

1
2
3
4
5
6
7 **WASHINGTON STATE OFFICE OF ADMINISTRATIVE HEARINGS**
8 **FOR THE EXECUTIVE ETHICS BOARD**

9 In the matter of:

10 FRED METZGER,

11 Respondent.

OAH NO. 02-2024-AGO-00063

EEB NO. 2023-022

12 FINDINGS OF FACT,
13 CONCLUSIONS OF LAW, AND
14 FINAL ORDER

15 **I. PROCEDURAL HISTORY**

16 1.1 On or about February 27, 2023, the Executive Ethics Board (the Board)
17 received an agency referral from Pierce College (PC) that alleged Fred Metzger, a
18 Communication/Theater/Film Instructor may have violated the Ethics in Public Service Act
19 (the Act) by using state resources for private benefit or gain. Declaration of Justin Cotte ¶
20 3, Exhibit 1.

21 1.2 On September 8, 2023, the Board found reasonable cause to believe that a
22 violation of RCW 42.52 was committed, as set forth in the Investigative Report and Board
23 Reasonable Cause Determination (Reasonable Cause Determination).

24 1.3 The Office of Administrative Hearings issued a Prehearing Conference Order on
25 March 7, 2024 setting March 21, 2024 as the deadline for filing and serving dispositive motions.
26 The Prehearing Conference Order further set May 9, 2024 as the date of oral argument regarding
any dispositive motions.

1 1.4 On March 13, 2024, Mr. Metzger filed a Motion to Present Evidence at the
2 May 9, 2024 dispositive motion hearing. Board Staff timely responded and opposed
3 Mr. Metzger's motion.

4 1.5 On March 21, 2024, Board Staff filed a Motion for Summary Judgment.

5 1.6 After due and proper notice, a hearing was held on Board Staff's Motion for
6 Summary Judgment, convening on May 9, 2024, and conducted via Zoom. ALJ TJ Martin from
7 the Office of Administrative Hearings conducted the proceedings, and Board Chair Jan Jutte,
8 along with Vice Chair Kelli Hooke, and Member Cam Comfort were present. Matthew Kernutt,
9 Senior Counsel and legal advisor to the Board appeared as well.

10 1.7 Julia Eisentrout, Assistant Attorney General for Board Staff, argued on behalf of
11 Board Staff. The Board's Executive Director, Kate Reynolds, and other Board Staff members
12 were present.

13 1.8 Mr. Metzger appeared pro se.

14 1.9 Board Staff filed the following documents:

15 Board Staff's Motion for Summary Judgment; and

16 Declaration of Justin Cotte in Support of Motion for Summary Judgment,
17 with attached Exhibits 1-9.

18 1.10 Mr. Metzger did not file a response to Board Staff's Motion for Summary
19 Judgment.

20 1.11 The proceedings were recorded and open to the public.

21 1.12 At the May 9, 2024 hearing, Administrative Law Judge (ALJ) Martin granted
22 Mr. Metzger's Motion to Present Evidence pursuant to RCW 34.05.437.
23 Mr. Metzger's proposed evidence consisting of 4 exhibits was submitted to the
24 Board and considered as part of the hearing.

25 1.12 Mr. Metzger was also placed under oath and provided testimony as part of his
26 oral presentation in response to Board Staff's Motion for Summary Judgment.

1 1.13 The hearing adjourned on May 9, 2024.

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

4 **II. FINDINGS OF FACT**

5 2.1 PC hired Mr. Metzger in 1977; he obtained tenure in 1980. Cotte Decl., ¶ 5, Ex. 2.
6 At all times relevant to this matter, Mr. Metzger was a Communication/Theater/Film instructor.
7 Declaration of Justin Cotte ¶ 3, Ex. 1.

8 2.2 PC initiated an investigation of Mr. Metzger based on a complaint unrelated to
9 the Ethics in Public Service Act, and searched Mr. Metzger’s email. Cotte Decl., ¶ 6, Ex. 3.
10 During that search, PC found that Mr. Metzger used his PC email account to send and receive
11 an email with a file attached containing bookmarks that were not work related. *Id.*
12 The bookmarks linked to different websites, like Sniffles.com, a “hookup” application used to
13 make connections for sex; Doublist.com, a page of personal ads for people looking for sex; and
14 CamSoda, a pornographic webcam site. *Id.* PC provided a copy of the email Mr. Metzger sent
15 to himself with the attached bookmarks for the sites listed above, dated July 16, 2022.
16 Cotte Decl., ¶ 8, Ex. 5.

17 2.3 PC also found personal browsing history for Mr. Metzger on his PC issued laptop.
18 Cotte Decl., ¶ 7, Ex. 4. The PC IT Department took screenshots, which show Mr. Metzger’s
19 visits to some of the same websites listed in the bookmarks Mr. Metzger emailed to himself.
20 *Id.* at ¶¶ 7-8, Exs. 4, 5. However, PC IT found that Mr. Metzger reformatted his computer at
21 some point, so there was limited information available on it. *Id.* at ¶ 9, Ex. 6.

22 2.4 Board Staff learned from Don Sanford, PC IT Customer Support Journeyman,
23 that when Mr. Metzger reformatted his PC computer, he overrode PC’s installations and
24 configurations, so they were no longer on the computer. Cotte Decl., ¶ 9, Ex. 6, p. 6. Mr. Metzger
25 also installed or re-installed an operating system (OS) without authorization from PC to do so.
26 *Id.* PC Interim Vice President for Administrative Services and Chief Information, Officer

1 Andrew Glass told Board Staff PC also found Mr. Metzger used a Secure Digital (SD) card to
2 “Command Boot” from the SD card with a different OS, one that was not supplied or approved
3 by PC. Cotte Decl., ¶ 10, Ex. 7.

4 2.5 Per Mr. Glass, Mr. Metzger’s use of his PC computer potentially violated several
5 policies and procedures: Policy – Computer Information Systems Resources Acceptable Use;
6 Policy – Limited Personal Use of Computers, Electronic Mail, the Internet and Other
7 Computer Information Systems Resources (CISR). Cotte Decl., ¶ 10, Ex. 7. Specifically, the
8 Procedure-Computer Information Systems Resources (CISR) Acceptable Use provides under
9 Section 5.3 that modification of computer hardware and software requires coordination with the
10 PC IT department, and prohibits the unauthorized installation of software because such
11 restrictions are “designed to ensure system integrity.” Cotte Decl., ¶ 11, Ex. 8. Additionally,
12 section 3 of the same procedure notes that adherence “to both the letter and spirit of this district
13 policy and its related procedures” is necessary to ensure a “predictable and secure computing
14 environment.” *Id.*

15 2.6 Board Staff reviewed Mr. Metzger’s email history from January 1, 2020 through
16 March 9, 2023. Cotte Decl., ¶ 8, Ex. 5. In addition to the July 16, 2022 email where Mr. Metzger
17 sent himself bookmarks, Board Staff found two additional emails where Mr. Metzger used his
18 PC email account to send himself bookmarks that were not work related. *Id.* On August 24, 2021,
19 Mr. Metzger used his PC email to send himself bookmarks that were not work related,
20 which included 16 bookmarks for cooking marijuana, approximately five bookmarks for
21 purchasing marijuana seeds, as well as bookmarks for purchasing watercraft like Yamaha and
22 WaveRunners. *Id.* On July 14, 2022, Mr. Metzger used his PC email to send himself bookmarks
23 that included CamSoda, Doublelist, Sniffles, as well as bookmarks for dog care, travel, skiing,
24 tax information, and boats. *Id.*

25 2.7 Mr. Metzger contends that he believes he downloaded browser history to his PC
26 computer from a personal computer, and that he did not visit the sites in the browsing history on

1 his PC computer. Cotte Decl., ¶ 12, Ex. 9; Testimony of Fred Metzger submitted at the May 9
2 Hearing. Mr. Metzger did not deny that he emailed himself bookmarks that linked to sites that
3 were not work related, nor did he deny reformatting his PC computer, or using an unauthorized
4 OS without PC approval. *Id.* Mr. Metzger further presented testimony that the installation of an
5 unauthorized OS was allegedly due to a lack of access to PC IT Customer Support after
6 Mr. Metzger had problems with his PC computer. Testimony of Fred Metzger submitted at the
7 May 9 Hearing.

8 III. CONCLUSIONS OF LAW

9 3.1 The Board has jurisdiction to hear this matter pursuant to RCW 42.52.360(1),
10 which authorizes the Board to enforce the Act with respect to employees in the executive branch
11 of state government. The Board has jurisdiction over Fred Metzger, and the conduct at issue
12 took place while he was a state employee. The complaint was filed in accordance with
13 RCW 42.52.410, the Board found reasonable cause pursuant to RCW 42.52.420, and an
14 adjudicative proceeding was conducted pursuant to RCW 42.52.430, .500. All the required
15 procedural notices have been provided.

16 3.2 WAC 10-08-135¹ provides that a motion for summary judgment may be granted
17 and an order issued if the written record shows that there is no genuine issue as to any material
18 fact and that the moving party is entitled to judgment as a matter of law. “A material fact is one
19 upon which the outcome of the litigation depends.” *Hudesman v. Foley*, 73 Wn.2d 880, 886,
20 441 P.2d 532 (1968). Summary judgment is proper if (1) there is no genuine issue of material
21 fact, (2) reasonable persons could reach but one conclusion, and (3) the moving party is entitled
22 to judgment as a matter of law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000);
23 CR 56(c).

24 The material facts in this matter are not in dispute, rendering summary judgment
25 appropriate. Mr. Metzger does not contest that he used his PC email to send himself bookmarks

26 ¹ The Board has adopted the model rules of procedures, chapter 10-08 WAC. WAC 292-100-006.

1 for websites that were not work related. Nor does Mr. Metzger contest that he stored bookmarks
2 on a browser on his PC computer. Finally, Mr. Metzger does not contest that he wiped his PC
3 computer and used an unauthorized OS run from an SD card without approval from PC and in
4 violation of PC policy and/or procedure. **As discussed below, summary judgment is granted**
5 **in favor of Board Staff based on Mr. Metzger’s violations of the Act.**

6 3.3 The Act governs the conduct of state officers and employees. Under
7 RCW 42.52.430(5), Board Staff must establish by a preponderance of the evidence that
8 Mr. Metzger violated the Ethics Act.

9 3.4 RCW 42.52.160(1) provides the following: “No state officer or state employee
10 may employ or use any person, money, or property under the officer's or employee's official
11 control or direction, or in his or her official custody, for the private benefit or gain of the officer,
12 employee, or another.”

13 3.5 Based on the preponderance of the evidence established in the Findings of Fact,
14 the Board concludes that Fred Metzger violated RCW 42.52.160(1) by using his PC computer
15 and PC email for his private benefit.

16 Mr. Metzger used his PC computer to store personal browsing history for websites not
17 related to his work as a professor at PC. While Mr. Metzger argues that this was accidental and
18 inadvertent, the evidence submitted shows that on three separate occasions, Mr. Metzger used
19 his PC email account to send and receive bookmarks for websites that were not related to work
20 as a PC professor. Finally, without PC approval, Mr. Metzger wiped his PC computer used an
21 SD card to run an unauthorized OS on his PC computer, overriding PC installations and
22 configurations that were previously installed, and without PC approval; this also violated PC
23 policy and procedure.

24 3.6 RCW 42.52.160(4) provides the following: “The appropriate ethics boards may
25 adopt rules providing exceptions to this section for occasional use of the state officer or state
26

1 employee, of de minimis cost and value, if the activity does not result in interference with the
2 proper performance of public duties.”

3 WAC 292-110-010(3) provides, in relevant portion, that:

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

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

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

21 Mr. Metzger’s personal use of PC’s resources was not “occasional,” “brief” or
22 “infrequent,” and the de minimis exception is not applicable. RCW 42.52.160(4),
23 WAC 292-110-010(3)(vii). Additionally, PC policy and procedure should have prevented
24 Mr. Metzger from reformatting his PC computer and running an unauthorized OS; such use
25 compromised the integrity of the PC system and/or software. *See* WAC 292-110-010(3)(a)(v);
26 *see also* Cotte Decl., ¶ 11, Ex. 8. Thus, this use is not de minimis under WAC 292-110-010.

3.7 Under RCW 42.52.480, the Board may impose a civil penalty of up to \$5,000 per
violation or three times the economic value of anything received or sought in violation of the
Ethics Act, whichever is greater. The Board concludes that a \$2,000 penalty is appropriate.

3.8 In determining the appropriate sanction, the Board reviewed the nature of the
violation, as well as the aggravating circumstances and mitigating factors set forth in
WAC 292-120-030. Mr. Metzger’s violations were continuing in nature, and tend to significantly

1 reduce public respect for or in state government or state government officers or employees.
2 WAC 292-120-030(2)(a) and (e). While Mr. Metzger claims that the presence of the referenced
3 bookmarks on his PC computer was unintentional, Mr. Metzger's submitted evidence did not
4 put in dispute any material fact. Further, Mr. Metzger admitted to wiping his PC computer using
5 an SD card to run an unauthorized OS on his PC computer, overriding PC installations and
6 configurations that were previously installed without PC approval. Based on the evidence
7 submitted, the Board finds that no mitigating factors are present.

8 **IV. FINAL ORDER**

9 4.1 Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby
10 ordered that Fred Metzger is assessed monetary civil penalty of \$2,000 based on his violations
11 of RCW 42.52.160(1).

12 4.2 The total amount of \$2,000 is payable in full within 90 days of the effective date
13 of this order.

14 DATED this _____ day of _____ 2024.

15
16 WASHINGTON STATE EXECUTIVE ETHICS BOARD

17 _____
18 Jan Jutte, Chair
19
20
21
22
23
24
25
26

1 **APPEAL RIGHTS**

2 **RECONSIDERATION OF FINAL ORDER – BOARD**

3
4 Any party may ask the Executive Ethics Board to reconsider a Final Order. The request
5 must be in writing and must include the specific grounds or reasons for the request. The request
6 must be delivered to Board office within 10 days after the postmark date of this order.

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

12
13 The Respondent is not required to ask the Board to reconsider the Final Order before
14 seeking judicial review by a superior court. RCW 34.05.470.

15 **FURTHER APPEAL RIGHTS – SUPERIOR COURT**

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

19 The petition for judicial review must be filed with the superior court and served on the
20 Board and any other parties within 30 days of the date that the Board serves this Final Order on
21 the parties. RCW 34.05.542(2).

22 A petition for review must set forth:

- 23 (1) The name and mailing address of the petitioner;
24 (2) The name and mailing address of the petitioner’s attorney, if any;
25 (3) The name and mailing address of the agency whose action is at issue;

- 1 (4) Identification of the agency action at issue, together with a duplicate copy, summary,
2 or brief description of the agency action;
- 3 (5) Identification of persons who were parties in any adjudicative proceedings that led to
4 the agency action;
- 5 (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;
- 6 (7) The petitioner's reasons for believing that relief should be granted; and
- 7 (8) A request for relief, specifying the type and extent of relief requested.
8 RCW 34.05.546.

9 **ENFORCEMENT OF FINAL ORDERS**

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

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