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7 **BEFORE THE STATE OF WASHINGTON**
8 **EXECUTIVE ETHICS BOARD**

9 In re the matter of:

10 Phil Moller,

11 Respondent.

OAH Docket No. 2012-EEB-0009
EEB No. 2010-067

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

12
13 **I. PROCEDURAL HISTORY**

14 1.1 On August 30, 2010, the Executive Ethics Board (Board) received a Fraud
15 Investigation Report from the State Auditor's Office (SAO) (Ex. 2a) alleging that Phil Moller,
16 Natural Resource Specialist 4, with the Department of Natural Resources (DNR), may have
17 violated the Ethics in Public Service Act.

18 1.2 On March 16, 2012, the Board entered a Preliminary Investigation and Board
19 Determination (Ex. S) finding reasonable cause to believe that a violation of the Ethics in
20 Public Service Act, chapter 42.52 RCW (Ethics Act), occurred, specifically alleging violations
21 of RCW 42.52.020 (activities incompatible with public duties), 42.52.070 (special privileges),
22 and 42.52.160 and WAC 292-110-010 (use of state resources).

23 1.3 A prehearing conference, in which all parties participated, was held on August
24 1, 2012, with Administrative Law Judge (ALJ) Alice L. Haenle presiding pursuant to RCW
25 42.52.500, and an Order Following Prehearing Conference was issued on August 3, 2012. A
26 status conference was held on February 3, 2013, and an order was issued on August 21, 2013,

1 rescheduling the hearing dates. Subsequent status conferences were held on April 4, 2014 and
2 May 1, 2014, and orders were issued on April 10, 2014 and May 1, 2014, respectively.

3 1.4 On April 10, 2013, Mr. Moller filed a motion to dismiss the matter on the basis
4 that the Board lacked jurisdiction to decide the alleged violations of the Ethics Act under the
5 doctrines of claim preclusion and issue preclusion because a prior arbitration concerning Mr.
6 Moller's employment had resulted in a decision reinstating his employment. Board staff filed
7 a response, and Mr. Moller filed a reply in support of his motion. A hearing on the motion to
8 dismiss was held on May 10, 2013, before the Board, with ALJ Haenle presiding. On May 16,
9 2013, the Board issued an Order denying the motion to dismiss, finding that the labor
10 arbitration did not deprive the Board of its jurisdiction to determine whether violations of the
11 Ethics Act had occurred.

12 On May 28, 2013, Mr. Moller filed a motion for reconsideration, Board staff filed a
13 response, and Mr. Moller filed a reply in support of his motion for reconsideration. The Board
14 was unable to issue an order on the motion for reconsideration, due to the short time frames
15 involved, and accordingly, Mr. Moller's motion for reconsideration was deemed denied by
16 operation of law on June 18, 2013. RCW 34.05.470.

17 On June 18, 2013, Mr. Moller filed a Petition for Judicial Review of the Board Order
18 denying his motion to dismiss.¹ The superior court dismissed the petition for judicial review
19 on November 15, 2013.

20 1.5 After due and proper notice, a hearing was held before the Board. Before the
21 hearing, Mr. Moller filed a pre-hearing brief, and both parties filed proposed findings of fact
22 and conclusions of law. The hearing was held at the Board offices at Bristol Court in Olympia,
23 Washington, convening on May 6, 2014 at 9:00 AM. ALJ Alice Haenle from the Office of
24 Administrative Hearings conducted the proceedings, and Board Chair Lisa Marsh and
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26 ¹ *Moller v. Executive Ethics Board*, King County Super. Ct. No. 13-2-23413-1.

1 members Matthew Williams III and Samantha Simmons were present. Also present was Bruce
2 L. Turcott, Assistant Attorney General, legal advisor to the Board.

3 1.6 Board staff was represented by Chad Standifer, Assistant Attorney General.
4 The Board's Acting Executive Director Evelyn Lopez and other Board staff members were
5 present.

6 1.7 Mr. Moller was present and represented by Thomas Hayton, attorney at law.

7 1.8 Board staff offered Exhibits 1 – 13. All were admitted into evidence. The
8 Board was provided copies of documents that were admitted as exhibits.

- 9 1. Stipulated Facts, Conclusions and Order, In the Matter of Randy
10 Sweet, Executive Ethics Board, No. 10-069 (as hereinafter
11 approved by the board) (10 pages)
- 12 2. Washington State Auditor's Office, Audit Procedures,
13 Department of Natural Resources, DNR Internal Investigation,
14 Audit Period Ending 6/30/2009 (12 pages)
- 15 2a. Washington State Auditor's Office Fraud Investigation Report
16 for the Department of Natural Resources, Report No. 1003441,
17 issued April 26, 2010 (8 pages)
- 18 3. DNR Compound Report, prepared by Kenneth J. Wilson,
19 January 23, 2009 (608 pages)
- 20 4. Memorandum from Elias F. Garcia to Jim Hurst, Engineering
21 and General Services Division Manager, dated June 5, 2002 (3
22 pages)
- 23 5. Office of State Procurement, Washington Purchasing Manual,
24 revised May 10, 2007 (101 pages)
- 25 6. Performance and Development Plans (PDP) for Phil Moller, July
26 2003 through October 2007 (22 pages)
7. DNR Cost Comparison Report relating to Affordable Auto Glass
and Safelite for January 2007 though October 2008 (8 pages)
8. DNR Report relating to Affordable Auto Glass and Safelite for
fiscal year 2008 (14 pages)
9. Memorandum from Lori Johnson, Agency Purchasing Manager,
DNR, to Personnel Responsible for Purchasing & Accounting
Functions, dated July 1, 2007 (7 pages)

- 1 10. DNR Addendum to Investigative Report (35 pages)
- 2 11. DNR Purchasing Procedures Notebook – Excerpt (6 pages)
- 3 12. DNR Memorandum from Elias F. Garcia to Staff dated May 15,
4 2002 (1 page)
- 5 13. Email from Phil Moller to Mike Smith, dated May 24, 2007 (1
6 page)

7 1.9 Mr. Moller offered Exhibits A, B, D, E, F, G, G-1, G-48, G-52, G-54, G-55, I,
8 K (pages 1-15, 58-71, and 83-84 only), L, N, O, Q, R, S, T (pages 1-39 only), and V. All were
9 admitted into evidence. The Board was provided copies of all documents that were admitted as
10 exhibits.

- 11 A. Arbitration Hearing Transcript, Vol. One, dated May 6, 2010 (89
12 pages)
- 13 B. Arbitration Hearing Transcript, Vol. Two, dated May 7, 2010 (64
14 pages)
- 15 D. Position Description Form (DNR Arbitration Exhibit), dated April 5,
16 2006 (7 pages)
- 17 E. Termination Letter (DNR Arbitration Exhibit), dated April 28, 2009 (20
18 pages)
- 19 F. Contemplating Discipline Letter (DNR Arbitration Exhibit), dated
20 March 13, 2009 (16 pages)
- 21 G. DNR Compound Report Prepared by Kenneth Wilson (includes Table
22 of Contents) (DNR Arbitration Exhibit), dated January 23, 2009 (25
23 pages)
- 24 G-1. Interview List from Wilson Report (DNR Arbitration Exhibit), undated
25 (2 pages)
- 26 G-48. Performance and Development Plans for Phil Moller, various dates (22
pages)
- G-52. Memorandum from Lori Johnson (DNR Arbitration Exhibit), dated July
1, 2007 (7 pages)
- G-54. Memorandum from Elias Garcia re: Personal Purchases Delivered to
the Compound (DNR Arbitration Exhibit), dated May 15, 2002 (1
page)

- 1 G-55. State of Washington, Department of Natural Resources Engineering –
- 2 organizational chart (DNR Arbitration Exhibit), dated August 2006 (1
- 3 I. Letter from Mike Hollingshead re October 29, 2009 Division Meeting
- 4 and list of attendees (DNR Arbitration Exhibit), dated February 1, 2010
- 5 (2 pages)
- 6 K. 2007-209 WFSE Collective Bargaining Agreement (DNR Arbitration
- 7 Exhibit), pages 1-15, 58-71, and 83-84 only (31 pages)
- 8 L. Respondent’s (AAG’s) Post Hearing Brief from Moller 2010
- 9 Arbitration Hearing, dated July 2, 2010 (23 pages)
- 10 N. Opinion and Award of Philip Kienast, Arbitrator, dated July 2, 2010 (4
- 11 pages)
- 12 O. Melanie deLeon’s June 25, 2013 email to Thomas Hayton and the
- 13 Washington State Ethics Board Ethics Complaint Form, dated June 25,
- 14 2013 and September 30, 2010, respectively (8 pages)
- 15 Q. Patricia Curry’s letter to Phil Moller regarding reinstatement to his
- 16 former position, dated August 27, 2010 (1 page)
- 17 R. William Frare’s letter to Phil Moller regarding reinstatement to his
- 18 former position, dated August 10, 2010 (1 page)
- 19 S. Preliminary Investigation and Board Determination, dated March 16,
- 20 2012 (17 pages)
- 21 T. Melanie deLeon’s June 27, 2013 email to Thomas Hayton and the DNR
- 22 Investigation File from Moller’s Public Records Request, dated June
- 23 27, 2013, pages 1-39 only (39 pages)
- 24 V. Comparison of Factual Allegations in EEB Charge, DNR Charge and
- 25 Wilson Report, dated June 2013 (41 pages)

- 1.10 The proceedings were recorded and open to the public.
- 1.11 The Board heard the testimony of David Killeen, Brad Littlefield, Lori Johnson,
- Will Broadbent, and Phil Moller.
- 1.12 The hearing was adjourned on May 7, 2014.

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

II. FINDINGS OF FACT

2.1 From February 2001 until April 2009, Phillip Moller was employed by DNR as

1 the Assistant Manager of the Equipment Fund, Equipment Services Section, Engineering and
2 General Services Division (his title, but not function, eventually changed to Fleet Services
3 Superintendent). He reported to the Manager of the Equipment Fund who, for most of Mr.
4 Moller's tenure was Elias Garcia. Mr. Garcia's title also changed; he became the Assistant
5 Manager of DNR's Equipment Services Section.

6 2.2 Mr. Moller's job was to manage the daily operation of DNR's main equipment
7 repair facility (located now in Tumwater) (Tumwater Compound) and (from a different office)
8 DNR's motor pool and other transportation functions (e.g, seasonal firefighting). In that
9 position, Mr. Moller was responsible for all of the on-site day-to-day operations and for all
10 staff members located at the Tumwater Compound, for a time period that included June 1,
11 2006 through December 31, 2008. (Ex. 6 at 1, 7) The Tumwater Compound had sub-sections
12 for different work (automobile repairs, heavy equipment repairs etc.) each of which was
13 managed by a supervisor who reported to Moller. (Ex. G-55) The Tumwater Compound was
14 associated with ten satellite service facilities throughout the state. Mr. Moller also was to
15 oversee broadly the operations of each of the satellite service facilities.

16 2.3 One of Mr. Moller's direct reports was DNR employee Jason Wise, a shop
17 supervisor at the Tumwater Compound.² DNR employee Randy Sweet, a parts specialist at the
18 Tumwater Compound, reported to Mr. Wise.³

19 2.4 Mr. Moller's job expectations, as set out in his 2005 Performance and
20 Development Plan (PDP), included the following:

- 21 • Read and learn the new Washington Purchasing Manual. Insure [sic]
22 that your staff follows the procedures on this manual.

23 ² On March 14, 2014 the Board entered Stipulated Facts, Conclusion and Order (EEB No. 10-068)
24 against Jason Wise resolving allegations that he violated the Ethics Act. Mr. Wise was ordered to pay a monetary
25 penalty of \$5,000, with \$1,000 of that amount suspended based on his future compliance with the Ethics Act for a
26 period of two years.

³ On July 12, 2013, the Board entered Stipulated Facts, Conclusion and Order (EEB No. 10-069) against
Randy Sweet resolving allegations that he violated the Ethics Act. Mr. Sweet was ordered to pay a monetary
penalty of \$7,500. (Ex 1)

1 • Insure [sic] that your staff follows contract requirements.
2 (Ex. 6 at 17)

3 2.5 Mr. Moller was also required to ensure that his employees who were
4 responsible for purchasing followed the DNR purchasing Policy and Procedures. Mr. Moller,
5 as the unit head, was to adopt the following principles and responsibilities:

- 6 • Principle 1 – Individuals conducting business transactions shall be
7 personally responsible to face punitive actions resulting from blatant violations
8 of the laws, regulations, policy or restrictions affecting the conduct of those
9 transactions.
- 10 • Principle 2 – Anyone who is aware of fraudulent or illegal business
11 transactions conducted in the name of the DNR shall report them immediately.
- 12 • Principle 3 – Each unit is responsible for the restitution of any
13 disallowance due to noncompliance with laws, regulations or special
14 restrictions.
- 15 • Principle 4 – Every employee who conducts DNR business transactions
16 is responsible for staying abreast of ever-changing legal and regulatory
17 requirements.
- 18 • Principle 5 – Legal and regulatory requirements, as well any donor-
19 imposed restrictions, shall be maintained on record with DNR and will be
20 readily accessible.

21 (Ex. 11 at 1)

22 2.6 During the relevant time period, the Office of State Procurement (OSP) set
23 limits to amounts an agency can purchase. The OSP provided agencies the authority to
24 purchase up to \$10,000. (Ex. 5 at 9, Test. of Johnson) Any purchase of \$10,000 or more had
25 to be sent through the Department of General Administration for competitive bid. (Ex. 5 at 9-
26 10, Test. of Johnson)

27 2.7 Consistent with OSP policy, DNR purchasing standards authorized employees
28 to make purchases up to \$3,300 as of July 1, 2007 without approval from the agency
29 Purchasing Authority, Lori Johnson. The limit changed over time. (Ex. 9 at 5, Test. of
30 Johnson) For purchases over that amount Ms. Johnson had to approve the purchase before it
31 was made. (Test. of Johnson)

32 2.8 Mr. Moller had limited involvement in two prior investigations of oral
33 complaints about purchasing and use of parts by DNR employees and was excluded from the

1 one at issue in this case.

2 2.9 Shortly after starting his job, Moller received a complaint from DNR employee,
3 Roy Hasuko, who later elected to file his complaint directly with the DNR Commissioner.
4 (Test. of Moller)

5 2.10 In June of 2001, the State Auditor's Office conducted a whistleblower
6 investigation of the DNR Tumwater Compound. (Ex. 2 at 2) The investigation revealed that
7 questionable purchases were made, that there was a lack of segregation of duties, and that there
8 was no routine monitoring of shop activities by the shop supervisor, Mr. Wise. (*Id.*) The
9 allegations made in the June 2001 investigation were that goods, primarily hydraulic hose and
10 fittings, were being purchased from Industrial Specialties and were never received by DNR.
11 (*Id.*) Mr. Moller was made aware of the State Auditor's findings. (Exs. 4, 12)

12 2.11 Thereafter, then-Division Manager Jim Hurst assigned Moller and two other
13 employees randomly to audit parts ordering, receipt and use. Moller and the others did those
14 audits until stopped by Mr. Hurst who said he was satisfied that the ordering and installing of
15 parts was proceeding properly. (Test. of Moller)

16 2.12 In May of 2002, Elias Garcia, DNR Equipment Services Manager, sent out a
17 directive to Equipment Services Staff, which included Mr. Moller, related to personal
18 purchases delivered to the DNR Compound. (Ex. 4) The directive stated, "Effective
19 immediately, personal purchases are not to be delivered to the compound. Arrangements must
20 be made for the delivery to take effect at places other than the compound. This directive is to
21 comply with the State's Auditor's recommendation on February 25, 2002." (*Id.*)

22 2.13 DNR Employee Will Broadbent was a Customer Service Specialist with
23 maintenance responsibilities relating to DNR Motor Pool vehicles, including the repair and
24 replacement of damaged windshields. Sometime around 2006, Mr. Broadbent showed Mr.
25 Moller several invoices from Affordable Autoglass (Affordable). (Test. of Broadbent). The
26 invoices were proof that Affordable was charging more for windshields, gaskets, and trim than

1 Safelite Autoglass (Safelite) charged. (*Id.*) According to Mr. Broadbent, Mr. Moller took the
2 invoices and told him he would look into it. (Test. of Broadbent) Mr. Moller referred all of
3 them to Mr. Garcia, who, with Mr. Hurst, reported to Mr. Moller that he reviewed them but
4 concluded all were wrong. (Test. of Moller) Mr. Moller failed to follow up with Mr.
5 Broadbent regarding the concerns Mr. Broadbent raised. (*Id.*)

6 2.14 After Mr. Garcia's 2006 retirement, complaints of the same nature and source
7 resumed. Brad Littlefield (Garcia's successor) hired Ken Wilson, a fraud consultant, to
8 conduct an internal investigation into irregular maintenance shop purchasing activity at the
9 Tumwater Compound. (Test. of Littlefield) Mr. Wilson's work started in October 2008. In
10 December 2008, Mr. Moller told DNR investigators that the compound used Affordable more
11 than Safelite. (Ex. 3 at 72) He assumed that it was because Affordable had better prices. (*Id.*)
12 Mr. Moller was aware that Safelite had a state convenience contract with DNR to
13 repair/replace windshields as of February 1, 2007, which was revised and retained on June 18,
14 2008. (Ex. 3 at 72, 497-98)

15 2.15 Mr. Moller had given Affordable key card access to the Tumwater Compound,
16 which allowed Affordable to enter, after hours, an area not open to the public. (Ex. 3 at 94, 98)
17 At least six DNR employees, including Mr. Moller, had Affordable come to the compound to
18 repair/replace windshields in their personal vehicles. (Ex. 3 at 41, 44, 87, 96, 107, and 110)
19 Mr. Moller had work done on his personal vehicle by Affordable at the compound in
20 November of 2008. (Ex. 3 at 96)

21 2.16 The internal investigation ended with a report of January 23, 2009 (DNR
22 Report). (Ex. G) The DNR Report surveyed state purchasing and ethics laws and regulations.
23 It revealed an issue with possible vendor favoritism by Mr. Sweet towards Affordable and
24 Industrial, based on Mr. Sweet's friendships with the respective owners of these two
25 companies, Mike Darrah (Affordable) and Marty Stepan (Industrial). Mr. Sweet was in fact
26 friends with both Mr. Darrah and Mr. Stepan, as confirmed by Mr. Sweet and several other

1 DNR employees. (Ex. 1 at 4-5, Ex. 3 at 41, 44, 52, and 101) The DNR Report concluded that
2 purchases by Mr. Sweet violated purchasing laws and regulations and postulated that Mr.
3 Sweet's motive was his personal relationship with the vendors. (Ex. 3 at 20)

4 2.17 The DNR Report found that in fiscal year 2007, the DNR Tumwater Compound
5 only used Safelite once. In contrast, the DNR Report found that in fiscal year 2007, the DNR
6 Tumwater Compound used Affordable seventy-seven times, spending \$15,357.49 on
7 windshield repair/replacement. (Ex. 3 at 502 and Test. of Littlefield) The DNR Report also
8 found that in the 22-month period from January 2007 through October 2008, Affordable
9 overcharged the state, compared with Safelite (under state convenience contract), by \$8,400.
10 (Ex. 7 and Test. of Littlefield) DNR did not have a state convenience contract with
11 Affordable. (Test. of Littlefield)

12 2.18 During the relevant time period, Industrial Specialties was the primary supplier
13 of most of the supplies purchased by the DNR Tumwater Compound. (Test. of Littlefield)
14 Industrial Specialties did not have a contract with the state or DNR. (*Id.*) From July 1, 2008
15 through December 18, 2008, the total amount of money spent with Industrial Specialties was
16 \$44,311.11. (Ex. 3 at 517, Test. of Littlefield) The DNR investigation revealed, by
17 comparison shopping with companies located on the Internet and those who have current state
18 contracts, that DNR overpaid Industrial Specialties approximately \$50,134 during fiscal years
19 2007 and 2008. (Ex. 10, Test. of Littlefield)

20 2.19 The DNR Report makes no specific charges against Moller but, rather, faults
21 supervisors generally for not catching the improper purchases. (Ex. G at 21) Mr. Moller was
22 responsible for day-to-day operations and for all staff members located at the DNR Tumwater
23 Compound.

24 2.20 In May 2009, the State Auditor's Office began their review of the DNR
25 investigation, which included reviewing irregular purchasing activity at the DNR Tumwater
26 Compound for the time period of June 1, 2006 through December 31, 2008. (Ex. 2a at 2-3)

1 The State Auditor's Office concluded that the fleet manager, Mr. Moller, did not monitor to
2 ensure that shop employees followed Department policies and procedures and state contracting
3 law. (Ex. 2a at 5) As a result, significant costs were incurred and internal control weaknesses
4 were not addressed. (*Id.*)

5 2.21 Following the DNR Report, DNR terminated the employment of the parts
6 purchasing person, Mr. Sweet, Mr. Sweet's immediate superior, Mr. Wise, and Mr. Wise's
7 immediate supervisor, Mr. Moller. Mr. Moller's employment was terminated effective April
8 30, 2009. (Exs. E, F)

9 2.22 Mr. Moller disputed his termination. Under the applicable union contract,
10 binding arbitration occurred on May 6-7, 2010. (Ex. N) The arbitration decision found that
11 Mr. Moller "had only broad, not specific, oversight of the Tumwater facility. His direct report
12 in Tumwater never alerted him of any issues regarding purchases from the two suppliers in
13 question. Mr. Moller accepted an award of back pay but elected not to reinstate his
14 employment with DNR.

15 2.23 The Board found that all Findings of Fact were proven by a preponderance of
16 the evidence.

17 III. CONCLUSIONS OF LAW

18 3.1 The Board has jurisdiction to hear this matter pursuant to RCW 42.52.360(1),
19 which authorizes the Board to enforce the Ethics in Public Service Act, chapter 42.52 RCW,
20 with respect to employees in the executive branch of state government. The Board has
21 jurisdiction over Phil Moller, whose actions occurred while a state employee. The complaint
22 was filed in accordance with RCW 42.52.410, the Board found reasonable cause pursuant to
23 RCW 42.52.420, and an adjudicative proceeding was conducted pursuant to RCW 42.52.430
24 and .500. All the required procedural notices have been provided.

25 3.2 This action is not barred by the five-year statute of limitations applicable to
26 actions under the Ethics Act, RCW 42.52.540. The alleged violations, and the violation found

1 by the Board, occurred in fiscal year 2007-2008 (Ex 2a at 2, Ex. 3 at 96), and this action was
2 commenced by the Board's reasonable cause determination entered March 16, 2012. (Ex. S)

3 3.3 The Ethics in Public Service Act governs the conduct of state officers and
4 employees. Under RCW 42.52.430(5), a violation must be established by a preponderance of
5 the evidence.

6 3.4 A state employee may not have interests that conflict with the proper discharge
7 of his duties under RCW 42.52.020, which states:

8 No state officer or state employee may have an interest, financial or otherwise,
9 direct or indirect, or engage in a business or transaction or professional activity, or
10 incur an obligation of any nature, that is in conflict with the proper discharge of
the state officer's or state employee's official duties.

11 3.5 A state employee may not use his position to secure privileges for himself or
12 other persons under RCW 42.52.070, which states:

13 Except as required to perform duties within the scope of employment, no state
14 officer or state employee may use his or her position to secure special privileges
or exemptions for himself or herself, or his or her spouse, child, parents, or
15 other persons.

16 3.6 A state employee may not use state resources under his official control for his
17 own private benefit or gain, or for the private benefit or gain of another, under
RCW 42.52.160(1) and WAC 292-110-010, which state:

18 No state officer or state employee may employ or use any person, money, or
19 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,
20 or another.

21 RCW 42.52.160(1):

22 The proper stewardship of state resources, including funds, facilities, tools,
23 property, and employees and their time, is a responsibility that all state officers
and employees share. Accordingly, state employees may not use state resources
24 for personal benefit or gain or for the benefit or gain of other individuals or
outside organizations. Responsibility and accountability for the appropriate use
25 of state resources ultimately rests with the individual state officer or state
employee, or with the state officer or state employee who authorizes such use.
26 State officers and employees should ensure that any personal use of state
resources permitted by this section is the most efficient in terms of overall time
and resources.

1 WAC 292-110-010.

2 3.7 Under RCW 42.52.480, the Board may impose a civil penalty of up to \$5,000
3 per violation or three times the economic value of anything received or sought in violation of
4 the Ethics in Public Service Act, whichever is greater. The Board may also impose the cost of
5 investigating the complaint and order restitution for any damages sustained by the state.

6 3.8 Mr. Moller relies on the arbitrator's ruling in the DNR disciplinary action that
7 found he was not discharged for cause and argues that the Board lacks jurisdiction to decide
8 alleged violations of the Ethics Act based on legal theories of claim preclusion and issue
9 preclusion. This argument is without merit. The Board previously issued a decision on this
10 issue, in response to Mr. Moller's motion to dismiss, that states "this Board has jurisdiction to
11 decide the alleged violations of Chapter 42.52 RCW; the doctrines of claim preclusion and
12 issue preclusion do not deprive this Board of jurisdiction."⁴ The authority of the Board to
13 enforce the Ethics Act derives from RCW 42.52.360. State agencies, on the other hand, have
14 authority to take disciplinary action for employee misconduct, including for violations of the
15 Ethics Act, under other statutes. RCW 42.52.520. Agencies do not have the authority
16 possessed by the Board to impose the sanctions for violations of the Ethics Act that are
17 authorized by the Act in RCW 42.52.480.

18 3.9 RCW 42.52.020, .070, and .160 provide, respectively, that state employees may
19 not have interests in conflict with the proper discharge of their official duties, use their position
20 to secure special privileges for themselves or others, or use state resources for the private
21 benefit of themselves or others.

22 Board staff argues that Mr. Moller knew or should have known that Affordable
23 was more expensive than Safelite, his employees were purchasing from Industrial at higher
24 prices than available elsewhere, and the purchasing agent, Mr. Sweet, had personal
25

26 ⁴ Order Denying Moller's Motion to Dismiss at 1-2, entered in this case on May 16, 2013.

1 relationships with the owners of Affordable and Industrial. In sum, Mr. Moller could have
2 inquired, done research, and verified the overpayments and favoritism issues, but did not.

3 Mr. Moller argues that these statutes apply to the specific employees involved in
4 the violations, and that as their supervisor he was not responsible for discovering and stopping
5 the violations.

6 Based on these facts, the Board concludes that Mr. Moller did not violate RCW
7 42.52.020, 42.52.070, 42.52.160, or WAC 292-110-010 for allowing employees at the
8 Tumwater Compound to use Affordable and Industrial. The Ethics Act provisions apply to the
9 individuals who committed the violations. There is no evidence that Mr. Moller participated in
10 or had specific knowledge of purchasing irregularities by other employees, except for receiving
11 complaints that he did not investigate and elevated to his supervisor. (See Ex. G-55) Mr.
12 Moller failed to investigate, discover, monitor, and correct the situation. His failure to take
13 action may constitute poor management and supervisory skills and nonexistent stewardship of
14 state resources, but it is not a violation of these provisions of the Ethics Act.^{5,6}

15 3.10 RCW 42.52.070 and .160 provide, respectively, that state employees may not
16 use their positions to secure special privileges for themselves or others or use state resources
17 for the private benefit of themselves or others.

18
19 ⁵ Board staff argues that Mr. Moller violated provisions of the Ethics Act because he knew or should
20 have known of violations of employees under his supervision. The Ethics Act contains a similar supervisory
21 violation for use of public resources for political campaigns. “Knowing acquiescence by a person with authority
22 to direct, control, or influence the actions” of a state officer using public resources for political campaigns
23 constitutes a violation of the Ethics Act. RCW 42.52.180(1). The Ethics Act does not contain comparable
24 language for violations of RCW 42.52.020, 42.52.070, or 42.52.160. The Board notes that Senate Bill 5577,
25 introduced in the 2013 legislature, contained a new section that stated, “Knowing acquiescence by a person . . .
26 with authority to direct, control, or influence the actions of . . . the state employee in violation of RCW 42.52.020,
42.52.070, . . . 42.52.160 constitutes a violation of [the Ethics Act].” This provision was removed from the bill
before it passed the legislature and was signed into law as Chapter 190, Laws of 2013.

⁶ Board Advisory Opinion 01-03 was cited by Board staff. The advisory opinion held that a State Lottery
sales representative would violate the Ethics Act by establishing an outside business relationship with a lottery
vendor when the sale representative’s duties included making discretionary decisions regarding distribution of the
vendor’s products. It is distinguishable from this case because, unlike Mr. Moller, the lottery sales representative
proposed to establish a business relationship with the vendor that included a financial interest on the part of the
lottery sales representative in products that he would sell to the vendor.

1 Board staff argues that Mr. Moller committed a violation when he used Affordable for
2 windshield work on his personal vehicle at the Tumwater Compound and had a duty to abstain
3 from using that vendor for personal purchases at a time when he had discretionary authority
4 over DNR purchases from the vendor.

5 Mr. Moller argues that work had to be done on his windshield the same day to drive
6 the vehicle home, the prohibition on giving special privileges to other persons applies to
7 family members but does not include vendors, and the DNR memo about delivery of personal
8 purchases did not apply to work on windshields.

9 Based on these facts, the Board concludes that Mr. Moller violated RCW 42.52.070,
10 42.52.160, and WAC 292-110-010 when he used Affordable to work on the windshield of his
11 personal vehicle at the Tumwater Compound. Establishing a personal business relationship
12 with Affordable and providing access to a gated, non-public area of a state compound to do
13 so, while he held discretionary authority to control DNR's use of the vendor, constituted using
14 special privileges for himself and granting special privileges to Affordable, in violation of
15 RCW 42.52.070. There is no evidence that it was not possible for Mr. Moller to have his
16 windshield work done off-site on the same day. The statutory prohibition on granting special
17 privileges to others applies to any person, including vendors. Providing access to the
18 Tumwater Compound also constituted use of state resources that were under his official
19 control for his private gain, in violation of RCW 42.52.160 and WAC 292-110-010. Mr.
20 Moller's personal use of Affordable on the Tumwater Compound was also inconsistent with
21 the directive issued by Mr. Garcia in May 2002 prohibiting delivery of personal purchases to
22 the Tumwater Compound. (Ex 12) It is not necessary for the purposes of an Ethics Act
23 violation to find that any damages were sustained by the state. *See* RCW 42.52.480, WAC
24 292-120-020 and -030 (authorizing Board to order payment of any damages sustained by the
25 state).
26

1 **APPEAL RIGHTS**

2 **RECONSIDERATION OF FINAL ORDER – BOARD**

3 Any party may ask the Executive Ethics Board to reconsider a Final Order. The
4 request must be in writing and must include the specific grounds or reasons for the request.
5 The request must be delivered to Board office within 20 days after the postmark date of this
6 order.

7 The Board is deemed to have denied the request for reconsideration if, within 20 days
8 from the date the request is filed, the Board does not either dispose of the petition or serve the
9 parties with written notice specifying the date by which it will act on the petition.
10 (RCW 34.05.470).

11 The Respondent is not required to ask the Board to reconsider the Final Order before
12 seeking judicial review by a superior court. (RCW 34.05.470).

13
14 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

15 A Final Order issued by the Executive Ethics Board is subject to judicial review under
16 the Administrative Procedure Act, chapter 34.05 RCW. See RCW 42.52.440. The procedures
17 are provided in RCW 34.05.510 - .598.

18 Judicial review must be sought with the superior court under Thurston County Case
19 No. 13-2-01086-8, in accordance with the February 25, 2014 Findings of Fact, Conclusions of
20 Law, and Order in that case, and served on the Board and any other parties within 30 days of
21 the date that the Board serves this Final Order on the parties. (RCW 34.05.542(2)).
22 Service is defined in RCW 34.05.010(19) as the date of mailing or personal service.
23
24
25
26

1 **CERTIFICATION OF MAILING**

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

5
6 Thomas Hayton
7 Cutler Nylander & Hayton PS
8 1191 Second Avenue, Suite 1800
9 Seattle, WA 98101-2996

Chad Standifer, AAG
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100

10 Bruce Turcott, AAG
11 1125 Washington Street SE
12 P.O. Box 40110
13 Olympia, WA 98504-0100

Alice L. Haenle
Administrative Law Judge
P.O. Box 42489
Olympia, WA 98504-2489

14 State of Washington)
15) ss.
16 County of Thurston)

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

20 Olympia, Washington, this 16th day of June 2014.



21 **RUTHANN BRYANT**
22 Administrative Officer