whether the members will come to a meeting on the subject, cannot be considered to be "maintenance" of the CBA in any reasonable interpretation of that concept.

11. The common understanding of "maintenance" is to "keep," "continue with," or to "uphold" or "defend," something which is already established. (See, *Webster's New World Dictionary,* 2nd College Ed., pg. 854 (1984) Similarly, "administration" of the CBA indicates action taken in relation to the established CBA. "Administer" or "administration" indicates "to tend, manage, direct, govern." (See *Webster's II Dictionary, 3rd Ed.; pg. 11 (2005)*

12. Here, the purpose of the email messages was not related to the agreement between the parties which was already established. It is an unreasonable stretch to conclude that asking members their opinions about proposed legislation has anything at all to do with maintaining or administering the CBA between the parties, even though the legislation eventually, if adopted, would change the structure of the agency, and secondarily, could change the CBA between the parties. The connection to the *established* CBA was too attenuated as of January 15, 2003, for Respondent's activity to be considered "maintenance" or "administration" of the CBA. Further, Respondent knew, or should have known, that her actions were not performed in "maintenance" or "administration" of the CBA, or related to the CBA in existence between the parties at all.

13. Section 2.9, of the CBA, in fact, *reinforces* the rule that state resources may *not* be used for certain activities, such as to circulate petitions; the CBA prohibits the use of state time (stating that such activities must occur on breaks), as well as specifying that the materials used must be those of the WPEA. Circulating petitions is akin to inquiring as to members' opinions on proposed legislation; like a petition, the email messages were a "gathering" of members' opinions and should have been done off state time, and without the use of state resources, even under the CBA.

14. Section 2.10 of the CBA states, "WPEA job representatives and chapter officers will be permitted to use agency electronic media in accordance with Agency policy and procedures to solicit agenda items for Labor/Management meetings and inform employees of Labor/Management and Association meetings. *Such notices are to be approved by the Employer prior to the release.*" (Emphasis added) (Exhibit R-1, page 5)

15. Respondent's actions were also not authorized by Section 2.10 of the CBA. This section clearly requires that email use be in accordance with the state agency's policy on use of email, and also states that approved uses are for the purpose of announcing certain meetings and soliciting agenda items for specified meetings. This section of the CBA clearly requires prior approval of email notices by the employer. Respondent did not follow any of the requirements of this section: she did not follow the employer's email policy; she did not use email to announce specified meetings or solicit agenda items for specified meetings, and she did not receive prior approval for the email messages from the employer.

16. Neither were Respondent's actions authorized by Sections 5.1 and 5.2 of the CBA. Section 5.1 allows WPEA *staff* to have contact with individual employees during normal work hours, if WPEA notifies the employer of its presence in the building and agrees not to disrupt the work of employees in so doing. The Human Resources manager will determine if employees may be released to meet with the WPEA staff at the requested time, and if not, will arrange a time within the immediate future for the employee to meet with the staff.

17. Respondent was not WPEA "staff" when she engaged in the actions at issue. This section does not contemplate that *job representatives and chapter officers* are included among those who are entitled to "meet" with individual employees under this

provision of the CBA. Where job representatives and chapter officers are intended in the CBA, they are clearly identified as "job representatives and chapter officers." Further, job representatives and chapter officers are *not* WPEA "staff." Therefore, this entire section has no applicability to Respondent. Even if it *did* apply to Respondent as a job representative or chapter officer, Respondent failed to follow the mandate to "notify the employer" of her intent to "meet" with individual employees. There is no dispute but that Respondent did not notify DRS management of her decision to send the messages to the DRS employees.

18. Section 5.2 of the CBA *does* refer to "job representatives" and their functions. The CBA identifies three specific tasks that these representatives are permitted to engage in during work hours, without pay loss. These include investigation of grievances; attendance at meetings with management to address grievances or disputes; and conferring with accredited representatives of the WPEA at work or at WPEA headquarters. Respondent was not engaged in any of these actions when she sent the email messages at issue.

19. Further, Section 5.2 goes on to mandate that the job representative will "notify their supervisor" when it is necessary to perform any of the itemized tasks. The supervisor gets to determine when the job representative can be released from work to perform the tasks, within the "immediate future." Here, Respondent failed to notify her supervisor that she was engaged in any union activity prior to, or during, the time she was so engaged, and she therefore failed to abide by the CBA.

20. Turning now to the regulation at issue, WAC 292-110-010, Respondent's actions violated WAC 292-110-010(6), which "explicitly prohibits at all times" the use of state resources for: 1) the promotion or benefit of an organization or group outside the state agency; 2) to assist in a campaign for the promotion or opposition to a ballot proposition; 3) or any use related to conduct that is prohibited a state agency policy.

21. RCW 42.52.500(1) authorizes State agencies to adopt their own rules to protect against violations of the Ethics Law. See, Advisory Opinion 96-04 (use of email, even if *de minimus,* must be for an official business purpose, which includes "communicating good will among employees, such as birth announcements, etc.). The email messages sent by Respondent cannot be described as communicating goodwill among employees; the evidence shows that, in fact, some employees were alarmed and confused by the email message which contained the information on the proposed merger of DRS and another State agency.

22. The Executive Ethics Board's Advisory Opinion, 02-01, does recognize that a union is a special entity, requiring special consideration as an "outside group or organization." Nonetheless, the Board notes that a collective bargaining agreement may not execute provisions which directly conflict with the statute, RCW 42.52, Ethics in Public Service Act. Cited as such a conflict is use of state resources to oppose or promote a ballot initiative, and use of resources for Union activities which are not "reasonably related to the negotiation and administration of collective bargaining agreements," such as "internal Union business" and use of state resources to lobby the

legislature on "matters of interest to the Union." The opinion concludes that the use of state resources "for the exclusive purposes of negotiation and administration of collective bargaining agreements" would not violate the Ethics in Public Service Act.

23. The WPEA made it clear in its email message, which Respondent forwarded to the 179 member employees, that the WPEA believed that the proposed legislation would be beneficial to the membership and WPEA. Thus, the WPEA was promoting the proposed legislation. Respondent adopted or endorsed that WPEA opinion by forwarding the message and instructing members to read and respond to it. Respondent's actions in sending out the email messages fall outside the "exclusive purposes of negotiation and administration of collective bargaining agreement." Respondent assisted in a campaign for the promotion or opposition to a proposed legislation; this is not the same as a "ballot proposition," which is precisely what is banned by the employer's policy. However, the overall intent of that policy, as evidenced by the title of the section ("Political Activities are Limited") is to limit all political activities during work hours.

24. Respondent's email messages violated the cited regulation because the messages "promoted or benefitted" an organization or group outside the DRS, in that the messages assisted the WPEA, an "outside organization or group" in getting out its message about the proposed legislation to members, at no cost in time or resources to the WPEA.

25. Respondent's email messages violated employer policy because the messages were sent without agency approval; were sent using the agency's distribution list; and because the subject of the email messages was "political" in a broad sense, as intended by the employer's policy. Respondent's use of state resources to send the email messages related to conduct that is "prohibited by a state agency policy," and therefore, was in violation of WAC 192-110-010(6).

26. The messages sent by Respondent further violated the employer's policies and the regulation because the use of state resources cannot be considered to be "*de minimus*" as required by those policies and WAC 192-110-010(6). Respondent's messages generated about 665 email exchanges in three days, all during DRS work hours. Many of the email messages clearly took a long time to contemplate and write. The use of state resources clearly promoted and supported the WPEA in its goal of informing members of proposed legislation and an upcoming meeting with the union to discuss the legislative agenda. Therefore, these email messages violated the employer's policies, and in turn, violated the regulation cited.

27. Thus, the preponderance of evidence proves that Respondent's actions were in violation of RCW 42.52.160; WAC 292-110-010; the employer's internal policies, and that Respondent's actions were not sanctioned nor protected by the Collective Bargaining Agreement between the employer and the union.

28. In accordance with WAC 292-120-030(5), each act which violates a provision of the statute or applicable regulations constitutes a *separate* violation. Therefore,

because Respondent sent two separate email messages, each one a *separate* violation of RCW 42.52.160, and each one in violation of WAC 292-110-010(6), we conclude that Respondent has committed four violations of the Ethics in Public Service Law.

29. Accordingly, the complaint is upheld and the Department of Retirement Systems is directed to consider placement of the April 23, 2003, Letter of Reprimand into Respondent's personnel file.

30. In imposing a sanction, WAC 292-120-030 applies. The Board's determination notified Respondent that a fine of less than $500.00 would be required. Consideration of the nature of the violation and the extent or magnitude or severity of the violation is to be considered in setting the amount of any fine.

31. The monetary cost of the violation is a factor to be considered. Here, the monetary cost of the violations is unknown; the lost work time of employees who responded to the email, sometimes with lengthy letters indicating a good deal of time was spent thinking about the issue, has not been quantified into a monetary figure. The investigative costs of the agency, if any, are likewise unknown. WAC 292-120-030(1)

32. Aggravating and mitigating factors are to be considered. A mitigating factor would normally be the letter of reprimand in Respondent's personnel file; however, given that Respondent is no longer a DRS, or State, employee, this factor can no longer be considered to be mitigating. Thus, no mitigating factor listed is applicable (no prior corrective action taken against Respondent; no prior recovery of damages; the behavior was not approved by a supervisor or the agency; and the violation was not unintentional).

33. WAC 292-120-030(3) lists aggravating factors to be considered. Two aggravating factors apply: Respondent knew her actions were in violation of the law or employer policy when she committed the acts, and no other sanctions have been applied. None of the other aggravating factor applies: Respondent was not untruthful or uncooperative; Respondent made no attempt to conceal her actions; Respondent had no significant supervisory or management responsibility, and no prior violations were committed.

34. Finally, regarding the nature of the infractions, there was no criminal conduct or continuing violation; the actions were not motivated by financial gain; and no agency functions were impaired. The actions, however, are of the type which would tend to reduce public respect for, or confidence in, state government or state employees.

35. Thus, considering all factors in WAC 292-120-030, the sanction imposed is $100.00 per violation, based on the fact Respondent knew her actions were in violation of law and policy, no other sanction is imposed, and the acts are of the type which decrease public confidence in State government. The total sanction is $200.00, for the two violations of the statute and regulation.

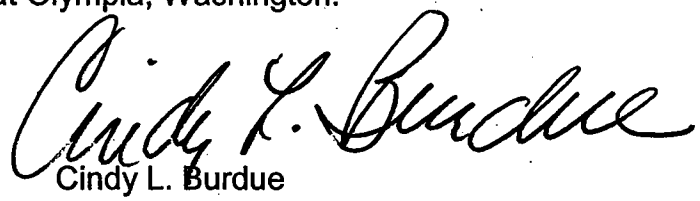
ORDER:

Respondent's actions were in violation of RCW 42.52.160, WAC 292-110-010, and the agency's internal policies. Respondent's actions were not protected by the Collective Bargaining Agreement between the agency and the union.

Respondent's actions constituted two violations of RCW 42.52.160 and WAC 292-110-010. A monetary penalty of $100.00 per violation is imposed, pursuant to WAC 292-030, for a total of $200.00.

The agency, the Department of Retirement Systems, will consider whether to place the Letter of Reprimand, dated April 23, 2003, into Respondent's personnel file.

Dated and Mailed on May 2, 2006, at Olympia, Washington.



Cindy L. Burdue
Administrative Law Judge
Office of Administrative Hearings
2420 Bristol Court SW
PO Box 9046
Olympia, WA 98507-9046

PETITION FOR REVIEW OF INITIAL ORDER:

(PLEASE NOTE TIME CHANGES from Original Initial Order - time begins to run from the Date of this Corrected Order, May 2, 2006)

WAC 292-100-170 Review of initial orders by an administrative law judge. (1) An initial order by an administrative law judge shall become the final order of the board within **forty-five** days of the initial order unless:

(a) A board member determines that the initial order should be reviewed as provided in WAC 292-100-175;

(b) A party files a petition for review of the initial order **within thirty days** of the entry of the initial order.

(2) The petition for review will specify the portions of the initial order to which exception is taken and will refer to the evidence of record relied upon to support the petition.

(3) Petitions for review shall be filed with the executive director and served on all other parties. The party not filing the petition for review shall have twenty days to reply to the

petition for review. The reply shall be filed with the executive director and copies of the reply shall be served on all other parties or their counsel at the time the reply is filed, and may cross-petition for review. If the reply contains a cross-petition, it shall specify portions of the initial order to which exception is taken by the replying party, and shall refer to the evidence of the record relied upon to support the reply.

(4) The board shall personally consider the whole record or such portions of it as may be cited by the parties.

(a) The board shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument.

(b) The board shall enter a final order disposing of the proceeding.

(c) The board shall serve copies of the final order on all parties, the complainant, and the employing agency.

Mailed to the following:

[redacted]
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