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**BEFORE THE WASHINGTON STATE  
EXECUTIVE ETHICS BOARD**

In the matter of:

KHOI MAI,

Respondent.

OAH NO. 04-2017-AGO-00010  
EEB NO. 2016-033

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND FINAL ORDER

**I. PROCEDURAL HISTORY**

1.1 On February 26, 2016, the Executive Ethics Board (Board) received a complaint referred by the State Auditor’s Office (SAO) alleging that Khoi Mai, a former Application Developer with the Washington State Department of Social and Health Services (DSHS), may have violated the Ethics in Public Service Act, chapter 42.52 RCW.

1.2 On November 18, 2016, the Board found reasonable cause to believe a violation of the Ethics in Public Service Act occurred.

1.3 A prehearing conference, with all parties participating, was held on January 11, 2018, with an Administrative Law Judge (ALJ) presiding pursuant to RCW 42.52.500.

1.4 After due and proper notice, a hearing was convened before the Board on January 11, 2018 at 9:00 a.m.. The hearing was held at the Board offices at Bristol Court in Olympia, Washington. ALJ TJ Martin from the Office of Administrative Hearings conducted the proceedings, and Board Vice Chair Shirley Battan, and Board members Anna Dudek Ross and

1 Gerri Davis were present. Also present was Bruce L. Turcott, Assistant Attorney General, legal  
2 advisor to the Board.

3 1.5 Board staff was represented by Chad C. Standifer, Assistant Attorney General.  
4 The Board's Executive Director Kate Reynolds and other Board staff members were present.

5 1.6 Mr. Mai did not appear. No notice of appearance had been filed, and Mr. Mai was  
6 not represented by an attorney.

7 1.7 Board staff offered Exhibits 1-16. All were admitted into evidence at hearing.

- 8 1. Investigative Report and Board Determination of Reasonable Cause  
9 relating to Khoi Mai dated October 26, 2016 (7 pages);
- 10 2. DSHS Data Collection Log dated August 13, 2015 relating to work  
11 computer of Khoi Mai (8 pages);
- 12 3. DSHS Administrative Policy No. 18.64 (Standards of Ethical Conduct for  
13 Employees, revised September 1, 2014) and DSHS Administrative Policy  
14 No. 15.15 (Use of Electronic Messaging Systems and the Internet, revised  
15 October 5, 2012) (15 pages);
- 16 4. DSHS Internet Access Request and Agreement relating to Khoi Mai,  
17 dated December 4, 2014 (1 page);
- 18 5. DSHS Employee Annual Review Checklists relating to Khoi Mai for the  
19 years 2012, 2013, and 2014( 3 pages);
- 20 6. State Auditor's Office Investigative Interview Notes relating to Khoi Mai  
21 dated December 3, 2015 (4 pages);
- 22 7. State Auditor's Office Investigative Interview Notes relating to Khoi  
23 Mai's supervisor dated December 9, 2015 (2 pages);
- 24 8. State Auditor's Office Investigative Notes of Computer Examination  
25 relating to Khoi Mai (2 pages);
- 26 9. Email from DSHS to Board Staff relating to Khoi Mai, dated April 21,  
2016 (1 page);
10. Internet browsing history found on Khoi Mai's state-owned computer (5  
pages);
11. Text file found on Khoi Mai's state-owned computer (40 pages);
12. Internet bookmarks found on Khoi Mai's state-owned computer, as  
compiled by the State Auditor's Office (149 pages);

1 13. Personal emails of Khoi Mai found on Khoi Mai's state-owned computer  
2 (298 pages);

3 14. State Auditor's Office Whistleblower Investigation Report dated  
4 February 18, 2016 relating to Khoi Mai (6 pages);

5 15. DSHS Investigation Report dated January 8, 2016 (9 pages); and

6 16. DSHS termination letter dated January 27, 2016 (14 pages).

7 1.8 Mr. Mai offered no exhibits.

8 The Board was provided copies of documents that were admitted as exhibits.

9 1.9 The proceedings were recorded and open to the public.

10 1.10 The Board heard the testimony of Jennifer Wirawan and David Killeen.

11 1.11 The hearing was adjourned on January 11, 2018.

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

## 14 **II. FINDINGS OF FACT**

15 2.1 Mr. Mai was hired by DSHS as an Information Technology Specialist 1 (ITS 1)  
16 on August 1, 1996. Mr. Mai worked at DSHS for 19 years as an Application Developer and for  
17 all times pertinent to this matter was an ITS 6. Exhibit (Ex.) 16 at 5.

18 2.2 On July 18, 2015, the SAO received an anonymous complaint alleging that  
19 Mr. Mai was using his state computer for personal benefit and gain. On July 23, 2015, the SAO  
20 opened a case for investigation. Ex. 1 at 1.

21 2.3 On August 12, 2015, DSHS obtained a copy of Mr. Mai's work computer hard  
22 drives. Ex. 2 at 2. Two hard drives containing images of Mr. Mai's hard drives were given to the  
23 SAO on September 2, 2015. Ex. 15 at 1. The SAO conducted a review of the hard drives.  
24 Testimony of Jennifer Wirawan.

25 2.4 The SAO examined Mr. Mai's Internet history for the period of  
26 September 19, 2014, through August 12, 2015. The SAO investigator found that Mr. Mai used  
his state computer for non-work related activity in excess of 338 hours over 156 working days

1 with an average per day use of more than two hours viewing news, videos, his personal email  
2 account, browsing for car parts and shopping. Ex.8 at 1; Testimony of Wirawan.

3         2.5     The SAO identified 27 weeks of more than five hours of personal browsing each  
4 week, including three weeks in which his personal browsing was over 20 hours per week.  
5 Ex. 10 at 1; Testimony of Wirawan. For the week of May 11, 2015, Mr. Mai spent 1,618 minutes  
6 (27 hours) browsing non-work related internet sites, with a high of more than seven hours on  
7 May 12, 2015. Ex. 10 at 1 and 4; Testimony of Wirawan.

8         2.6     During the search of Mr. Mai's computer, the SAO determined that Mr. Mai had  
9 visited more than 150 web sites for sexually explicit films (e.g., rarelust.com) and visited forums  
10 used for the sharing of sexually explicit photographs (e.g., trinity.ru and warnet.ws). Ex. 8 at 2;  
11 Testimony of Wirawan. In some instances, shortly after accessing these sites, Mr. Mai would  
12 visit websites intended for uploading, storing, and sending large files forms used for the sharing  
13 of sexually explicit photographs (e.g., fboom.me, uploadto.us, lumfile.com, and keeps2s.cc). *Id.*  
14 The SAO further found that Mr. Mai accessed sites created for downloading and saving videos  
15 (e.g., elby.ch, videokeep, and kepvod) and sites for storing large quantities of images (e.g.,  
16 gmx.com). *Id.*

17         2.7     Over a period covering 49 days, Mr. Mai spent more than 21 hours accessing  
18 sexually explicit material. Some examples are provided below:

- 19         • September 29, 2014 — over two hours browsing sexually explicit content,  
20 including accessing ten sexually explicit films.
- 21         • March 16, 2015 — over four hours browsing sexually explicit content, including  
22 accessing nine sexually explicit films.
- 23         • Internet Favorites — contained 55 websites for adult content.
- 24         • A 30-page text file containing website addresses linked to sexually explicit  
25 content.
- 26         • Three sexually explicit films.

Ex. 14 at 4.

1           2.8     SAO investigators asked Mr. Mai about the 260 personal files, such as videos of  
2 scuba diving, pictures of various types of cars like Mustangs, user manuals for car repairs, etc.  
3 Ex. 6 at 1; Testimony of Wirawan. Mr. Mai responded by stating that he would load videos and  
4 pictures onto his computer from his GoPro camera because the USB 2.0 port installed on his  
5 state computer made playing the files from his personal devices problematic because it was so  
6 slow. *Id.* Mr. Mai further indicated in his response that he believed he could store and access  
7 these files on his state computer as long as there was no cost to the state. *Id.*

8           2.9     In addition, the SAO found numerous documents that belonged to the Health Care  
9 Authority (HCA) that included confidential information regarding HCA clients. Ex. 13. Mr.  
10 Mai's sister, Huong Mai (Ms. Mai), an employee at HCA, created many of these documents. *Id.*  
11 SAO investigators asked Mr. Mai why he had documents containing health care provider or  
12 patient information on his work computer. Mr. Mai responded that his sister,  
13 Ms. Mai, worked at the HCA and that sometimes he would help her with the creation of Excel  
14 spreadsheets. Ex. 6 at 1. The SAO investigator asked Mr. Mai how the HCA documents got on  
15 his work computer. Mr. Mai responded that his sister would email the documents to him using  
16 the state email system. Ex. 6 at 1-2.

17           2.10    The SAO investigator asked Mr. Mai about his approximately 340 hours of  
18 non-work related browsing history over a 150-day period for an average of two hours per day.  
19 Mr. Mai responded by saying that he was multi-tasking and that sometimes he would browse  
20 during his lunch period, such as catching up on a Seahawks game or reading tech forums. Ex. 6  
21 at 2; Testimony of Wirawan.

22           2.11    Mr. Mai explained to the SAO investigator that most of his job is maintenance  
23 and "putting out fires." He further indicated that sometimes there are large gaps during the day  
24 where he lacks work and that he did not see a problem with browsing the internet during those  
25 down times when there was no cost to the state. Ex. 6 at 2; Testimony of Wirawan.

1           2.12 The SAO found reasonable cause to believe an improper governmental action  
2 occurred. Ex. 14 at 3; Testimony of Wirawan. Because of the SAO Whistleblower investigation,  
3 DSHS conducted an internal investigation. A review of Mr. Mai's work computer hard drive was  
4 conducted by DSHS investigators, which revealed the following picture files stored on the hard  
5 drive:

- 6           • Clothing: 347 picture files
- 7           • Nudity: 406 picture files
- 8           • Explicit (sexual in nature): 12 picture files
- 9           • Violence: 15 picture files
- Movies: 190 picture files
- House: 39 picture files
- Cars: 70 picture files

10 Ex. 16 at 2.

11           2.13 A DSHS internal investigator (internal investigator) asked Mr. Mai about the  
12 documents found on his computer that belonged to HCA that contained information such as  
13 Social Security Numbers, prescription information, and diagnostic codes for HCA clients. Mr.  
14 Mai indicated in his response that his sister provided him with the documents seeking his  
15 assistance to create a spreadsheet that would show how many clients are on different plans and  
16 how far away (geographically) clients were from providers and programs. Mr. Mai told the  
17 internal investigator that he created or wrote about 31 VBA (Visual Basic for Application) scripts  
18 in his effort to assist his sister and that he would spend about 1 to 1.5 hours per script. Ex. 16 at  
19 7.

20           2.14 The internal investigator asked Mr. Mai if he informed his supervisor about the  
21 work he was performing for his sister. He stated, "No." Ex. 16 at 8. Mr. Mai told the internal  
22 investigator that he worked on the HCA spreadsheets for about eight to nine months. He further  
23 indicated in his response that he did the work for his sister because he did not want to turn her  
24 down. Mr. Mai was asked if he disseminated the HCA data to anyone else and he replied that he  
25 had not. *Id.*

1           2.15    The DSHS internal investigator asked Mr. Mai if he conducted any other outside  
2 work. He indicated that people would come to him with their broken (non-work) computers and  
3 ask him to repair them. The internal investigator asked Mr. Mai if this was done during work  
4 hours. He replied that it was. The internal investigator asked Mr. Mai if during these repairs he  
5 used other state resources. Mr. Mai indicated that he would use electricity and internet resources  
6 but that he would use his own tools. Ex. 16 at 8.

7           2.16    The internal investigation revealed that on October 26, 2012, October 8, 2013,  
8 December 4, 2014, and October 29, 2015, Mr. Mai signed the Employee Annual Review  
9 Checklist attesting that he is responsible to read, be familiar with, and comply with the policies  
10 and procedures identified in the checklist. Ex. 5; Ex. 16 at 2. Policies pertinent to this  
11 investigation that are included on the checklist are:

- 12           • Use of Electronic Messaging Systems and Internet.
  - 13                 • Permitted Business Use
  - 14                 • Permitted Personal Use
  - Prohibited Uses
- Standards of Ethical Conduct for Employees

15 Ex. 3.

16           DSHS Administrative Policy No. 15.15 (Use of Electronic Messaging and the Internet)  
17 states in part as follows:

18           Example 6: An employee spending thirty to forty minutes looking a various  
19 websites related to personal interest. **THIS IS A POLICY VIOLATION.**

20 Ex. 3 at 14 (emphasis in original).

21           2.17    In addition to the Annual Reviews, Mr. Mai signed and acknowledged having  
22 read and understood the “Internet Access Request and Agreement” on the following dates;  
23 October 26, 2012, October 11, 2013, December 4, 2014, and October 16, 2015. Ex. 16 at 5; Ex.  
24 4. The Internet Access Agreement identifies prohibited activities related to internet use.

25           2.18    Mr. Mai told Board staff he used the Google Chrome browser at work because it  
26 allowed him to have multiple sites open at one time. He admitted that he would go to non-work

1 related sites everyday but that he did not spend as much time on the sites as indicated in the SAO  
2 report. He further indicated that his co-workers were all doing the same thing. Ex. 1 at 4.

3 2.19 The internal investigator asked Mr. Mai if he would log onto his personal Google  
4 account from his work computer. He indicated that he would. He further indicated that he would  
5 not use Google Chrome for work related internet searches. Ex. 16 at 7.

6 2.20 Mr. Mai told Board staff that because his work required him to spend a large  
7 amount of time on the internet he would occasionally be re-directed to a pornographic website,  
8 which would account for the images found on his computer. Mr. Mai denied downloading  
9 pornographic movies. Ex. 1 at 4-5.

10 2.21 Mr. Mai's supervisor, Kevin Ferrell, told the SAO investigator that Mr. Mai's  
11 description of having a light workload each day was not accurate. Ex. 7 at 1. He also told the  
12 investigator that Mr. Mai had complained about being too busy and that there was a "work  
13 request board" with tasks employees can do if they have extra time. *Id.*

14 2.22 Mr. Mai was terminated from state service on January 27, 2016 for misuse of  
15 state resources, using his position for personal/non-related business reasons, and violation of  
16 DSHS policies on standards of ethical conduct for employees, use of electronic messaging  
17 systems and the internet, and internet and email use. Ex. 16.

18 2.23 Jennifer Wirawan is an investigator with the SAO. Ms. Wirawan testified  
19 regarding the investigation she conducted relating to Mr. Mai's misuse of his state computer.  
20 She also testified regarding concerns about the security risks to the state computer system  
21 presented by downloading and uploading files and the websites he visited.

22 2.24 David Killeen is a Senior Investigator with the Board. He testified regarding  
23 Board staff's investigation of this matter, including his review of the investigations conducted  
24 by the SAO and DSHS.

25 2.25 The Board found that all of the above findings of fact were proven by a  
26 preponderance of the evidence.

1 **III. CONCLUSIONS OF LAW**

2 3.1 The Board has jurisdiction to hear this matter pursuant to RCW 42.52.360(1),  
3 which authorizes the Board to enforce the Ethics in Public Service Act with respect to employees  
4 in the executive branch of state government. The Board has jurisdiction over Khoi Mai, whose  
5 actions occurred while he was a state employee. The complaint was filed in accordance with  
6 RCW 42.52.410, the Board found reasonable cause pursuant to RCW 42.52.420, and an  
7 adjudicative proceeding was conducted pursuant to RCW 42.52.430 and 42.52.500. All required  
8 procedural notices were provided.

9 3.2 The Ethics in Public Service Act governs the conduct of state officers and  
10 employees. Under RCW 42.52.430(5), a violation must be established by a preponderance of the  
11 evidence.

12 3.3 A state employee may not use state resources under his official control for his  
13 own private benefit or gain, or for the private benefit or gain of another, under RCW  
14 42.52.160(1), which states:

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

18 3.4 WAC 292-110-010(3) provides permitted personal use of state resources:

19 (a) A state officer or employee's use of state resources is de minimis only if each  
20 of the following conditions are met:

21 (i) There is little or no cost to the state;

22 (ii) Any use is brief;

23 (iii) Any use occurs infrequently;

24 (iv) The use does not interfere with the performance of any state officer's or  
25 employee's official duties;

26 (v) The use does not compromise the security or integrity of state property,  
information systems, or software;

(vi) The use is not for the purpose of conducting an outside business, in  
furtherance of private employment, or to realize a private financial gain; and

(vii) The use is not for supporting, promoting the interests of, or soliciting for an  
outside organization or group.

(b) A state officer or employee may use state resources for wellness or combined  
fund drive activities as long as use conforms with (a) of this subsection or as  
authorized in state law and rule.

1           3.5     Based on the above findings of fact, the Board concludes that Mr. Mai repeatedly  
2 violated RCW 42.52.160 when he used his state computer for private benefit or gain. Mr. Mai  
3 used his state computer on numerous occasions over the course of several months to browse  
4 internet websites relating to personal interests that bore no relation to his job duties, including  
5 websites that were pornographic in nature.

6           3.6     Mr. Mai's extensive personal use of his state computer was not brief, nor was it  
7 infrequent. His personal use of state resources far exceeded acceptable de minimis use as  
8 specified in WAC 292-110-010(3). Contrary to Mr. Mai's assertions, his inappropriate computer  
9 use cost the state money because he was paid to perform a job. Instead of consistently performing  
10 his job duties, Mr. Mai, at times for several hours a day, browsed his state computer to view  
11 pornography and other subject matter relating to personal interests.

12           If, as he contends, Mr. Mai had "downtime" due to the nature of his job, it was his  
13 obligation to speak with his supervisor about how to use his time more effectively to further the  
14 mission of his agency. Mr. Mai's supervisor disputes Mr. Mai's characterization of how busy he  
15 was. Ex. 7. In any event, having "downtime" would not excuse violations of the Ethics in Public  
16 Service Act.

17           3.7     Based on the above findings of fact, the Board concludes that Mr. Mai violated  
18 RCW 42.52.160 when he used his state computer to store videos, pictures, and other files of a  
19 personal nature on his state computer.

20           3.8     Based on the above findings of fact, the Board concludes that Mr. Mai violated  
21 RCW 42.52.160 when he used his state computer to perform work for his sister, Huong Mai. Mr.  
22 Mai's work on HCA spreadsheets he received from Ms. Mai was not related to his own job duties  
23 at DSHS. Rather, that work was for the personal benefit or gain of another, Ms. Mai, in violation  
24 of RCW 42.52.160.

1           3.9    The Board may impose a civil penalty of up to \$5,000 per violation, or three times  
2 the economic value of anything received or sought, whichever is greater. RCW 42.52.480; WAC  
3 292-120-020.

4           3.10 Each time Mr. Mai used his state computer for his own personal benefit or gain by  
5 browsing the internet for greater than de minimis use, including viewing pornography, he  
6 violated RCW 42.52.160. He did this on many occasions.

7           3.11 Each time Mr. Mai used his state computer for his own personal benefit or gain by  
8 storing personal files on his computer, including pornography, he violated RCW 42.52.160. The  
9 number of personal documents stored on his state hard drive was extensive.

10          3.12 Each time Mr. Mai used his state computer for his own personal benefit or gain or  
11 for the benefit or gain of his sister by creating scripts for her, he violated RCW 42.52.160. He  
12 did this on numerous occasions.

13          3.13 In determining the appropriate sanction, the Board considered all of the criteria for  
14 determining sanctions under WAC 292-120-030.

15          3.14 The Board determined that the monetary cost of the violations, under WAC 292-  
16 120-030(1), included wages paid to Mr. Mai for time he was not working.

17          3.15 The Board determined that the nature of the violations, under WAC 292-120-  
18 030(2)(a), (d), (e), and (f), respectively, were continuing in nature, impaired an agency function  
19 due to the security risks they created, tended to significantly reduce public respect for or  
20 confidence in state government or state employees—especially viewing pornography, and  
21 involved personal gain or a special privilege for Mr. Mai's sister.

22          3.16 The Board determined, as aggravating circumstances under WAC 292-120-  
23 030(3)(a) and (d), respectively, that Mr. Mai intentionally committed the violation with  
24 knowledge that his conduct constituted a violation and that he had significant official  
25 responsibility at a professional level as an IT6.

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 request  
4 must be in writing and must include the specific grounds or reasons for the request. The request  
5 must be delivered to Board office within 10 days after the postmark date of this order.

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

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

12 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

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

16 The petition for judicial review must be filed with the superior court and served on the  
17 Board and any other parties within 30 days of the date that the Board serves this Final Order on  
18 the parties. RCW 34.05.542(2). Service is defined in RCW 34.05.542(4) as the date of mailing  
19 or personal service.

20 A petition for review must set forth:

- 21 (1) The name and mailing address of the petitioner;  
22 (2) The name and mailing address of the petitioner’s attorney, if any;  
23 (3) The name and mailing address of the agency whose action is at issue;  
24 (4) Identification of the agency action at issue, together with a duplicate copy, summary,  
25 or brief description of the agency action;

1 (5) Identification of persons who were parties in any adjudicative proceedings that led to  
2 the agency action;

3 (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

4 (7) The petitioner's reasons for believing that relief should be granted; and

5 (8) A request for relief, specifying the type and extent of relief requested.  
6 RCW 34.05.545.

7 **ENFORCEMENT OF FINAL ORDERS**

8 If there is no timely request for reconsideration, this is the Final Order of the Board. The  
9 Respondent is legally obligated to pay any penalty assessed.

10 The Board will seek to enforce a Final Order in superior court and recover legal costs  
11 and attorney's fees if the penalty remains unpaid and no petition for judicial review has been  
12 timely filed under chapter 34.05 RCW. This action will be taken without further order by the  
13 Board.