

BEFORE THE WASHINGTON STATE  
EXECUTIVE ETHICS BOARD

In the Matter of:

James Duncan

Respondent.

No. 2018-002

STIPULATED FACTS,  
CONCLUSIONS OF LAW AND  
AGREED ORDER

THIS STIPULATION is entered into by Respondent, James Duncan, 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 December 12, 2017, the Executive Ethics Board (Board) received an anonymous complaint alleging that James Duncan (Mr. Duncan), Physician Assistant (PA) at the Washington State Penitentiary (SP) with the Department of Corrections (DOC), may have violated the Ethics in Public Service Act. The complaint alleged that Mr. Duncan was taking sick time off from work without submitting the proper leave slips.
2. Mr. Duncan has worked at DOC since April 2015 and was in his current position for all times pertinent to this investigation.

3. Mr. Duncan is not authorized to work remotely except times when he is in on-call status. Mr. Duncan and all of his co-workers are on-call at least one day a week for a 14-hour period in addition to their regular daily work schedule and about every 7<sup>th</sup> week, they would be on-call for the entire weekend.

4. After a review of the data, Board staff was able to identify four days where Mr. Duncan called in sick, was not at work, and did not submit leave; October 12, October 13, October 27 and December 12, 2017, for a total of 32 hours.

5. During the 17-month period, there were days where the Key Watcher data indicated that Mr. Duncan did not remove or return his work keys from the Key Watcher kiosk. Some of those days can be explained by taking leave, attending training, or by not retrieving his work keys. Board staff only looked at days where there was Key Watcher data showing that Mr. Duncan arrived and left the SP facility at some point during his shift.

6. During the 17-month period staff identified 267 days were Mr. Duncan removed and returned his work keys using the Key Watcher kiosk indicating that he was at the SP facility for some portion of his shift. Of those 267 day reviewed, it appears that Mr. Duncan was short on his scheduled work time, on average, by approximately 20 minutes per day.

7. Mr. Duncan indicated in a response to Board staff that he routinely enters the SP facility by storing any personal items in a DOC provided locker, removing his work keys from the Key Watcher kiosk after which correctional officers would randomly search him, and then he would enter through the turnstiles.

8. Mr. Duncan indicated in a response to Board staff that he is not required to check out keys and he did not always get them. He further indicated that if he was working at the hospital (Health

Service Building), he would not need his keys and sometimes if he was running late he might enter at a different entry gate and he would not be able to get his keys from that location.

9. Based on Mr. Duncan's use of the Key Watcher system to retrieve his work keys, it would be an accurate method to determine if he was at work at some point during his shift but would be an inaccurate method to determine if he was arriving late or leaving early.

10. However, regardless if Mr. Duncan removed/returned his keys from the Key Watcher kiosk, he had to enter the premises through a turnstile entry point using his proximity card. Board staff was only able to obtain 90 days of data prior from the date of request. Board staff made the request for the turnstile data on June 5, 2018. Data received covered the period of March 7 through June 4, 2018. See details below:

<b>Month/2018</b>	<b># Days worked</b>	<b>Average Arrival</b>	<b>Average Departure</b>	<b>Average minutes short/over</b>
<b>March 7- 31</b>	13	7:05 am	2:51 pm	14 short
<b>April 1- 30</b>	10	7:29 am	3:11 pm	18 short
<b>May 1- 31</b>	21	6:30 am	3:02 pm	28 over

11. Comparing the Key Watcher data with the turnstile data there were several days where Mr. Duncan went through the turnstiles but did not remove keys from the Key Watcher system. This seems to support Mr. Duncan's statement that he did not always retrieve his work keys.

12. Dr. John F. Smith (Dr. Smith), Mr. Duncan's supervisor, indicated in his response to Board staff that a staff member came to him and raised the concern that Mr. Duncan seemed to be away from work a lot. Dr. Smith indicated in his response that he discussed with Mr. Duncan the concern raised by one of his co-workers and reiterated his expectations of submitting the proper leave slips when he takes time off from work.

13. Dr. Smith indicated in his response to Board staff that there have been times that Mr. Duncan asked to leave work early and he had to remind him to submit leave for the time away.

14. Dr. Smith indicated that Mr. Duncan is a hard worker and is always willing to go the extra mile. Mr. Duncan has been diligent in his assigned duties and he provides excellent care to his patients. Dr. Smith further indicated that if Mr. Duncan has unaccounted time off he would suspect it was due to forgetfulness and not a deliberate attempt to cheat the state of time.

15. Board staff talked with many of Mr. Duncan's co-workers and most would acknowledge that Mr. Duncan seems to be away from work more than they would like to see but that his absences has not affected their ability to perform their jobs.

## **B. CONCLUSIONS OF LAW**

1. 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.

2. Based on the stipulated facts above, Mr. Duncan used state resources (time) for a personal benefit in violation of RCW 42.52.160.

3. 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 an aggravating factor these types of violations

significantly reduce the public respect and confidence in state government employees and they were continuous in nature.

#### **D. STIPULATION AND AGREED ORDER**

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over James Duncan 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. James Duncan 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. James Duncan 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. James Duncan waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or her 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 James Duncan 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. James Duncan 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 James Duncan and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future. No other claims of alleged violations are pending against James Duncan at this time.

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 James Duncan 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, James Duncan 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, James Duncan 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.

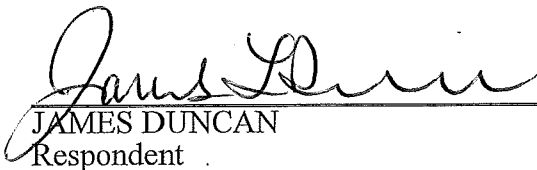
11. James Duncan agrees to pay a civil penalty in the amount of one-thousand five hundred dollars (\$1,500) associated with violations of, RCW 42.52. The Board agrees to suspend five-hundred dollars (\$500) on the condition that James Duncan complies with all terms and conditions of this

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.

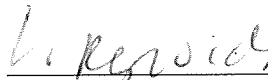
12. The non-suspended portion of the civil penalty in the amount of one-thousand dollars (\$1,000) is payable in full to the Washington State Executive Ethics Board within forty-five (45) days after this stipulation is signed and accepted by the Board, or as otherwise agreed to by the parties.

## II. CERTIFICATION

I, James Duncan, 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.

 12/21/18  
Date  
JAMES DUNCAN  
Respondent

Presented by:

 1/2/19  
Date  
KATE REYNOLDS  
Executive Director

**II. 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 11<sup>th</sup> day of January, 2019

  John    
John Ladenburg, Sr, Chair

  Shirley    
Shirley Battan, Vice-Chair

  Lisa    
Lisa Marsh, Member

  Anna    
Anna Dudek Ross, Member

  Gerri    
Gerri Davis, Member

\* I, James Duncan, accept/do not accept (circle one) the proposed modification(s).

\_\_\_\_\_  
James Duncan, Respondent                      Date