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

9 In the matter of:

EEB No. 2015-031

10 [REDACTED]

OAH No. 07-2018-AGO-00020

11 Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER

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14 **I. PROCEDURAL HISTORY**

15 1.1 On April 23, 2015, the Executive Ethics Board (Board) received a complaint
16 alleging that [REDACTED], an employee with the Department of Social and Health
17 Services (DSHS), may have violated the Ethics in Public Service Act, chapter 42.52 RCW
18 (Ethics Act) when he received free legal assistance from his direct report, Scott Bird (Mr. Bird), a
19 licensed attorney.

20 1.2 On November 18, 2016, the Board found reasonable cause to believe that a
21 violation of the Ethics Act was committed.

22 1.3 On or about September 4, 2018, [REDACTED] filed a motion to dismiss. On
23 October 11, 2018, the Executive Ethics Board Staff (Board Staff) filed a motion for summary
24 judgment.

25 1.4 After due and proper notice, a hearing was held on Respondent's motion to
26 dismiss and on Board Staff's motion for summary judgment. The hearing was held at the Board

1 offices at Bristol Court in Olympia, Washington, convening on November 9, 2018. ALJ Dawn
2 Bettinger from the Office of Administrative Hearings conducted the proceedings, and Board
3 Chair John Ladenburg, and members Gerri Davis and Shirley Battan were present. Also present
4 was Bruce L. Turcott, Assistant Attorney General, legal advisor to the Board.

5 1.5 Board Staff was represented by Chad C. Standifer, Assistant Attorney General,
6 who appeared telephonically. The Board's Executive Director Kate Reynolds and other Board
7 staff members were present.

8 1.6 [REDACTED] appeared telephonically and represented himself, *pro se*.

9 1.7 Board Staff filed the following documents:

- 10
- 11 • Board Staff's Motion for Summary Judgment;
 - 12 • Declaration of David Killeen in Support of Motion for Summary Judgment, with
attached Exhibits 1-7; and
 - 13 • Board Staff's Response to Respondent's Motion to Dismiss.

14 1.8 [REDACTED] filed the following documents:

- 15 • Motion to Dismiss; and
- 16 • Declaration of [REDACTED]

17 1.9 The proceedings were recorded and open to the public.

18 1.10 The hearing was adjourned on November 9, 2018.

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

21 II. FINDINGS OF FACT

22 2.1 At all times pertinent to this matter, [REDACTED] was employed as the Director
23 of Residential Care Services (RCS) with DSHS. In October of 2014, Mr. Bird was promoted
24 from his position of Policy Program Manager at RCS to an Office Chief. Declaration (Decl.) of
25 David Killeen (Killeen), Ex. 3. [REDACTED] made the final decision regarding the promotion.
26 *Id.* Mr. Bird reported directly to [REDACTED]. Decl. of Killeen, Ex. 2.

1 3.2 [REDACTED] asserts any violations committed were inadvertent and minor,
2 pursuant to RCW 42.52.425(1)(c). He also asserts that dismissal is proper based on the dismissal
3 of a separate complaint involving Scott Bird, EEB 2015-030. Finally, [REDACTED] claims that
4 he did not use state resources in requesting Mr. Bird's assistance. None of these arguments
5 provide a basis to dismiss this matter.

6 3.3 [REDACTED] violations were neither inadvertent nor minor. The evidence
7 demonstrates this was not an isolated incident. Mr. Bird met with and advised [REDACTED] on
8 several occasions, providing between 8-12 hours of work for him, and memorializing their
9 arrangement in a written agreement.

10 3.4 A complaint was filed against Mr. Bird in April 2015, alleging that he violated
11 the Ethics Act when he was promoted to an Office Chief position. The complaint alleged the
12 promotion was improper because it was obtained in exchange for Mr. Bird having provided *pro*
13 *bono* legal work to his supervisor, [REDACTED]. The Board's Executive Director dismissed that
14 complaint on November 18, 2016. The dismissed complaint against Mr. Bird and the complaint
15 at issue in this case against [REDACTED] therefore involve separate allegations. The dismissal of
16 the complaint against Mr. Bird does not dictate the result in this case.

17 3.5 The allegations against [REDACTED] did not include misuse of state resources
18 under RCW 42.52.160. No evidence was provided demonstrating that [REDACTED] used state
19 resources in securing Mr. Bird's assistance. That, however, does not provide a basis to dismiss
20 this matter, which is based on other alleged violations of the Ethics Act.

21 3.6 WAC 10-08-135¹ provides that a motion for summary judgment may be granted
22 and an order issued if the written record shows that there is no genuine issue as to any material
23 fact and the moving party is entitled to judgment as a matter of law. The object and function of
24 a summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn. 2d 880, 886,
25 441 P.2d 532 (1968). Summary judgment is appropriate if there is no genuine issue of material
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¹ The Board has adopted the model rules of procedures, chapter 10-08 WAC. WAC 292-100-006.

1 fact and the moving party is entitled to judgment as a matter of law. *Ellis v. City of Seattle*, 142
2 Wn. 2d 450, 458, 13 P.3d 1065 (2000); *see* CR 56(c). The facts of this matter are not in dispute,
3 rendering resolution of this matter by summary judgment appropriate. There is no factual dispute
4 that [REDACTED] arranged with his subordinate, Mr. Bird, to provide him with free legal services.

5 3.7 The Ethics Act governs the conduct of state officers and employees. Under
6 RCW 42.52.430(5), a violation of the Ethics Act must be established by a preponderance of the
7 evidence.

8 3.8 RCW 42.52.020 provides that no state employee:

9 [M]ay have an interest, financial or otherwise, direct or indirect, or engage in a
10 business or transaction or professional activity, or incur an obligation of any
11 nature, that is in conflict with the proper discharge of the state officer's or state
12 employee's official duties.

13 3.9 RCW 42.52.070 states:

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

18 3.10 Based on the above Findings of Fact, the Board concludes that [REDACTED]
19 violated RCW 42.52.020. Through his arrangement with Mr. Bird, [REDACTED] had an interest
20 that directly conflicted with the proper discharge of his official duties, which included
21 supervision of Mr. Bird. By its very nature, their arrangement compromised the ability of
22 [REDACTED] to properly supervise Mr. Bird. Mr. Bird was providing a service to [REDACTED]
23 that [REDACTED] may have otherwise had to pay for. [REDACTED] therefore had an incentive to
24 ignore or minimize any performance issues that may have arisen with Mr. Bird. Whether or not
25 any such performance issues actually arose during the period in question, a conflict of interest
26 existed that created the potential for harm to the state.

3.11 Based on the above Findings of Fact, the Board also concludes that [REDACTED]
violated RCW 42.52.070. Through his employment with the state, [REDACTED] secured special
privileges in the form of free legal services from a subordinate state employee, Mr. Bird. By

1 arranging to have Mr. Bird provide free legal services regarding a personal matter unrelated to
2 his state position, ██████████ secured a special privilege for himself. Regardless of whether
3 state resources were used by ██████████ to obtain this service, or Mr. Bird to perform it, Mr.
4 ██████████ received a benefit by securing free services from a state employee he supervised.

5 3.12 An agreement formalized the arrangement between ██████████ and Mr. Bird.
6 Decl. of Killeen, Ex. 4. This agreement states, in part: (1) Mr. Bird’s legal work would not
7 interfere with Mr. Bird’s “performance of his official duties at DSHS”; (2) Mr. Bird’s legal work
8 would not affect Mr. Bird’s “position at DSHS or his official working relationship” with Mr.
9 ██████████ and (3) Mr. Bird would not “receive any direct or indirect benefit” due to his legal work.
10 *Id.* Thus, the agreement focuses on Mr. Bird’s conduct. Such an agreement does not, and could
11 not, insulate ██████████ from any ethical issues related to having a subordinate perform free
12 legal work.

13 3.13 ██████████ also failed to follow DSHS policies, which further supports the
14 Board’s conclusions. The agreement references DSHS Policy 18.18, a policy that requires an
15 official “Notification of Outside Employment” form to be completed. No such form was
16 completed by Mr. Bird.² Thus, ██████████ failed to adhere to that policy. If such a form had
17 been completed, it is possible that the arrangement would have been flagged by DSHS
18 management or the human resources department. The DSHS ethics policy, Policy 18.64, states
19 that employees shall not “[u]se or create the appearance of using the employee’s position for
20 the personal gain or advantage of the employee or others.” Decl. of Killeen, Ex. 7, ¶ B. At a
21 minimum, ██████████ arrangement with Mr. Bird created an appearance that ██████████ was
22 using his position for personal gain.

23 3.14 Under RCW 42.52.480, the Board may impose a civil penalty of up to \$5,000 per
24 violation or three times the economic value of anything received or sought in violation of the

25 ² DSHS Policy 18.18 also states, “[w]hen appropriate, the immediate supervisor should seek guidance from the
26 next higher-level supervisor in the chain-of-command and/or DSHS Human Resources.” Decl. of Killeen, Ex. 5,
¶E. There is no evidence in the record indicating that ██████████ discussed this issue with DSHS management or
human resources.

1 Ethics Act, whichever is greater. The Board concludes that a \$1,000 penalty is appropriate,
2 calculated as follows: \$500 for [REDACTED] violation of RCW 42.52.020 and \$500 for Mr.
3 [REDACTED] violation of RCW 42.52.070. The aggravating and mitigating factors discussed below
4 support this penalty.

5 3.15 In determining the appropriate sanction, including the amount of any civil
6 penalty, the Board determined, under WAC 292-120-030(2)(a) and (e), that the violations were
7 continuing in nature and tended to reduce public respect for or confidence in state government
8 and state government officers and employees. It is an aggravating circumstance that [REDACTED]
9 had significant official, management, and supervisory responsibility as the Director of
10 Residential Care Services for DSHS. WAC 292-120-030(3)(d). It is a mitigating circumstance
11 that the violations committed by [REDACTED] appear to have been unintentional. WAC 292-
12 120-030(4)(d). The Board therefore reduced the penalty amount from the \$1,500 amount
13 requested by Board Staff.

14 IV. ORDER

15 4.1 Respondent's motion to dismiss is DENIED. Board Staff's motion for summary
16 judgment is GRANTED.

17 4.2 Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby
18 ordered that [REDACTED] is assessed a total monetary civil penalty of \$1,000, based on his
19 violations of RCW 42.52.020 and RCW 42.52.070.

20 4.3 The total amount of \$1,000 is payable in full within 90 days of the effective date
21 of this order, which is the date of mailing.

22 DATED this 3 day of January, 2019.

23 WASHINGTON STATE EXECUTIVE ETHICS BOARD

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26 John Ladenburg, Chair