BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter Of:	)	
	)	No. 00-36
SHERRY POWELL,	)	OAH No. 2002-EEB-0003
	)	
Respondent.	)	FINDINGS OF FACT, CONCLUSIONS
	)	OF LAW AND FINAL ORDER
	)	
	)	

The Executive Ethics Board received a complaint regarding Ms. Powell on October 6, 2000. The complaint alleged that Ms. Powell violated the Ethics in Public Service Act by using the equipment of the Spokane AGO for personal litigation.

On September 11, 2003, the Executive Ethics Board held a hearing in this matter at the Board office in Olympia, Washington. Adam Torem, Administrative Law Judge from the Office of Administrative Hearings, presided over the hearing. Board members James M. Vache, Laquita Fields, and Paul Zellinsky attended the hearing, heard the testimony of the witnesses, the arguments of the parties, and were provided copies of documents admitted as exhibits.

Respondent Sherry Powell appeared pro se, and Board staff was represented by Linda Dalton, Senior Assistant Attorney General.

Based on the evidence presented, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. Sherry Powell has been an employee of the Washington State Attorney General's Office (AGO) since 1992.

2. Ms. Powell attended Ethics Law Training in 1994.

3. Ms. Powell eventually was promoted to the position of Legal Secretary 3. In this position, Ms. Powell was part of the Management Team. The prohibition on personal use of AGO resources was a topic that was discussed at Management Team meetings from time to time.

4. On or before October 1999, Ms. Powell and her husband became involved in a dispute with a contractor they had hired to build a residence. The dispute was the subject of arbitration, and later superior court litigation. Both the arbitration and litigation will be referred to in this Order as *Asher v. Powell.*

Outgoing Faxes

5. Initially, the Powells were represented by an attorney, Mr. Grimes. Ms. Powell used the AGO fax machine to fax documents to Mr. Grimes regarding *Asher v. Powell.* In addition, Mr. Grimes faxed at least 71 pages of documents to Ms. Powell at the AGO fax machine.

6. On May 30 2000, Sherry Powell faxed a letter to three attorneys, stating that she and her husband would act pro se from that date forward. This letter stated that Ms. Powell could be reached at (509) 456-6141 during business hours. This telephone number was Ms. Powell's number at the AGO. In the ensuing months, Ms. Powell sent numerous letters related to *Asher v. Powell* which stated that Ms. Powell's AGO work number was a number at which Ms. Powell could be contacted regarding *Asher v. Powell.*

7. Ms. Powell sent faxes related to *Asher v. Powell* from the AGO fax machine to four attorneys (Mr. Grimes, Mr. Roecks, Mr. Delay, and Mr. Devlin) at four different locations.

8. Ms. Powell believes that she sent faxes from the AGO machine on 47 different occasions, totaling 224 pages.

9. Mr. Roecks, the attorney who represented Asher Construction in the litigation, estimates that Ms. Powell sent approximately 800 pages to his law firm from the AGO fax machine. Because Mr. Roecks destroyed many faxes when he received hard copies, Mr. Roecks cannot confirm his estimate.

10. The investigation conducted by the AGO discovered evidence of 49 events in which Ms. Powell sent faxes related to *Asher v. Powell* from the AGO fax machine, for a total of 214 pages.

11. The Board finds that Ms. Powell used the AGO fax machine to send documents related to *Asher v. Powell* on at least 49 occasions, totaling at least 224 pages.

Incoming Faxes

12. The AGO investigation discovered evidence of 16 occasions, totaling 130 pages on which Ms. Powell received faxes related to *Asher v. Powell* on the AGO fax machine.

13. Ms. Powell does not recall telling attorneys to use the AGO fax machine to fax documents to her. However, the AGO fax number was contained on the fax cover sheets Ms. Powell used to send documents by fax. Ms. Powell therefore provided the AGO fax number to four attorneys in such a manner that they likely believed it was the fax they should use to fax documents to her.

Use of Copy Machine

14. Ms. Powell used the AGO copy machine to make copies of documents related to *Asher v. Powell*, although she used her own paper. She copied exhibits and documents she needed to provide to her attorney. It was not possible to determine the

total number of copies Ms. Powell made on the AGO copy machine.

15. Ms. Powell testified that she received permission to use the AGO copy machine, so long as she used her own paper, from Assistant Attorney General Maureen McGuire. However, Ms. Powell did not testify that she asked permission to receive or send faxes on the AGO fax machine, or to use the AGO computer and attached printer to prepare documents for *Asher v. Powell.*

16. Ms. McGuire does not recall any conversation with Ms. Powell regarding personal use of the copy machine. Ms. McGuire was surprised when she learned of the ethics complaint against Ms. Powell. Although she did not testify about a specific incident, Ms. McGuire believes she would at most give permission to do personal copying on an AGO machine for only one copy, and only in an emergency. Ms. McGuire has acted as an Ethics Law trainer, and her understanding of the Ethics Law is that only such minimal copying would qualify as de minimis within the meaning of the Ethics Law.

17. The Board finds credible the testimony of Ms. McGuire, based on Ms. McGuire's demeanor while testifying, her lack of knowledge that Ms. Powell was making personal use of any AGO equipment, and her lack of personal stake in the issues in this case. Additionally, Ms. McGuire's status as an Ethics Law trainer and Spokane AGO management team member added to her credibility. Ms. Powell did not have permission to make personal copies on the AGO copy machine.

Use of Computer Resources and Work Time

18. Ms. Powell used an AGO computer to prepare documents related to *Asher v. Powell.* The AGO investigator found 18 pages of documents on Ms. Powell's AGO computer, including a fax cover sheet, letters, and a pleading. Ms. Powell prepared at least 18 pages of documents on the computer in her AGO work area. She used the printer

attached to her computer to print documents.

19. Ms. Powell admits that she neither sought nor obtained permission to use the AGO fax machine, computer, printer, and CD Law account.

20. Ms. Powell used time during her scheduled work day to fax, copy, prepare on her AGO computer, and hand deliver, documents related to *Asher v. Powell*. No leave slips or other documentation were placed in the record to demonstrate that Ms. Powell used her own personal time to work on *Asher v. Powell* when she spent time on that case during her work day. Ms. Powell claims that the time spent on *Asher v. Powell* was her break or lunch time, or time she was entitled to due to her status as a nonscheduled employee who sometimes worked past the end of her scheduled work day. However, Renee Zirkle, a Human Resources specialist, stated that nonscheduled employees are not permitted to flex during their regularly scheduled work day to attend to personal business. Rose Priest, the Spokane AGO office manager, stated that employees are allowed to make up time (up to two hours) spent on personal business during their work day, but only with supervisor approval. The record contains no evidence that Ms. Powell sought or obtained such permission from her supervisor to take personal time during her work day to work on *Asher v. Powell*.

21. It is not possible to determine how much work time Ms. Powell spent working on *Asher v. Powell*, based on the evidence in the record. The Board finds, however, that it is likely Ms. Powell spent a substantial amount of work time on *Asher v. Powell*, given the preceding findings regarding the timing and volume of the faxes sent and received from the AGO fax machine, the documents found on the hard drive of the office computer hard drive, and copying on the AGO copy machine.

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Other Findings

22. On four or five occasions, Ms. Powell used the AGO CD Law account to conduct research for *Asher v. Powell*. CD Law is an on-line legal research tool. Ms. Powell accessed the AGO CD Law account from her home computer.

23. Ms. Powell admitted that she used an AGO envelope and label for *Asher v. Powell* on one occasion.

24. All but one of the performance evaluations in the record were prepared prior to the time Ms. Powell used AGO resources for *Asher v. Powell*. The 2000 evaluation was prepared by Ms. McGuire prior to summer 2001, when Ms. McGuire learned that Ms. Powell had used AGO resources for *Asher v. Powell*.

25. At a commercial facility, it would cost approximately 50 cents per page to send a document by facsimile. A CD Law account costs $75 per month.

26. Ms. Powell avoided incurring personal expenses by using the AGO fax machine, copier, CD Law account, and supplies.

27. Two employees of the Roecks Law Firm who were aware of Ms. Powell's use of AGO resources believed it was wrong for a state employee with access to government funded equipment and materials to take advantage of these taxpayer funded resources for her personal legal matter.

28. Ms. Powell states that she still does not understand the meaning of de minimis use.

Costs and Agency Action

29. The Ethics Board investigator spent 33 hours investigating the complaint against Ms. Powell. The actual cost to the state of the investigator's time is $2,142.69.

30. An AGO staff member, Renee Zirkle, completed the investigation at the

request of Board staff. Ms. Zirkle spent 59.5 hours further investigating the complaint against Ms. Powell. The cost of Ms. Zirkle's time is $2039.66.

31. The AGO took disciplinary action against Ms. Powell for her personal use of AGO resources. The AGO reduced Ms. Powell's salary from Range 41 Step K to Range 41 Step F for a period of three months. The monetary value of this discipline was $1,077.

32. On February 8, 2002, the Executive Ethics Board reviewed the Renee Zirkle investigation and the disciplinary action imposed on Ms. Powell, and issued a Reasonable Cause Determination under RCW 42.52.420.

CONCLUSIONS OF LAW

1. There is jurisdiction to hear this matter pursuant to RCW 42.52.360(1), which authorizes the Board to enforce RCW 42.52, including RCW 42.52.160(1), with respect to employees in the executive branch of state government. The Board has jurisdiction over Ms. Powell. She is an employee 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. Under RCW 42.52.430(5), a violation of RCW 42.52.160(1) must be established by a preponderance of the evidence.

3. RCW 42.52.160(1) provides:

> 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.

4. The Board concludes that Ms. Powell used state property under her official control for her private benefit. Ms. Powell used state property in support of personal

litigation wholly unrelated to her duties at the AGO. Ms. Powell used an AGO fax machine to send and receive faxes; her AGO computer to prepare documents; an AGO copy machine to duplicate documents; the AGO CD Law account to conduct research; and an envelope and label from AGO supplies.

5. RCW 42.52.160(3) provides:

> The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of pubic duties.

Under RCW 42.52.160(3), private use of state resources that might be prohibited by RCW 42.52.160(1) is permissible, but only if authorized by a Board rule.

6. During 1999-2001, the time frame applicable to the facts of this case, the following Board rule authorized use of state resources for personal benefit in limited circumstances. The rule stated in pertinent part as follows:

> [A] state officer or employee may make occasional but limited use of state resources only if:
> (a) There is no cost to the state; and
> (b) The use of state resources does not interfere with the performance of the officer's or employee's official duties;
> (c) The use is brief in duration and does not disrupt or distract from the conduct of state business due to volume or frequency....

WAC 292-110-010(3) (2001). Moreover, the rule states that a state employee "may not make private use of any state property which is consumable such as paper, envelopes or spare parts, even if the actual cost to the state is de minimis." *Id.* at subsection (5)(c).

7. The record shows that Ms. Powell used the fax machine to send faxes at least 49 times, and to receive faxes at least 16 times. Ms. Powell used her AGO computer to prepare at least 18 documents for her personal business. Ms. Powell used the CD Law account four or five times. Ms. Powell made extensive use of the AGO fax machine, copy machine, computer and printer, and CD Law account. Given the volume of faxes sent from and received by the AGO fax machine, the copying performed at the AGO, and the documents found on Ms. Powell's computer, Ms. Powell's actions and

personal use of AGO time and equipment were not occasional, as WAC 292-110-010 requires. Moreover, Ms. Powell violated the requirement that personal use be brief in duration.

8. Ms. Powell made personal use of consumables that were the property of the AGO. Faxes she received at the AGO used AGO paper. Copy and fax machines and printers use toner or ink. Ms. Powell used an AGO envelope and a label. Ms. Powell violated the provision of WAC 292-110-010(3) prohibiting personal use of consumables.

9. Ms. Powell's personal use of AGO equipment was not de minimis under WAC 292-110-010.

10. By a preponderance of the evidence, Ms. Powell violated RCW 42.52.160(1) by making personal use of AGO equipment and time during her work day on her personal business, *Asher v. Powell.*

11. Under RCW 42.52.480(1)(b) and (c), 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. Ms. Powell committed multiple violations of RCW 42.52.160(1).

12. The Board evaluates the penalty under WAC 292-120-030.

13. With regard to the monetary costs of the violations under WAC 292-120-030(1)(a) and (b), the cost of the consumables confirmed to have been used by Ms. Powell is relatively small. However, the value of things received by Ms. Powell from the violations are significant. Ms. Powell saved the expense of paying for faxing and copying costs, the cost of a CD Law account, and the expense of some consumables such as paper, an envelope, and a label. In addition, Ms. Powell received the benefit of working on her personal business during her work day without incurring the time, expense, and inconvenience of traveling to her home or other locations to copy, fax, prepare, and print documents.

14. With regard to WAC 292-120-030(1)(d), the cost of investigating the complaint was $4,182.35.

15. With regard to the nature of the violations under WAC 292-120-030(2), Ms. Powell's violation was continuing. Ms. Powell first used AGO equipment in October 1999 and did not stop until June 2001. The use was motivated by financial gain, as Ms. Powell was using AGO resources to benefit herself in her dispute with the contractor who constructed Ms. Powell's residence. Ms. Powell's use involved personal gain and special privilege. Ms. Powell saved expenses, time, and inconvenience by using her position as an AGO employee to use AGO equipment and time during her work day to work on her personal legal dispute.

16. Ms. Powell's use tended to significantly reduce public respect for or confidence in state government and its employees. Four Spokane law firms knew that Ms. Powell was using the AGO fax machine for personal litigation. Two persons who work in the Roecks law firm stated their belief that it was wrong for Ms. Powell to use the AGO fax machine for the *Asher v. Powell* litigation. Ms. Powell's unlawful personal use was known to members of the public, thereby creating the appearance that Ms. Powell, as a state employee, could use state resources and state working hours to assist her in pursuing a private legal matter. Citizens expect that state employees will spend their working hours and work resources to conduct the public's business, not their personal business. That is particularly true in the litigation context, where conduct such as Ms. Powell's could lead attorneys and their clients to believe that state resources are being actively used to support the private interests of a state employee to gain advantage in a private dispute.

17. The discipline previously imposed by the AGO is not sufficient to address the substantial violations committed by Ms. Powell. The violations occurred over a long period, involved a high volume of personal use of AGO equipment, and involved use of

state work time. The AGO resources were used for a personal matter that might have resulted in substantial financial advantage to Ms. Powell.

18. Even if there were not conflicting testimony in the record concerning Ms. Powell's assertion that her supervisor authorized her to use the AGO copy machine, the Board is not persuaded by Ms. Powell's defense. First, this defense does nothing to explain why Ms. Powell believed she could use AGO office equipment other than the copy machine. Second, even if Ms. Powell's supervisor had improperly authorized Ms. Powell to make unlimited use of the copy machine so long as she used her own paper, Ms. Powell's extensive use would nevertheless have violated RCW 42.52.160(1). A supervisor's authorization would not eliminate such violations. A state employee is personally responsible for complying with the Ethics Law.

19. With regard to the aggravating circumstances under WAC 292-120-030(3), Ms. Powell had received ethics training, and she was a supervisor. As a supervisor, she has an obligation to remain informed about, and comply with, the Ethics Law.

20. With regard to the mitigating circumstances under WAC 292-120-030(4), Ms. Powell has already been disciplined by the agency. The reduction in pay imposed by the agency constitutes restitution (at least in part) to the agency. Ms. Powell claims that the violation was unintentional, although as noted in Conclusion of Law 18, this is not justification for not knowing that this extensive use of resources is contrary to the Ethics Law.

21. The maximum penalty is $5,000 per violation. $5,000 per violation is not appropriate here, since many of the violations did not create a cost for the state, and the total benefit to Ms. Powell of the sum of the individual violations was not large enough to justify the maximum penalty.

22. Although the Board does not impose the maximum penalty, Ms. Powell

committed significant violations. The violations used substantial AGO resources, given that: many uses were time consuming; the uses continued over an eighteen month period; and Ms. Powell personally benefited from the violations. The violations may have undermined public confidence in state government and employees, which weighs heavily in favor of a significant penalty. In light of these factors, the appropriate penalty is $3,500. In addition, investigation costs of $1,500 are imposed pursuant to RCW 42.52.490(1)(c).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that Sherry Powell violated RCW 42.52.160(1), and she is ordered to pay a penalty in the amount of $3,500, and investigation costs in the amount of $1,500. Furthermore, Ms. Powell is ordered to attend Ethics Law training within the six (6) month period starting on the date of this

Order.

DATED this 10th day of October, 2003.

WASHINTON STATE EXECUTIVE
ETHICS BOARD

James M. Vache, Chair

Laquita Fields, Member

Paul Zellinsky, Member

APPEAL RIGHTS

Pursuant to RCW 34.05.470 and WAC 292-100-210 a party may seek reconsideration of this Final Order upon written request served at the office of the Board and upon the parties no later than ten (10) days after service of this Final Order. The office of the Board is located at 2425 Bristol Court SW, P. O. Box 40149, Olympia, Washington 98504-0149. A request will be deemed served at the office of the Board upon actual receipt during office hours. WAC 10-08-110(1). Service on the parties may be made personally or by first-class mail, registered mail, or certified mail, by fax *and* same-day mailing of copies, or by a commercial parcel delivery company. WAC 10-08-110(2). A request for consideration shall specify the grounds therefor. After a request for reconsideration has been received, the Board shall act upon the request at the next meeting at which it practicably may do so.

This Final Order of the Board is subject to judicial review pursuant to RCW 34.05. RCW 42.52.440. A petition for judicial review of this Final Order may be instituted by paying the fee required under RCW 36.18.020 and filing a petition in superior court, at the petitioner's option, for (a) Thurston county, (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property is owned by the petitioner and affected by the contested decision is located. RCW 34.05.514. A petition for judicial review shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order. Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark. Failure to timely serve a petition on the office of the attorney general is not grounds for

dismissal of the petition. Service upon the attorney of any agency or party of record constitutes service upon the agency or party of record. RCW 34.05.542. A petition for review must set forth:

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

RCW 34.05.545.