

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

DON MAKENA (HULSE)

Respondent.

NO. 2012-034

STIPULATED FACTS,
CONCLUSIONS AND ORDER

STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, DON MaKENA, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through MELANIE DE LEON, Executive Director. The following stipulated facts, conclusions, and agreed order will be binding upon the parties if fully executed, and if accepted by the Board without modification(s), and will not be binding if rejected by the Board, or if the Respondent does not accept the Board's proposed modification(s), if any, to the stipulation.

Section 1: PROCEDURAL FACTS

1.1. On July 13, 2012, the Executive Ethics Board (Board) received a referral from the State Auditors Office (SAO) alleging that Don Makena, a Fire Alarm Control Technician Lead at the University of Washington, may have violated one or more sections of the Ethics in Public Service Act. The Board found reasonable cause on May 10, 2013.

1.2. The Board is authorized under RCW 34.05.060 to establish procedures for attempting and executing informal settlement of matters in lieu of more formal proceedings

under the Administrative Procedures Act, including adjudicative hearings. The Board has established such procedures under WAC 292-100-090.

1.3. Don Makena understands that if Board Staff proves any or all of the alleged violations at a hearing, the Board may impose sanctions, including damages sustained by the state that were caused by the conduct constituting the violation under RCW 42.52.480(1)(a) and a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000 for each violation found, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

1.4. Mr. Makena recognizes that the evidence available to the Board Staff is such that the Board may conclude he violated the Ethics in Public Service Act. Therefore, in the interest of seeking an informal and expeditious resolution of this matter, the parties agree to entry of the stipulated findings of fact, conclusions of law and agreed order set forth below.

1.5. Don Makena waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2) which provides in part:

The board has the option of accepting, rejecting, or modifying the proposed stipulation or asking for additional facts to be presented. If the board accepts the stipulation or modifies the stipulation with the agreement of respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or respondent does not agree to the board's proposed modification to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussion shall not be admitted into evidence at a subsequent public hearing.

1.6. If the Board accepts this stipulation, the Board will release and discharge Mr. Makena from all further ethics proceedings under chapter 42.52 RCW for matters arising out of

the facts contained in the complaint in this matter, subject to payment of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the agreed order. Don Makena in turn agrees to release and discharge the Board, its officers, agents and employees from all claims, damages, and causes of action arising out of this complaint and this Stipulation and Agreed Order.

1.7. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Mr. Makena and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future. Furthermore, any and all stipulations by Mr. Makena are for the sole purpose of settling this matter and are not admissible or stipulated to for any other purpose than the ethics board proceedings.

1.8. If this Stipulation is accepted, this Stipulation and Order is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

1.9. If the Board rejects this Stipulation, or if Don Makena does not accept the Board's proposed modification(s), if any, Mr. Makena waives any objection to participation at any subsequent hearing by any Board member to whom this Stipulation was presented for approval under WAC 292-100-090(2). Further, Mr. Makena understands and agrees that if this proposed Stipulation, with any applicable modification by the Board, is rejected by him, this Stipulation and information obtained during any formal settlement discussions held between the parties shall not be admitted into evidence at a subsequent public hearing, unless otherwise agreed by the parties.

Section 2: FINDINGS OF FACT

2.1. Don Makena is a Fire Alarm Control Technician Lead for the Fire Alarm and Signal Shop at the University of Washington (UW) and was so for all times pertinent to this

investigation. During the period under investigation, Mr. Makena supervised four Fire Control Technicians.

2.2. As a Lead, Mr. Makena's general duties included leading and working with Fire Control Technicians to perform journey-level work in the inspection, testing servicing, programming and maintenance of the complex buildings Fire Alarm Systems ensuring regulatory compliance. He was to assign work to technicians, inspect work for quality and completeness, keep detailed records and create work assignments for the regulatory preventive maintenance program of the Seattle Campus Fire Alarm Systems. He also directed the duties on non-control technician workers in support of operations of the campus fire alarm systems.

2.3. The Fire Control Leads and Technicians fall under the Collective Bargaining Agreement (CBA) between the Board of Regents of the University of Washington and the Washington Federation of State Employees. Under this CBA, overtime work must be approved in advance by the Employer. According to UW representatives, overtime is usually approved verbally by the Supervisor/Manager in advance, with follow-up completion of the authorization after the fact.

2.4. Per Mr. Makena, his work schedule is 6:00 am – 2:30 pm, Monday through Friday. He does not work a flexible schedule. Mr. Makena's crew works from 6:45 am – 3:15 pm, Monday-Friday. Shop 24 does not have a night crew, nor any reason to be in the shop after the normally scheduled work hours unless there was an emergency situation requiring a shop employee to be called back in to handle the matter.

2.5. Mr. Makena has his own private office with a computer. Technicians do not use Mr. Makena's computer, but computers located on the shop floor. Mr. Makena spent the majority of his time in the office, not out working with the technicians at the actual work site.

2.6. On April 19, 2011, the SAO received an assertion that Mr. Makena used state resources for personal purposes. The SAO reviewed Don Makena's computer use. The SAO audit contained a report entitled, "HTTP(S) Tagged Activity Sorted by Date." This report listed all of the non-work related internet sites Mr. Makena visited over a 14-month period (February 2010 – August 2010 and December 2010 – June 2011).

2.7. A website activity report identified 93 websites Mr. Makena had visited at least once. Of these 93, Mr. Makena visited ESPN websites 471 times, an average of 34 times a month. He visited classmates.com 10 times, YouTube 39 times and Yahoo mail 113 times. All toll, Mr. Makena visited non-work related websites 1263 times, or an average of 90 times a month for the 14-month timeframe.

2.8. The SAO internet activity report indicated that Mr. Makena spent at least 109 hours visiting sites on his state computer that were not job-related during. The UW also paid Mr. Makena overtime at a rate of \$47.25 per hour on the days where he was also using the state computer for non-work related matters.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Don Makena and over the subject matter of this complaint.

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

3.3. Don Makena's stipulations to the following conclusions of law are for the sole purpose of reaching settlement in this matter and are limited to these proceedings. These stipulations and conclusions are not admissible for any other purpose or proceedings.

3.4. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from using state resources for personal gain or benefit. RCW 42.52.160(1), Use of persons, money, or property for private gain, states:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

Don Makena used his state computer to access non-work related sites on a recurring basis that was more than de minimis in nature. Mr. Makena spent at least 109 hours on his state computer visiting sites that were not job-related. During the days he was pursuing this personal business, he also requested and received paid overtime to accomplish his regular Lead duties.

3.5. Based on Findings of Fact 2.1 through 2.10, Don Makena violated RCW 42.52.160.

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

Section 4: AGGRAVATING AND MITIGATING FACTORS

In determining the appropriateness of the civil penalty, the criteria in WAC 292-120-030 has been reviewed. Aggravating factors include: the violations were continuing in nature and involved personal gain. It is also an aggravating factor that Mr. Makena had significant official, management, or supervisory responsibility.

Section 5: . AGREED ORDER

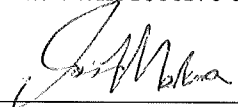
5.1 Don Makena will pay a civil penalty in the amount of five thousand dollars (\$5,000) and restitution to the University of Washington in the amount of five thousand, one hundred fifty dollars (\$5,150). The Board agrees to suspend \$2,500.00 of the civil penalty on the

condition that Don Makena complies with all terms and conditions of this Stipulation and Order and commits no further violations of RCW 42.52 for a period of two years from the date this agreement is executed.

5.2 The civil penalty of \$2,500 is payable in full within forty-five (45) days after this stipulation is accepted by the Board or as agreed to by the parties. Don Makena shall pay the restitution directly to the University of Washington.

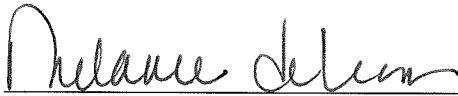
CERTIFICATION

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

 10/27/13

Don Makena Date
Respondent

Stipulated to and presented by:

 11-4-13

Melanie de Leon Date
Executive Director

IV. ORDER

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

✓ ACCEPTED in its entirety;
 REJECTED in its entirety;
 MODIFIED. This Stipulation will become the Order of the Board if the Respondent approves* the following modification(s):

DATED this 8th day of November, 2013.

Lisa Marsh
Lisa Marsh, Chair

Am
Anna Dudek Ross, Vice-Chair

M. Williams, III
Matthew Williams, III, Member

Samantha Simmons
Samantha Simmons, Member

* I, Don Makena, accept/do not accept (circle one) the proposed modification(s).

Don Makena 10/27/13
Don Makena, Respondent Date