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**BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD**

IN THE MATTER OF:

ALFRED SMACK,

RESPONDENT.

OAH NO. 09-2022-AGO-0050
EEB NO. 2022-012

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER ON GRANTING BOARD
STAFF’S MOTION FOR
SUMMARY JUDGMENT

I. PROCEDURAL HISTORY

1.1 On March 24, 2022, the Board initiated a complaint after receiving information that Respondent, Alfred Smack, an employee of WA State Department of Corrections, may have violated the Ethics in Public Service Act, Chapter 42.52 RCW, by using state resources for his private benefit and gain.

1.2 On July 8, 2022, the Executive Ethics Board (the Board) found reasonable cause to believe that a violation of RCW 42.52 was committed.

1.3 On February 3, 2023, Board Staff, through counsel, filed a Motion for Summary Judgment, to which Respondent did not reply.

1.4 After due and proper notice, a hearing was held on the Board Staff’s Motion for Summary Judgment. The hearing was held via Video Conference convening on March 10, 2023. Administrative Law Judge T.J. Martin, from the Office of Administrative Hearings, conducted the proceedings, the Board Chair Shirley Battan, and Board Members Jan Jutte, Kelli Hooke,

1 and Megan Abel were present. Also present was Assistant Attorney General, Leo V. Roinila,
2 Legal advisor to the Board.

3 1.5 Julia Eisentrout, Assistant Attorney General for Board Staff, was present.

4 1.6 Respondent did not appear.

5 1.7 Board Staff filed the following documents:

- 6 • Motion for Summary Judgment;
- 7 • Declaration of Justin Cotte in Support of Motion for Summary Judgment
with Exhibits 1-14.

8 1.8 The proceedings were recorded and open to the public.

9 1.9 The hearing was adjourned on March 10, 2023.

10 Based on the documents filed, and evidence presented, the Board enters the following
11 Findings of Fact, Conclusions of Law, and Order on Board Staff’s Motion for Summary
12 Judgment:

13 II. FINDINGS OF FACT

14 2.1 On March 24, 2022, the Board received a complaint alleging that Respondent,
15 Alfred Smack, used state resources, including his work computer, cell phone, state landline, and
16 teleworking schedule, to “date women from other facilities.” Declaration of Justin Cotte, ¶ 3
17 (Cotte Decl.). Board Staff Investigator Justin Cotte interviewed witnesses and reviewed
18 information provided by the Department of Corrections, Respondent’s employer.

19 2.2 DOC hired Respondent as a Corrections and Custody Officer on December 1,
20 2001. Cotte Decl., ¶ 4. Eventually, DOC promoted Respondent to Superintendent at Cedar Creek
21 Corrections Center in 2019. *Id.* In 2021, DOC demoted Respondent to Associate Superintendent,
22 and Respondent moved to work out of Washington Corrections Center. *Id.* In 2022, DOC again
23 demoted Respondent to Correction Unit Supervisor, and he moved to Coyote Ridge Corrections
24 Center. *Id.*

25 2.3 Board Staff interviewed Tomas Fithian, who supervised Respondent at Cedar
26 Creek Corrections Center (CCCC) for approximately one year. Cotte Decl., ¶ 5. In the fall of

1 2020, Respondent began to have personal issues, which other DOC Staff noticed, and reported
2 to Mr. Fithian, that Respondent did not always appear for work as scheduled. *Id.* In addition,
3 although at that time, Respondent had approval to telework one day a week, Mondays, Mr.
4 Fithian noticed that Respondent started to telework more than the approved one day a week. *Id.*
5 Mr. Fithian also stated that Respondent could often not be reached while teleworking, and
6 Respondent did not always show up to work. Cotte Declaration, ¶ 5. Each time Mr. Fithian
7 confronted Respondent, he immediately submitted leave. *Id.* Ultimately, DOC demoted
8 Respondent to Associate Superintendent, and Respondent moved from CCCC to Washington
9 Corrections Center (WCC). *Id.*

10 2.4 One of Respondent’s direct reports, Christian Bailey, also provided information
11 to Board Staff, stating there were multiple days on which Respondent was a “no show” at CCCC.
12 Cotte Decl., ¶ 7, Ex. 4. In addition, Mr. Bailey reported that, on other occasions, Mr. Bailey was
13 unable to reach Respondent via computer, email, Teams, or personal cell phone, even though
14 Respondent was scheduled to telework on those dates. Cotte Decl., ¶ 7, Ex. 4. Mr. Bailey
15 transferred to WCC shortly before the Respondent, and, according to Mr. Bailey, Respondent’s
16 issues with showing up to work late or not showing up at all continued at WCC. Cotte Decl., ¶7,
17 Ex. 4.

18 2.5 Jean Anderson, another of Respondent’s direct reports at CCCC, likewise
19 informed Board Staff that Respondent was frequently absent from CCCC. *Id.* Ms. Anderson
20 further stated that, on occasion, Ms. Anderson attempted without success to reach Respondent
21 via computer, Teams, work phone or personal cell phone. Cotte Decl., ¶ 6, Ex. 3.

22 2.6 Daniel White supervised Respondent following Respondent’s demotion and
23 move to WCC. Cotte Decl., ¶ 8, Exs. 5, 9. During this time, Mr. White noted numerous days on
24 which Respondent was late or did not come to work at all. Mr. White provided a list of those
25 dates to Respondent via email, and eventually to Board Staff. *Id.* Mr. White also forwarded a
26 copy of Respondent’s approved leave for the period at issue to Respondent. *Id.*

1 2.7 During its investigation, Board Staff compared the list of days Mr. White
2 compiled with Respondent’s approved leave during that time, and created its own list of
3 unaccounted for days. Cotte Decl., ¶ 10. Board Staff then provided this list to Respondent for
4 Respondent’s review. Although Respondent was able to provide some explanation with respect
5 to some of the time catalogued on Board Staff’s list, three days remained unaccounted for
6 entirely. More specifically, Respondent was not at work, did not telework, and did not submit
7 leave for those days, namely, September 8, 2021, October 14, 2021, and November 8, 2021.
8 Cotte Decl., ¶ 12, Ex. 8. Respondent, however, received gross pay in the amount of \$395.14 for
9 8 hours on each of those days. *Id.*

10 2.8 Investigator Cotte also interviewed Ashley Coxen in investigation of the
11 allegation that Respondent used state resources to “date” her. Cotte Decl., ¶ 15, Ex. 10. Ms.
12 Coxen confirmed she is in a personal relationship with Respondent, but denied Respondent ever
13 missed or skipped work to see her or chat with her. *Id.* Ms. Coxen added that Respondent has
14 never had authority over her, and did not use his position to persuade her to date him. *Id.*
15 According to Ms. Coxen, her personal relationship with the Respondent did not begin until after
16 Respondent stopped teleworking. *Id.*

17 2.9 In addition to providing explanations for some of the days he was not at work,
18 Respondent stated that his transition to WCC, along with working through his divorce, made
19 things “blurry,” and that he worked with his supervisor to ensure all time off was accounted for.
20 Cotte Decl., ¶ 11, Ex. 7. He further stated that if time off was not accounted for, he would submit
21 additional leave. *Id.*

22 2.10 In addition, Respondent denied using state resources to date women, including
23 Ms. Coxen. Cotte Decl., ¶ 14, Ex. 7. Respondent stated that he has known Ms. Coxen since he
24 worked at Coyote Ridge Corrections Center, and they stayed in touch. *Id.* Respondent further
25 stated he did not physically see Ms. Coxin from 2014 until February 2022, and denied using his
26

1 position to make advances on women below him or using state resources for his personal gain.
2 He did not believe his Teams messages violated any state or agency standards. *Id.*

3 2.11 During its investigation, Board Staff also reviewed Respondent's Teams
4 messages and determined that Respondent and Ms. Coxen exchanged over 300 personal
5 messages on March 21st, March 22, and March 28th. Cotte Decl., ¶ 17, Ex. 11.

6 2.12 In his Response to the Board's Investigative Report and Determination of
7 Reasonable Cause, Respondent submitted a written statement. Cotte Decl., ¶ 18, Ex. 12. In it, he
8 admitted that, during the relevant time period, his personal life interfered with work. *Id.* He noted
9 that DOC demoted him for performance and leave issues. *Id.* Respondent, however, disputed
10 employee accounts and stated that he believed he communicated with his supervisors and other
11 employees when he was gone. *Id.* Respondent stated that he already accepted responsibility and
12 had been punished through the demotions he received. Cotte Decl., ¶ 18, Ex. 12.

13 14 III. CONCLUSIONS OF LAW

15
16 3.1 WAC 10-08-135¹ provides that a motion for summary judgment may be granted
17 and an order issued if the written record establishes that there is no genuine issue as to any
18 material fact and that the moving party is entitled to judgment as a matter of law. The object
19 and function of a summary judgment is to avoid a useless trial. *Hudesman v. Foley*, 73 Wn.2d
20 880, 886, 441 P.2d 532 (1968). Summary judgment is proper if (1) there is no genuine issue of
21 material fact, (2) reasonable persons could reach but one conclusion, and (3) the moving party
22 is entitled to judgment as a matter of law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d
23 1065 (2000); CR 56(c). The moving party bears the initial burden of demonstrating the absence
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¹ The Board has adopted the model rules of procedures, chapter 10-08 WAC. WAC 292-100-006.

1 of a genuine issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S. Ct. 2548, 91
2 L. Ed. 2d 265 (1986). Once the moving party has met its burden, the non-moving party must
3 produce concrete evidence that shows genuine disputes of fact; it may not rely on allegations.
4
5 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50, 106 S. Ct. 2505, 91 L. Ed. 2d 202
6 (1986).

7 3.2 Here, Respondent does not dispute that he failed to submit leave for at least three
8 days, which resulted in payment to him when he did not work, and was not entitled to payment
9 for any leave. Nor does he argue that he did not send the messages at issue to Ms. Coxen.
10 Accordingly, no genuine issue of material fact exists, and summary judgment is appropriate.

11
12 **As discussed below, summary judgment is therefore granted in favor of Board Staff**
13 **based on Respondent’s violations of the Ethics Act.**

14 3.2 The Ethics Act governs the conduct of state officers and employees. Under
15 RCW 42.52.430(5), a violation must be established by a preponderance of the evidence.

16 3.3 The Ethics in Public Service Act, Chapter 42.52 RCW, prohibits state employees
17 from using State resources for an employee’s personal benefit or gain. More specifically, RCW
18 42.52.050, in relevant part, provides that:

19
20 (1) No state officer or state employee may employ or use any person, money, or property
21 under the officer's or employee's official control or direction, or in his or her official
22 custody, for the private benefit or gain of the officer, employee, or another.

22 ...

23 (4) The appropriate ethics boards may adopt rules providing exceptions to this
24 section for occasional use of the state officer or state employee, of de minimis
25 cost and value, if the activity does not result in interference with the proper
26 performance of public duties.

WAC 292-110-010(3) provides that:

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

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

- 3 (i) There is little or no cost to the state;
- 4 (ii) Any use is brief;
- 5 (iii) Any use occurs infrequently;
- 6 (iv) The use does not interfere with the performance of any state
7 officer's or employee's official duties;
- 8 (v) The use does not compromise the security or integrity of state
9 property, information systems, or software;
- 10 (vi) The use is not for the purpose of conducting an outside business, in
11 furtherance of private employment, or to realize a private financial gain; and
- 12 (vii) The use is not for supporting, promoting the interests of, or
13 soliciting for an outside organization or group.

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

17 3.4 The Board's Advisory Opinion No. 02-02A, issued in 2007, specifies that "state
18 employees" are state resources. It also discusses "de minimis use," and defines the phrase as
19 "infrequent or occasional use that results in little or no actual cost to the state." *Id.* The same
20 opinion provides three examples of an employee's de minimis use of state resources: 1) calling
21 on a state phone or sending an email to ensure a person's children arrived home safely, as long
22 as the call or email is brief and doesn't interfere with performance of official duties; 2) sending
23 an email wishing another employee happy birthday; and 3) employees meeting during lunch in
24 a conference room not needed for agency business, to organize a softball team. *Id.*

25 3.5 The Board concludes that Respondent violated RCW 42.52.160 in two ways.
26 First, DOC paid Respondent for time he did not work, and for which he did not submit leave.
Here, the state resource used is Respondent's time as a state employee, and the personal gain or
benefit is the pay he received as if he had worked those days or used leave on those days. On
September 8, 2021, October 14, 2021, and November 8, 2021, DOC paid Respondent for eight
hours, and he grossed \$395.14 for each of these days. Without using leave for this time, or
actually working those days, he received money, which qualifies as a personal gain or benefit.
This use was not de minimis, as there was significant cost to the state and, because it occurred
on three separate occasions, it was not infrequent. Additionally, it interfered with the
performance of Respondent's official duties. This type of use goes beyond well beyond that

1 described in the advisory opinion. The examples provided there involve minutes of state time, at
2 little or no cost to the state, which is not the case here, where days were lost.

3 3.6 Second, the Board further concludes that the uncontested facts establish
4 Respondent violated RCW 42.52.160 through his use of his DOC Microsoft Teams
5 account, which was provided by DOC, to exchange with Ashley Coxen more than 300 personal
6 messages over 3 days. It is clear from the content of the messages that Respondent and Ms.
7 Coxen had a personal relationship, and that the messages were not related to any work or agency
8 business. This use was likewise neither infrequent nor brief and, accordingly, does not constitute
9 de minimis personal use.

10 3.7 Respondent admits he failed to submit leave or complete work on the days at
11 issue, and admits that he messaged Ashley Coxen through Teams. Thus, both Respondent's
12 unauthorized time off from work, and his exchange of over 300 personal messages over three
13 days on his DOC Microsoft Teams account, violate RCW 42.52.160.

14 3.8 RCW 42.52.480 authorized the Board to impose a civil penalty of up to \$5,000
15 per violation or three times the economic value of anything received or sought in violation of the
16 Ethics in Public Service Act, whichever is greater. In this case, the Board concludes that a
17 penalty of \$2,000 is appropriate.

18 3.9 In determining the appropriate sanction, the Board reviewed the nature of the
19 violation, as well as the aggravating circumstances and mitigating factors set forth in WAC 292
20 120-030. Respondent's violations tend to reduce public respect for, or confidence in, state
21 government or state government officers or employees. WAC 292-120-030(2)(e). The violations
22 also involved personal gain to Respondent because DOC paid Respondent for time he did not
23 work, and for which he did not submit leave. WAC 292-120-030(2)(f). It is a mitigating factor
24 that DOC disciplined Respondent and demoted him due to the same conduct at issue here.
25 WAC 292-120-030(4)(a).

1 **IV. FINAL ORDER**

2
3 Based upon the foregoing Findings of Fact and Conclusions of Law, the Board orders
4 as follows:

5 4.1 Board Staff's Motion for Summary Judgment is GRANTED.

6 4.2 It is hereby further ordered that Alfred Smack is assessed a total monetary civil
7 penalty of \$2,000 based on his violations of RCW 42.52.160(1).

8 4.5 The total amount of \$2,000 is payable in full within 90 days of the effective date of this
9 order.

10
11 DATED this 13th day of April, 2023 at Olympia, Washington.

12
13 WASHINGTON STATE EXECUTIVE ETHICS BOARD

14
15 
16 Jan Jutte, Chair

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 34.05.546.

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.