STATE OF WASHINGTON EXECUTIVE ETHICS BOARD

In the Matter of: NO. Docket No. 2008-EEB-0001
Tom Rockey,
Complaint No. 08-028
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER OF THE BOARD

Pursuant to due and proper notice to all interested parties, a hearing was held in the above-entitled matter before the Executive Ethics Board (Board). The hearing was heard on cross motions for summary judgment by the Respondent and Board Staff. The hearing was held on April 10 and May 8, 2009. The following Board members were present at the April 10 hearing: Chair Neil Gorrell, Vice Chair Linnea Jablonski and members Golberg and Connelly. The following Board members were present at the May 8 hearing: Chair Neil Gorrell and members Golberg and Connelly. Board member Biegelman recused himself from participation in this matter. The Board was assisted by Administrative Law Judge Rebekah R. Ross at the April 10 hearing. The Board was assisted by Administrative Law Judge Cindy L. Burdue at the May 8 hearing. Also present was Jerald R. Anderson, Senior Counsel, legal advisor to the Board.

At the hearings, the Respondent was represented by Janel K. Ostrem, attorney at law. The Respondent appeared and testified at the May 8 hearing. Board Staff was represented by Mickey B. Newberry, Assistant Attorney General.
At the conclusion of the May 8 hearing, counsel for Board Staff provided Mr. Anderson a proposed draft Order. Since this proposed Order was provided on the condition that it not be shared with the Board, it was not reviewed, consulted, or used in any fashion in drafting the Findings of Fact, Conclusions of Law and Final Order of the Board.

I. STATEMENT OF THE CASE

On or about September 12, 2008, the Board determined that there existed reasonable cause to believe that the Respondent had committed a violation or violations of RCW 42.52.160 and WAC 292-110-010 and that the penalty for such violation(s) may be more than $500.00. On or about October 16, 2008, the Appellant filed a response to the Reasonable Cause Determination and requested a hearing.

At the April 10 hearing, the parties agreed that the case presented three issues:

(1) Does the Board retain jurisdiction over violations committed while an individual is a state employee if the individual is no longer employed by the state when a Reasonable Cause Determination is made?

(2) Did Central Washington University, the employer in this matter, “abandon” the property taken by the Respondent precluding any violation of RCW 42.52.160(1) and WAC 292-110-010?

(3) If a violation of RCW 42.52.160(1) and WAC 292-110-010 is found, what is the appropriate civil monetary penalty?

At the April 10 hearing the Board concluded that even taken in the light most favorable to the Respondent, the undisputed material facts supported summary judgment in favor of Board Staff on the issues of whether the Board had jurisdiction over the Respondent and whether the Respondent violated RCW 42.52.160(1) and WAC 292-110-010. The evidence was insufficient, however, for the Board to reach a decision regarding the appropriate civil penalty, if any. Accordingly, a separate Hearing on Civil Penalty was conducted on May 8, 2009.
The following documents were called to the attention of the Board before the granting of Board Staff's motion for summary judgment:

1. Board Staff Motion and Memorandum of Authorities in Support of Motion for Summary Judgment, dated March 10, 2009;


3. Motion for Summary Judgment Dismissal by Tom Rockey, dated March 10, 2009;

4. Declaration of Tom Rockey, dated March 10, 2009;

5. Tom Rockey's Response to Motion and Memorandum of Authorities in Support of Motion for Summary Judgment by Executive Ethics Board Staff, dated March 24, 2009;


7. Tom Rockey's Reply Memorandum, dated April 3, 2009;


9. Declaration of Gene Rau in Support of Board Staff's Motion for Summary Judgment, dated April 3 2009 and an accompanying copy of Exhibit J.

II. FINDINGS OF FACT

A. Findings from April 10, 2009 Summary Judgment Hearing

The Board finds that there is no genuine dispute as to the following facts:

1. Tom Rockey was employed by Central Washington University (CWU) as an Information Technology Specialist 3 until May 18, 2007.
2. When CWU acquired new computers for use on campus, a copy of Windows XP Home Edition software was included with each computer along with the Certificate of Authenticity (COA). It was CWU's practice to throw the software away because it was not needed by the university. The software was placed in an unsecured garbage dumpster located on the university campus for removal and, ultimately, disposal.

3. Tom Rockey became aware of CWU's software disposal practices as a direct result of his position in CWU's Information Technology Services unit. At some time in 2006, Mr. Rockey removed copies of software from the dumpster before they could be taken away for disposal, and sold them on eBay. Mr. Rockey does not deny these actions.

4. Mr. Rockey derived private financial gain from these sales. He derived this gain from knowledge obtained as a direct result of his position as a state employee.

5. Mr. Rockey resigned from CWU on May 18, 2007.

6. On September 18, 2008, a Reasonable Cause Determination was served on Mr. Rockey through his attorney, Ms. Janel K. Ostrem. The Reasonable Cause Determination alleged that Mr. Rockey's removal of software from the dumpster and subsequent sale of the software on eBay was in violation of RCW 42.52.160(1) and WAC 292-110-010(1) and (6)(f). RCW 42.52.160(1) states:

   (1) 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.

WAC 292-110-010(1) states:

   (1) The proper stewardship of state resources, including funds, facilities, tools, property, and employees and their time, is a responsibility that all state officers and employees share. Accordingly, state employees may not use state resources for personal benefit or gain or for the benefit or gain of other individuals or outside organizations.

WAC 292-110-010(6)(f) states:

   (6) The state Constitution, state and federal laws, and the Ethics in Public Service Act strictly prohibit certain private activity and certain uses of state resources. Any use of state resources to support such activity clearly undermines public confidence in state government and reflects negatively on state employees generally. This rule explicitly prohibits at all times the following private uses of state resources.
(f) Any private use of any state property that has been removed from state facilities or other official duty stations, even if there is no cost to the state.

B. Findings from May 8, 2009 Sanction Hearing.

1. Based on Mr. Rockey's testimony at the May 8 hearing, the Board finds that he sold at least 200 copies of software removed from the CWU dumpster for an average price of $78 apiece.

2. The Board consulted WAC 292-120-030 which contains criteria to be considered in determining the appropriate remedy in this case, including aggravating and mitigating factors. The Board finds that the value received by Mr. Rockey was $15,600 (WAC 292-110-030(1)(b)), and that his violation was continuing in nature, was motivated by financial gain, and involved personal gain (WAC 292-120-030(2)(a), (b) and (e)). The Board finds no other aggravating or mitigating factors.

3. The Board incurred $804.58 in investigation costs.

III. CONCLUSIONS OF LAW

1. The Board has jurisdiction to hear this matter pursuant to RCW 42.52.360(1), which authorizes the Board to enforce RCW 42.52 with respect to employees in the executive branch of state government. The complaint was filed in accordance with RCW 42.52.410, the Board found reasonable cause pursuant to RCW 42.52.425, and the public hearing was conducted pursuant to RCW 42.52.430 and .500. All the required procedural notices have been provided.

2. Mr. Rockey contends that the Board lacks jurisdiction over this matter because the statute and regulation he is charged with violating refer to state "employees" and he was not a state employee at the time the Reasonable Cause Determination was issued. Further, he
contends that the software was "abandoned" by CWU when it was placed in the dumpster and, as a result, was no longer state property.

3. The Board has jurisdiction over Mr. Rockey notwithstanding his argument that RCW 42.52.160(1) or WAC 292-110-010 do not apply to him because he was no longer a state employee at the time the Reasonable Cause Determination was made. The Board reaches this conclusion for two reasons. First, this reading is consistent with the overall spirit and principle of the Ethics in Public Service Act. RCW 42.52.900 provides in relevant part as follows:

Government derives its powers from the people. Ethics in government are the foundation on which the structure of government rests. State officials and employees of government hold a public trust that obligates them, in a special way, to honesty and integrity in fulfilling the responsibilities to which they are elected and appointed. Paramount in that trust is the principle that public office, whether elected or appointed, may not be used for personal gain or private advantage.

The citizens of the state expect all state officials and employees to perform their public responsibilities in accordance with the highest ethical and moral standards and to conduct the business of the state only in a manner that advances the public's interest. State officials and employees are subject to the sanctions of law and scrutiny of the media; ultimately, however, they are accountable to the people and must consider this public accountability as a particular obligation of the public service. Only when affairs of government are conducted, at all levels, with openness as provided by law and an unwavering commitment to the public good does government work as it should.

The obligations of government rest equally on the state's citizenry. The effectiveness of government depends, fundamentally, on the confidence citizens can have in the judgments and decisions of their elected representatives. Citizens, therefore, should honor and respect the principles and the spirit of representative democracy, recognizing that both elected and appointed officials, together with state employees, seek to carry out their public duties with professional skill and dedication to the public interest. Such service merits public recognition and support.

All who have the privilege of working for the people of Washington state can have but one aim: To give the highest public service to its citizens.

RCW 42.52.901 requires that the Ethics in Public Service Act "be construed liberally to effectuate its purposes and policy." Public confidence in the ethical standards of state officers and employees would be diminished were the Board to conclude that a former state officer or employee could escape responsibility for even the most egregious ethical violations by simply
resigning before a formal finding of Reasonable Cause. The purpose of the act would further be thwarted in any case in which a state officer was terminated due to ethical violations prior to a finding of Reasonable Cause. Second, the Legislature has enacted a limitation period of five years from the date of the violation or two years from the date the violation is discovered or reasonably should have been discovered for actions taken under RCW 42.52. See RCW 42.52.540. This limitation period indicates a legislative intent to give the Board jurisdiction over action taken while an individual is a state officer or employee, regardless of the individual's employment status at the time a Reasonable Cause Determination is ultimately made.

4. Taking into account the facts of this case and mindful of the purpose of the Ethics in Public Service Act as set out in RCW 42.52.900, the Board concludes that software placed in a dumpster located on the CWU campus remained state property and was not intentionally "abandoned." Rather, it was CWS's reasonable expectation that material placed in the dumpster would be removed and eventually disposed of. There is no evidence to support a contention that it was CWU's intent to allow employees to take the software home for eventual sale.

5. The undisputed facts in this case support the conclusion that the conduct of Mr. Rockey violated RCW 42.52.160(1) and WAC 292-110-010(1) and (6)(f).

6. 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 any thing received or sought in violation of RCW 42.52, whichever is greater. The Board may also impose the cost of investigating the complaint. Based on the totality of the facts in the record, and utilizing RCW 42.52.480 and WAC 292-120-030 as a guide, the Board finds that a monetary penalty equal to the direct economic value to the Respondent, plus investigation costs, is appropriate.

IV. ORDER
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
ordered that Mr. Rockey pay a monetary civil penalty in the amount of $15, 600, and
investigation costs in the amount of $804.58. Total payment of $16,404.58 is due within 180
days of the date of this order.

DATED this 25th day of August, 2009.

Neil Gorrell, Chair                      Linnaea Jablonski, Vice Chair

Judith K. Golberg, Member               Mike Connelly, Member
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
ordered that Mr. Rockey pay a monetary civil penalty in the amount of $15,600, and
investigation costs in the amount of $804.58. Total payment of $16,404.58 is due within 180
days of the date of this order.

DATED this 26th day of August, 2009.

Neil Gorrell, Chair

Linnacea Jablonski, Vice Chair

Judith K. Golberg, Member

Mike Connelly, Member
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that Mr. Rockey pay a monetary civil penalty in the amount of $15,600, and investigation costs in the amount of $804.58. Total payment of $16,404.58 is due within 180 days of the date of this order.

DATED this 25 day of August, 2009.

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Neil Gorrell, Chair                      Linnaea Jablonski, Vice Chair

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Judith K. Golberg, Member                      Mike Connelly, Member
Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby
ordered that Mr. Rockey pay a monetary civil penalty in the amount of $15,600, and
investigation costs in the amount of $804.58. Total payment of $16,404.58 is due within 180
days of the date of this order.

DATED this 8< day of August, 2009.

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Neil Gorrell, Chair                 Linnea Jablonski, Vice Chair

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Judith K. Golberg, Member          Mike Connelly, Member