

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

Susan E. Birch
Respondent.

No. 2020-055

STIPULATED FACTS,
CONCLUSIONS OF LAW AND
AGREED ORDER

THIS STIPULATION is entered into by Respondent, SUSAN E. BIRCH, 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 August 18, 2020, the State Auditor's Office, Whistleblower Program, received an anonymous complaint alleging that Susan Birch (Ms. Birch), Director of the Health Care Authority (HCA) may have violated state ethics laws. The complaint alleged that Ms. Birch authorized HCA leadership to encourage all HCA employees to use 30 minutes of state time, per day, for "wellness time" beginning in April 2020 when most HCA employees were working from home. The complaint alleges that Ms. Birch described "wellness time" as anything the employee can do to promote their own wellness; like exercise, meditation, care for their mental and physical health, or whatever else they wanted to use that time for.

The Executive Ethics Board (Board) received the referral from the State Auditor's Office Whistleblower Program on September 10, 2020, without investigation.

2. On January 1, 2018, Ms. Birch was appointed to serve as the Director of the HCA by Governor Inslee. Ms. Birch was the Director of the HCA for all times pertinent to this investigation.

3. Ms. Birch indicated in her response that she does not believe it to be a misuse of state resources to invest in the well-being of the HCA employees. She further indicated that she believed that the COVID-19 pandemic and the unique challenges it presents requires leadership to find new and innovative ways to empower employees to be their very best even as they work from their homes. Many of them balance childcare and school obligations while working.

4. Ms. Birch indicated in her response that she encouraged her leadership team to encourage employees to take an additional 30 minutes each day to engage in wellness activities. On April 16, 2020, she sent an email to all HCA employee, informing them that HCA was temporarily authorizing an additional 30 minutes of work time per day for employee wellness.

5. Ms. Birch indicated in her response that these breaks are in addition to the already legally required two 15 minute paid rest periods.

6. Ms. Birch indicated that the wellness guidance she provided to her employees during this pandemic is not significantly different than the routine breaks they expect their employees to take when in the office setting; the only difference is they are in a home setting, and some employees unavoidably have children and other family members present while they working.

7. Ms. Birch indicated that there is no playbook for what we are currently experiencing and it is her belief that social isolation, increased anxiety, and the uncertainty about the future are affecting the wellbeing and productivity of HCA employees.

8. Ms. Birch indicated that during all-staff meetings in May and June 2020, she encouraged employees to use the wellness time to take care of themselves and focus on their well-being.

9. Ms. Birch indicated that a Frequently Asked Questions (FAQ) document was created by the HCA Human Resource Office clearly states that the 30 minutes “is intended to give you a break to conduct wellness activities (such as physical exercise, meditation, or other activities) to support your well-being during the course of your shift.” Employees were asked to seek prior approval from their supervisor prior to taking the wellness time.

10. Ms. Birch indicated in her response that the 30-minute wellness time is not an entitlement but an opportunity. It was her expectation that if employees could, they should take extra 30 minutes every day to focus on wellness and that they are not required to submit leave.

11. Ms. Birch indicated that the 30 minutes is in addition to the employees paid rest period and as stated the HR FAQs, the 30 minutes could be combined with the employees’ unpaid lunch break, depending on the business need and with prior approval of and in coordination with the employee’s direct supervisor.

12. Ms. Birch indicated in her response that she specifically authorized the temporary wellness time in response to the COVID-19 pandemic and it would only be available while the Governor’s Stay Home, Stay Healthy proclamation was in effect.

13. Ms. Birch has indicated that she did not intentionally violate any ethics laws.

14. Ms. Birch ended the authorization for 30-minute paid wellness time after receiving information that the Executive Ethics Board found that it would violate the state’s ethic laws.

15. Ms. Birch believed that she had the authority as the Director of HCA to authorize the personal use of time for the personal benefit of HCA employees. Ms. Birch indicated that she believes that as the Director of the HCA she has broad discretion to encourage employees to engage in activities

that she believes will improve their well-being, productivity, and willingness to contribute to the organization as a whole. Ms. Birch provided the following examples, she could encourage all HCA employees to use up to 30 minutes each day to consider how they could contribute to a positive and supportive work environment or encourage all employees to use 30 minutes each day to organize their workspace or emails to help clear clutter from their space and minds. She further indicated that there were an endless number of creative ideas that she could use to encourage her employees to engage in that do not fall within their specific job duties, but all support their well-being as individuals and members of the large team.

16. Wellness programs are statutorily authorized under RCW 41.04.362, which allow the Department of Personnel¹ to develop and administer a voluntary wellness program. RCW 41.04.362 – Employee wellness program – states:

- (1) Directors of state and local entities, in consultation with applicable state agencies and employee organizations, may develop and administer a voluntary state employee wellness program.
- (2) A director may:
 - (a) Develop and implement state employee wellness policies, procedures, and activities;
 - (b) Disseminate wellness educational materials to agencies and employees;
 - (c) Encourage the establishment of wellness activities in agencies;
 - (d) Provide technical assistance and training to agencies conducting wellness activities for their employees;
 - (e) Develop standards by which agencies sponsoring specific wellness activities may impose a fee to participating employees to help defray the cost of those activities;
 - (f) Monitor and evaluate the effectiveness of this program, including the collection, analysis, and publication of relevant statistical information; and
 - (g) Perform other duties and responsibilities as necessary to carry out the purpose of this section.
- (3) **No wellness program or activity that involves or requires organized or systematic physical exercise may be implemented or conducted during normal working hours. (Emphasis added)**

17. The law passed in 1987 and was based on the following finding of the legislature:
- 1) Improved health among employees will result in a more productive workforce, better morale, reduced stress, lower injury rate and absenteeism, and improved recruitment and retentions rates;

¹ The Department of Personnel no longer exists as a state agency.

- 2) A substantial amount of illness and injury in the workforce is preventable because it results from lifestyle decisions;
- 3) Illness and injury among state employees can be reduced if employees engage in healthier lifestyles.

The state, as an employer, desires to foster a working environment that promotes the health and well-being of its employees. Therefore, it is the purpose of this act to establish a state employee wellness program. "Wellness program" means those policies, procedures, and activities that promote the health and well-being of the state employees and that contribute to a healthful work environment.

18. This wellness program did not involve or require systematic physical exercise.

19. In Advisory Opinions AO 96-03 and AO 10-01, the Board has generally opined that the use of state resources in the support of wellness activities is allowable as long as the use conforms to the "de minimis use section of the rule" addressed in WAC 292-110-010.

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, Ms. Birch directed the use of state resources for the personal benefit of her employees at the HCA 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 can

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

It is a mitigating factor that there has been no prior corrective action taken against Ms. Birch. It is also a mitigating factor that after learning of the Board's action, Ms. Birch discontinued the program and that Ms. Birch has been truthful and cooperative in dealing with the Board and Board staff.

D. STIPULATION AND AGREED ORDER

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Susan Birch 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. Susan Birch 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. Susan Birch further agrees that the evidence available to the Board is such that the Board may conclude they 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. Susan Birch waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or their 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 Susan Birch 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. Susan Birch 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 Susan Birch 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 Susan Birch 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 Susan Birch 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, Susan Birch 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, Susan Birch 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. Susan Birch agrees to pay a civil penalty in the amount of five-thousand dollars (\$5,000) associated with violations of RCW 42.52. The Board agrees to suspend two-thousand five hundred dollars (\$2,500) on the condition that Ms. Birch 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 two-thousand five hundred (\$2,500) 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.

I. CERTIFICATION

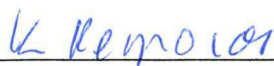
I, Susan E. Birch, hereby certify that I have read this stipulation in its entirety, that my counsel of record, if any, has fully explained the legal significance and consequence of it. I further certify that I fully understand and agree to all of it, and that it may be presented to the Board without 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.



SUSAN E. BIRCH
Respondent

5/26/2021
Date

Presented by:



KATE REYNOLDS
Executive Director

9/10/21
Date

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 10th day of September, 2021

Shirley Battan
Shirley Battan, Chair

Gerri Davis
Gerri Davis, Vice-Chair

Jan Jutte
Jan Jutte, Member

not voting
Earl Key, Member

* I, Susan E. Birch, accept/do not accept (circle one) the proposed modification(s).

Susan E. Birch, Respondent Date