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STATE OF WASHINGTON EXECUTIVE ETHICS BOARD

In the Matter of:



Respondent.

NO. Docket No. 2008-EEB-0001

Complaint No. 08-028

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
FINAL ORDER OF THE BOARD**

Pursuant to due and proper notice to all interested parties, a hearing was held in the above-entitled matter before the Executive Ethics Board (Board). The hearing was heard on cross motions for summary judgment by the Respondent and Board Staff. The hearing was held on April 10 and May 8, 2009. The following Board members were present at the April 10 hearing: Chair Neil Gorrell, Vice Chair Linnaea Jablonski and members Golberg and Connelly. The following Board members were present at the May 8 hearing: Chair Neil Gorrell and members Golberg and Connelly. Board member Biegelman recused himself from participation in this matter. The Board was assisted by Administrative Law Judge Rebekah R. Ross at the April 10 hearing. The Board was assisted by Administrative Law Judge Cindy L. Burdue at the May 8 hearing. Also present was Jerald R. Anderson, Senior Counsel, legal advisor to the Board.

At the hearings, the Respondent was represented by Janel K. Ostrem, attorney at law. The Respondent appeared and testified at the May 8 hearing. Board Staff was represented by Mickey B. Newberry, Assistant Attorney General.

1 At the conclusion of the May 8 hearing, counsel for Board Staff provided Mr.
2 Anderson a proposed draft Order. Since this proposed Order was provided on the condition
3 that it not be shared with the Board, it was not reviewed, consulted, or used in any fashion in
4 drafting the Findings of Fact, Conclusions of Law and Final Order of the Board.

5 **I. STATEMENT OF THE CASE**

6 On or about September 12, 2008, the Board determined that there existed reasonable
7 cause to believe that the Respondent had committed a violation or violations of RCW
8 42.52.160 and WAC 292-110-010 and that the penalty for such violation(s) may be more than
9 \$500.00. On or about October 16, 2008, the Appellant filed a response to the Reasonable
10 Cause Determination and requested a hearing.

11 At the April 10 hearing, the parties agreed that the case presented three issues:

- 12 (1) Does the Board retain jurisdiction over violations committed while an individual is a
13 state employee if the individual is no longer employed by the state when a Reasonable
14 Cause Determination is made?
- 15 (2) Did Central Washington University, the employer in this matter, "abandon" the
16 property taken by the Respondent precluding any violation of RCW 42.52.160(1) and
17 WAC 292-110-010?
- 18 (3) If a violation of RCW 42.52.160(1) and WAC 292-110-010 is found, what is the
19 appropriate civil monetary penalty?

20 At the April 10 hearing the Board concluded that even taken in the light most
21 favorable to the Respondent, the undisputed material facts supported summary judgment in
22 favor of Board Staff on the issues of whether the Board had jurisdiction over the Respondent
23 and whether the Respondent violated RCW 42.52.160(1) and WAC 292-110-010. The
24 evidence was insufficient, however, for the Board to reach a decision regarding the
25 appropriate civil penalty, if any. Accordingly, a separate Hearing on Civil Penalty was
26 conducted on May 8, 2009.

1 The following documents were called to the attention of the Board before the granting
2 of Board Staff's motion for summary judgment:

3 1. Board Staff Motion and Memorandum of Authorities in Support of Motion for
4 Summary Judgment, dated March 10, 2009;

5 2. Declaration of Nancy Lewin in Support of Board Staff's Motion for Summary
6 Judgment, dated March 10, 2009, and attached Exhibits A-J;

7 3. Motion for Summary Judgment Dismissal by [REDACTED] dated March 10,
8 2009;

9 4. Declaration of [REDACTED] dated March 10, 2009;

10 5. [REDACTED] Response to Motion and Memorandum of Authorities in
11 Support of Motion for Summary Judgment by Executive Ethics Board Staff, dated March 24,
12 2009;

13 6. Memorandum of Authorities in Response to Respondent's Motion for
14 Summary Judgment, dated March 24, 2009;

15 7. [REDACTED] Reply Memorandum, dated April 3, 2009;

16 8. Memorandum of Authorities in Reply to Respondent's Response to Board
17 Staff's Motion for Summary Judgment, dated April 3, 2009;

18 9. Declaration of Gene Rau in Support of Board Staff's Motion for Summary
19 Judgment, dated April 3 2009 and an accompanying copy of Exhibit J.

20
21 **II. FINDINGS OF FACT**

22 **A. Findings from April 10, 2009 Summary Judgment Hearing**

23 The Board finds that there is no genuine dispute as to the following facts:

24 1. [REDACTED] was employed by Central Washington University (CWU) as an
25 Information Technology Specialist 3 until May 18, 2007.

1 2. When CWU acquired new computers for use on campus, a copy of Windows
2 XP Home Edition software was included with each computer along with the Certificate of
3 Authenticity (COA). It was CWU's practice to throw the software away because it was not
4 needed by the university. The software was placed in an unsecured garbage dumpster located
5 on the university campus for removal and, ultimately, disposal.

6 3. [REDACTED] became aware of CWU's software disposal practices as a direct
7 result of his position in CWU's Information Technology Services unit. At some time in 2006,
8 [REDACTED] removed copies of software from the dumpster before they could be taken away
9 for disposal, and sold them on eBay. [REDACTED] does not deny these actions.

10 4. [REDACTED] derived private financial gain from these sales. He derived this
11 gain from knowledge obtained as a direct result of his position as a state employee.

12 5. [REDACTED] resigned from CWU on May 18, 2007.

13 6. On September 18, 2008, a Reasonable Cause Determination was served on [REDACTED]
14 [REDACTED] through his attorney, Ms. Janel K. Ostrem. The Reasonable Cause Determination
15 alleged that [REDACTED] removal of software from the dumpster and subsequent sale of the
16 software on eBay was in violation of RCW 42.52.160(1) and WAC 292-110-010(1) and
17 (6)(f). RCW 42.52.160(1) states:

18 (1) No state officer or state employee may employ or use any person,
19 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.

20 WAC 292-110-010(1) states, in relevant part:

21 (1) The proper stewardship of state resources, including funds,
22 facilities, tools, property, and employees and their time, is a responsibility that
23 all state officers and employees share. Accordingly, state employees may not
use state resources for personal benefit or gain or for the benefit or gain of
other individuals or outside organizations.

24 WAC 292-110-010(6)(f) states:

25 (6) The state Constitution, state and federal laws, and the Ethics in
26 Public Service Act strictly prohibit certain private activity and certain uses of
state resources. Any use of state resources to support such activity clearly
undermines public confidence in state government and reflects negatively on
state employees generally. This rule explicitly prohibits at all times the
following private uses of state resources.

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(f) Any private use of any state property that has been removed from state facilities or other official duty stations, even if there is no cost to the state.

B. Findings from May 8, 2009 Sanction Hearing.

1. Based on [REDACTED] testimony at the May 8 hearing, the Board finds that he sold at least 200 copies of software removed from the CWU dumpster for an average price of \$78 apiece.

2. The Board consulted WAC 292-120-030 which contains criteria to be considered in determining the appropriate remedy in this case, including aggravating and mitigating factors. The Board finds that the value received by [REDACTED] was \$15,600 (WAC 292-110-030(1)(b)), and that his violation was continuing in nature, was motivated by financial gain, and involved personal gain (WAC 292-120-030(2)(a), (b) and (e)). The Board finds no other aggravating or mitigating factors.

3. The Board incurred \$804.58 in investigation costs.

III. CONCLUSIONS OF LAW

1. The Board has 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 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 provided.

2. [REDACTED] contends that the Board lacks jurisdiction over this matter because the statute and regulation he is charged with violating refer to state "employees" and he was not a state employee at the time the Reasonable Cause Determination was issued. Further, he

1 contends that the software was "abandoned" by CWU when it was placed in the dumpster
2 and, as a result, was no longer state property.

3 3. The Board has jurisdiction over [REDACTED] notwithstanding his argument that
4 RCW 42.52.160(1) or WAC 292-110-010 do not apply to him because he was no longer a
5 state employee at the time the Reasonable Cause Determination was made. The Board
6 reaches this conclusion for two reasons. First, this reading is consistent with the overall spirit
7 and principle of the Ethics in Public Service Act. RCW 42.52.900 provides in relevant part as
8 follows:

9 Government derives its powers from the people. Ethics in government are the
10 foundation on which the structure of government rests. State officials and
11 employees of government hold a public trust that obligates them, in a special
12 way, to honesty and integrity in fulfilling the responsibilities to which they are
13 elected and appointed. Paramount in that trust is the principle that public
14 office, whether elected or appointed, may not be used for personal gain or
15 private advantage.

16 The citizens of the state expect all state officials and employees to perform
17 their public responsibilities in accordance with the highest ethical and moral
18 standards and to conduct the business of the state only in a manner that
19 advances the public's interest. State officials and employees are subject to the
20 sanctions of law and scrutiny of the media; ultimately, however, they are
21 accountable to the people and must consider this public accountability as a
22 particular obligation of the public service. Only when affairs of government are
23 conducted, at all levels, with openness as provided by law and an unswerving
24 commitment to the public good does government work as it should.

25 The obligations of government rest equally on the state's citizenry. The
26 effectiveness of government depends, fundamentally, on the confidence
citizens can have in the judgments and decisions of their elected
representatives. Citizens, therefore, should honor and respect the principles and
the spirit of representative democracy, recognizing that both elected and
appointed officials, together with state employees, seek to carry out their public
duties with professional skill and dedication to the public interest. Such service
merits public recognition and support.

All who have the privilege of working for the people of Washington state
can have but one aim: To give the highest public service to its citizens.

RCW 42.52.901 requires that the Ethics in Public Service Act "be construed liberally to
effectuate its purposes and policy." Public confidence in the ethical standards of state officers
and employees would be diminished were the Board to conclude that a former state officer or
employee could escape responsibility for even the most egregious ethical violations by simply

1 resigning before a formal finding of Reasonable Cause. The purpose of the act would further
2 be thwarted in any case in which a state officer was terminated due to ethical violations prior
3 to a finding of Reasonable Cause. Second, the Legislature has enacted a limitation period of
4 five years from the date of the violation or two years from the date the violation is discovered
5 or reasonably should have been discovered for actions taken under RCW 42.52. See RCW
6 42.52.540. This limitation period indicates a legislative intent to give the Board jurisdiction
7 over action taken while an individual is a state officer or employee, regardless of the
8 individual's employment status at the time a Reasonable Cause Determination is ultimately
9 made.

10 4. Taking into account the facts of this case and mindful of the purpose of the
11 Ethics in Public Service Act as set out in RCW 42.52.900, the Board concludes that software
12 placed in a dumpster located on the CWU campus remained state property and was not
13 intentionally "abandoned." Rather, it was CWS's reasonable expectation that material placed
14 in the dumpster would be removed and eventually disposed of. There is no evidence to
15 support a contention that it was CWU's intent to allow employees to take the software home
16 for eventual sale.

17 5. The undisputed facts in this case support the conclusion that the conduct of [REDACTED]
18 [REDACTED] violated RCW 42.52.160(1) and WAC 292-110-010(1) and (6)(f).

19 6. Under RCW 42.52.480, the Board may impose a civil penalty of up to \$5,000
20 per violation or three times the economic value of any thing received or sought in violation of
21 RCW 42.52, whichever is greater. The Board may also impose the cost of investigating the
22 complaint. Based on the totality of the facts in the record, and utilizing RCW 42.52.480 and
23 WAC 292-120-030 as a guide, the Board finds that a monetary penalty equal to the direct
24 economic value to the Respondent, plus investigation costs, is appropriate.

25 IV. ORDER

26

1 Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
2 ordered that [REDACTED] pay a monetary civil penalty in the amount of \$15, 600, and
3 investigation costs in the amount of \$804.58. Total payment of \$16,404.58 is due within 180
4 days of the date of this order.

5 DATED this 25th day of August, 2009.

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Neil Gorrell, Chair

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Linnaea Jablonski, Vice Chair

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Judith K. Golberg, Member

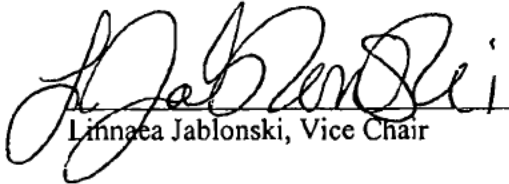
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Mike Connelly, Member

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DATED this 15th day of August, 2009.

Neil Gorrell, Chair


Linnaea Jablonski, Vice Chair

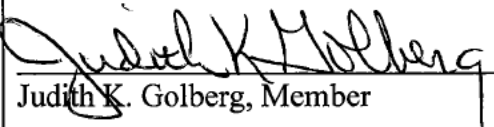
Judith K. Golberg, Member

Mike Connelly, Member

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Mike Connelly, Member

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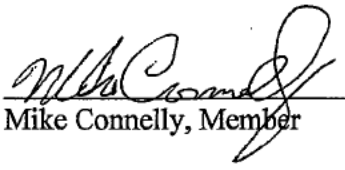
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DATED this 25 day of August, 2009.

Neil Gorrell, Chair

Linnaea Jablonski, Vice Chair

Judith K. Golberg, Member



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