

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

Joel Berg

Respondent.

No. 2017-005

STIPULATED FACTS,
CONCLUSIONS OF LAW AND
AGREED ORDER

THIS STIPULATION is entered into by Respondent, JOEL BERG, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through Kate Reynolds, Executive Director pursuant to chapter 42.52 RCW, chapter 34.05 RCW, and WAC 292-100-090(1). The following stipulated facts, conclusions of law, 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. This stipulation is based on the following:

A. STIPULATED FACTS

1. On February 17, 2017, the Executive Ethics Board (Board) received a complaint alleging that Joel Berg (Dr. Berg), Dean and Professor of Pediatric Dentistry at the University of Washington School of Dentistry (UW), may have violated the Ethics in Public Service Act by using state resources for his private benefit or gain by using state resources for his outside business. The complaint further alleged he had a private interest in vendors and potential vendors used by the School of Dentistry.

2. Dr. Berg became Dean of the UW School of Dentistry in August of 2012 and was in that position for all times pertinent to this investigation.

3. Board staff received Outlook emails and calendar data going back to 2011. Board staff reviewed all emails for the period of January 1, 2013 through February 15, 2017 totaling 59,624 emails.

4. Board staff identified 468 emails related to three outside business ventures of Dr. Berg: SpringRock Ventures, LLC (128 emails); consulting contracts to review medical reports for the Office of Counsel to the Inspector General, US Department of Health and Human Services (DHHS) (174 emails); and DMG America (166 emails).

5. Most of the 128 emails related to SpringRock Ventures were sent/received from Kirsten Morbeck (Ms. Morbeck) and Eric Bell (Mr. Bell). Ms. Morbeck and Mr. Bell are Managing Directors of SpringRock Ventures.

6. Dr. Berg indicated in his response to Board staff that he is on the SpringRock Ventures Advisory Board as a consultant and that he receives a quarterly stipend for his service on that Board.

7. On November 23, 2015, Dr. Berg received an email from Mr. Bell with a draft copy of the SpringRock Ventures Advisory Agreement as an attachment. The Advisory Agreement indicates the services to be provided:

Advisor Services. Advisor's services to the Company hereunder as a member of the Advisory Board shall include, but shall not be limited to: (a) advising the Company on the identification and development of investment opportunities; (b) reviewing investment opportunities on behalf of the Company; (c) participate in diligence / management reference calls on behalf of the Company; (d) mentorship of certain portfolio company management teams; (e) helping to identify and recruit potential employees for portfolio companies of the Company; (f) providing market insight and information on industry trends; (g) grant right to list name and pre-approved biography on the Company's website as a "Venture Advisor" and (h) introducing the Company to potential strategic

partners and co-investors (collectively, the “Advisor Services”). The Advisor Services will be provided by Advisor on an as-needed and as-able basis; provided that Advisor shall be available for at least five (5) hours per month at the request of the Company.

8. The agreement also contained methods of compensation for Dr. Berg’s service.

- Cash Compensation – \$10,000 per year to be paid in quarterly installments.
- Co-Investments – SpringRock Ventures, in its sole discretion, may offer the right to co-invest in one or more investment opportunities of the company.

9. Currently, the SpringRock Ventures webpage lists Dr. Berg as a Venture Partner.

10. Dr. Berg indicated in his response to Board staff that he did not use state resources to support his outside business with SpringRock Ventures, indicating that he is careful to conduct the few calls early in the morning or on his own time. Dr. Berg further indicated that he scheduled Outlook calendar appointments for calls and other meeting to avoid scheduling conflicts, but that was all.

11. Dr. Berg also indicated in his response to Board staff that he did not use his position to influence potential investors indicating that he was not involved in suggesting or arraigning investors in any way. He stated that he would only advise SpringRock Ventures on dental ideas that they had received from others.

12. Some examples of the emails the Board discovered are below.

From: Kirsten Morbeck [mailto:kmorbeck@springrockventures.com]
Sent: Tuesday, March 22, 2016 4:10 PM
To: Joel H. Berg <joelberg@uw.edu>
Cc: Eric Bell <ebell@springrockventures.com>
Subject: Minnesota next week, any dental leaders we should meet?

Joel,

Eric and I are heading to Minnesota next week for 2 days (tues & wed).
If there are any companies or key dental leaders you believe we should meet while we are there, please let us know.

On a separate topic, any update on what you are doing from a virtual reality perspective?

In terms of Navigate, we are still in discussions. They will not receive US regulatory approval until the end of the year. However, they are going live in a few sites in Germany and Canada in April.

Thanks for your help,
Kirsten

Kirsten Morbeck
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On Mar 22, 2016, at 7:12 PM, Joel H. Berg <joelberg@uw.edu> wrote:

Kristen,

Would you want to follow up with 3M Dental while there? WE met one of the GMs at their booth at the NY dental meeting.

When you return, let's meet with EnvelopVR and talk about our proposed work together. We have some new ideas.

Thank you,

Joel

Ms. Morbeck's Response on March 24, 2015 @ 3:06 pm:

Joel,

Yes -- a meeting with 3m while we are in Minnesota would be great. I think you introduced us to the women in charge of corp dev / m&a at the by conference?

We will be there on the 28th & 29th

Best,
Kirsten

Sent from my iPhone

13. In response to Board staff, Dr. Berg indicated that he has not directed his staff to do any work in support of SpringRock Ventures, i.e., set up meetings, attend meetings, copy and mail documents.

14. Jennifer Grant (Ms. Grant), Assistant to the Dean of the UW School of Dentistry, indicated in her response to Board staff that she was not aware of Dr. Berg's outside employment with SpringRock Ventures.

15. Ms. Grant indicated in her response to Board staff that she was never directly asked by Dr. Berg to do anything related to SpringRock Ventures but that she went back through past emails and saw an email from SpringRock Ventures where she was copied. The message was requesting Dr. Berg accept a meeting request. She contacted Dr. Berg to see if he wanted to accept the meeting. Ms. Grant further indicated that she was never directed by Dr. Berg to do any work for SpringRock Ventures.

16. Jada Stewart (Ms. Stewart), Administrative Coordinator for the UW School of Dentistry, indicated in her response to Board staff that she recalled using state resources to support Dr. Berg's outside employment with SpringRock Ventures, but at the time, she thought he was conducting business on behalf of the UW School of Dentistry.

17. Ms. Stewart indicated in her response to Board staff that she scheduled several meetings between Ms. Morbeck and Mr. Bell at the request of Dr. Berg.

18. As identified above, 174 emails were sent/received from Dr. Berg's state email address related to personal service contracts between the US DHHS regarding dental case reviews for the Office of Counsel to the Inspector General. Most of the emails sent/received from Dr. Berg's state email account were sent/received from Geoffrey Hymans (Mr. Hymans), Senior Counsel, Office of Counsel to the Inspector General, DHHS.

19. The emails regarding the DHHS contracts contained contracts for work, invoices for payment to Dr. Berg and to set up meetings to discuss cases or other administrative issues. Some emails indicate that UW staff and resources were used to set up the meetings with Mr. Hymans and for delivery of final reports at the direction of Dr. Berg.

20. Dr. Berg indicated in a response to Board staff that he contracted in the past to work on specific cases. Each case is a separate contract. Dr. Berg indicated that he is paid for the work he does on each case.

21. Dr. Berg indicated in response to Board staff that he did not use state resources, i.e., phones, emails UW staff, office space, in support of his outside work with DHHS indicating that he conducts all of his work from private resources and devices. Dr. Berg indicated that he may have, on occasion, had email contact with the DHHS to arrange a call or discussion but most was from a private email and using his private resources.

22. Ms. Stewart indicated in her response to Board staff that she was not aware of Dr. Berg's outside employment with the US DHHS; but she believed she set up meetings and phone calls with Mr. Hymans at the request of Dr. Berg.

23. Ms. Grant indicated in response to Board staff that she was aware of Dr. Berg's outside work with the DHHS. Ms. Grant further indicated that at the direction of Dr. Berg she has used state resource, i.e., time, facilities, computer and email, to support Dr. Berg's outside employment with DHHS.

24. Ms. Grant also indicated in response to Board staff that she was not concerned with Dr. Berg's request for her to assist him with the DHHS contract, stating, "In an environment of federally funded grants it did not occur to me that the relationship could be a problem."

25. Ms. Grant indicated in her response to Board staff that she has always found Dr. Berg to be responsive to any of her concerns and that she has never felt coerced.

26. Mr. Hymans indicated in his response to Board staff that Dr. Berg was hired by DHHS as an expert witness on several cases. He further indicated that he believed that Dr. Berg was acting in a personal capacity and not as an employee of the UW.

27. Mr. Hymans indicated in his response to Board staff that he did not recall ever calling Dr. Berg at his office regarding any of Dr. Berg's contracted work but he believes that most of the phone calls where to a cell phone.

28. Mr. Hymans indicated in his response to Board staff that he was not certain what the “official” UW letter head looked like but indicated that several of Dr. Berg’s reports and letters had the following at the top of the letter/report:



29. Mr. Hymans indicated in his response to Board staff that he had used the UW email system to communicate with Dr. Berg, but not in the last few years.

30. As indicated above, 166 emails were sent/received from Dr. Berg’s state email address related to personal service contracts with DMG America. DMG America is a manufacturer and supplier of dental equipment.

31. A search of Dr. Berg’s computer revealed a word document titled “Joel Berg consulting terms with DMG America for the year 2014.” The document properties shows Dr. Berg as the author and that it was last modified on January 9, 2015 at 6:15 am by Dr. Berg.

32. The document indicates that Dr. Berg will consult for DMG America in areas of general dental business, product development activities and opinion leader activities.

33. The document also indicates that Dr. Berg will provide an average of 12-15 hours of work per month. At the conclusion of each month, he will invoice DMG America \$4,000. The document further indicates that any consulting related expenses that have been pre-approved will be billed separately.

34. Dr. Berg attended a UW sponsored ethics training in October 2016.

B. CONCLUSIONS OF LAW

1. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from conducting activities incompatible with their public duty (conflict of interest). RCW 42.52.020 states:

No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or 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.

2. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from securing special privileges. RCW 42.52.070 states:

Except as required to perform duties within the scope of employment, no state 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 other persons.

3. Based on the stipulated facts, Dr. Berg had an interest in his personal endeavors, including use of staff time for his personal benefit, in conflict with the proper discharge of his official duties in violation of RCW 42.52.020. Additionally, Dr. Berg used his position as a supervisor in order to secure special privileges. These activities are in violation of RCW 42.52.070

4. The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees from using state resources for their benefit. RCW 42.52.160(1) 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.

5. WAC 292-110-010 Use of state resources, prior to April 1, 2016, states, in part:

.....

(2) The following are permitted uses:

(a) Use of state resources that is reasonably related to the conduct of official state duties, or which is otherwise allowed by statute.

(b) An agency head or designee may authorize a use of state resources that is related to an official state purpose, but not directly related to an individual employee's official duty.

(c) An agency may authorize a specific use that promotes organizational effectiveness or enhances the job-related skills of a state officer or state employee.

(d) A state officer or employee may make an occasional but limited personal use of state resources only if each of the following conditions are met:

- (i) There is little or no cost to the state;
- (ii) Any use is brief;
- (iii) Any use occurs infrequently;
- (iv) The use does not interfere with the performance of any officer's or employee's official duties; and
- (v) The use does not compromise the security or integrity of state property, information, or software.

WAC 292-110-010 Use of state resources, after April 2016, states, in part:

(3) **Permitted personal use of state resources.** This subsection applies to any use of state resources not included in subsection (2) of this section.

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

- (i) There is little or no cost to the state;
- (ii) Any use is brief;
- (iii) Any use occurs infrequently;
- (iv) The use does not interfere with the performance of any state officer's or employee's official duties;
- (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
The use is not for supporting, promoting the interests of, or soliciting for an outside organization or group

6. Based on the stipulated facts above, Dr. Berg used state resources for a personal benefit in support of his outside employment in violation of RCW 42.52.160 and WAC 292-110-010.

7. The Board is authorized to impose sanctions for violations to 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.

C. AGGRAVATING AND MITIGATING FACTORS

In determining the appropriateness of the civil penalty, the Board reviewed the criteria in WAC 292-120-030. In the matter at hand, it is aggravating factors that these types of violations significantly reduce the public respect and confidence in state government employees, they were continuing in nature and Dr. Berg was in a position of management.

D. STIPULATION AND AGREED ORDER

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Joel Berg and over the subject matter of this complaint.

2. Under RCW 34.05.060, the Board can 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.

3. 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.

4. Joel Berg agrees that if any or all of the alleged violations were proven at a hearing the Board may impose sanctions, including a civil penalty under RCW 42.52.480(1)(b) of up to \$5,000, or the greater of three times the economic value of anything received or sought in violation of chapter 42.52 RCW, for each violation found. The Board may also order the payment of costs, including reasonable investigative costs, under RCW 42.52.480(1)(c).

5. Joel Berg further agrees that the evidence available to the Board 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.

6. Joel Berg waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or his acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2).

7. If the Board accepts this stipulation, the Board agrees to release and discharge Joel Berg from all further ethics proceedings under chapter 42.52 RCW for any allegations arising out of the facts 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 stipulation. Joel Berg 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.

8. If the Board accepts this stipulation, it does not purport to settle any other claims between Joel Berg and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future.

9. If the Board accepts this stipulation, it is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

10. If the Board rejects this stipulation, or if Joel Berg does not accept the Board's proposed modification(s), if any, this matter will be scheduled for an administrative hearing before the Board. If an administrative hearing is scheduled before the Board, Joel Berg waives any objection to participation by any Board member at the hearing to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Joel Berg understands and agrees that this stipulation as well as information obtained during any settlement discussions between the parties shall not be admitted into evidence during the administrative hearing, unless otherwise agreed by the parties.

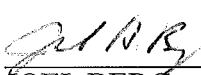
11. Joel Berg agrees to pay a civil penalty in the amount of six-thousand dollars (\$6,000). The Board agrees to suspend two-thousand dollars (\$2,000) on the condition that Joel Berg

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.


12. The civil penalty in the amount of four-thousand dollars (\$4,000) is payable in full to the Washington State Executive Ethics Board within forty-five (45) days after this stipulation is signed and accepted by the Board, or as otherwise agreed to by the parties.

II. CERTIFICATION

I, Joel Berg, hereby certify that I have read this stipulation in its entirety, that my counsel of record, if any, has fully explained the legal significance and consequence of it. I further certify that I fully understand and agree to all of it, and that it 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 the stipulation, I understand that I will receive a signed copy.

 10/31/17
JOEL BERG Date
Respondent

Presented by:

 11/7/17
KATE REYNOLDS Date
Executive Director

