

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

BRIAN FITZGERALD,

Respondent.

NO. 01-09

STIPULATED FACTS,
CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, BRIAN FITZGERALD, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through BRIAN R. MALARKY, Executive Director. The following stipulated facts, conclusions, 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.

Section 1: PROCEDURAL FACTS

1.1. On March 7, 2001, the Executive Ethics Board received an ethics complaint alleging that Brian Fitzgerald, a Clinical Pharmacist with the State of Washington, Department of Social and Health Services (DSHS) at Fircrest School, violated the Ethics in Public Service Act when he received \$2,750.00 in compensation for five speaking presentations from a pharmaceutical company that engages in business with Fircrest School.

1.2. The Board is authorized under RCW 34.05.060 to 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.

1.3. Brian Fitzgerald understands that if Board staff proves any or all of the alleged violations 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).

1.4. Without admitting to any of the allegations, Brian Fitzgerald nevertheless recognizes that there exists a likelihood that the Board staff has evidence from which the Board may conclude Mr. Fitzgerald violated the Ethics in Public Service Act, even if only unintentionally or unknowingly. 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 set forth below.

1.5. Brian Fitzgerald waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or his acceptance of any modification(s) proposed by the Board, pursuant to the provisions of WAC 292-100-090(2) which provides in part:

The board has the option of accepting, rejecting, or modifying the proposed stipulation or asking for additional facts to be presented. If the board accepts the stipulation or modifies the stipulation with the agreement of the respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or the respondent does not agree to the board's proposed modifications to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussions shall not be admitted into evidence at a subsequent public hearing.

1.6. If the Board accepts this stipulation, the Board will release and discharge Brian Fitzgerald from all further ethics proceedings under chapter 42.52 RCW for matters arising out of the facts contained in the complaint in this matter, subject to payment in full of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the agreed order. Mr. Fitzgerald 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 and agreed order.

1.7. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Brian Fitzgerald and the Washington State Executive Ethics Board, the State of Washington, or other third party, which may be filed in the future.

1.8. If this Stipulation is accepted, this Stipulation and Order is enforceable under RCW 34.05.578 and any other applicable statutes or rules.

1.9. If the Board rejects this stipulation, or if Brian Fitzgerald does not accept the Board's proposed modification(s), if any, Mr. Fitzgerald waives any objection to participation at any subsequent hearing by any Board member to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Mr. Fitzgerald understands and agrees that this proposed stipulation and information obtained during any formal settlement discussions held between the parties shall not be admitted into evidence at a subsequent public hearing, unless otherwise agreed by the parties.

Section 2: FINDINGS OF FACT

2.1. When the complaint in this matter was filed, and at all times material hereto, DSHS employed Brian Fitzgerald as a Clinical Pharmacy Supervisor at Fircrest School. Mr. Fitzgerald has not been employed by the State of Washington since April 1, 2003.

2.2. Brian Fitzgerald's duties at Fircrest School included providing and coordinating the provision of clinical pharmacy services to clients of Fircrest School. Mr. Fitzgerald provided information about medications and medication safety and efficacy to clients, clients' families, physicians, nurses, and other members of interdisciplinary teams. He also planned and provided staff with development programs regarding medications and pharmacotherapy. Mr. Fitzgerald supervised and coordinated the provision of pharmacy and central supply services ensuring cost-effective provision of medications and supplies.

2.3. On May 19, 2000, Brian Fitzgerald obtained permission from his immediate supervisor to accept compensation for speaking engagements. Pursuant to DSHS Policy 531, and unbeknownst to Mr. Fitzgerald, his immediate supervisor did not have the authority to approve outside employment which is reserved for the appropriate division **director or assistant secretary**.

2.4. According to Brian Fitzgerald, his immediate supervisor encouraged him to accept the speaking engagements. Mr. Fitzgerald's supervisor was Mr. Fitzgerald's primary source of upper management and policy information as Mr. Fitzgerald was not a member of the **Fircrest Management Team**. Mr. Fitzgerald's supervisor was the **Director/Administrator** of Medical Sciences, on the **Fircrest Management Team** and had over 20 years of experience working for **Fircrest School**.

2.5. According to Brian Fitzgerald, his two immediate predecessors engaged in outside speaking events receiving honorarium from drug companies.

2.6. Based on the purported authorization received from his **supervisor**, Brian Fitzgerald accepted five offers to provide presentations for **Elan Pharmaceutical**, a company that provides pharmaceutical goods and services to **Fircrest School**.

2.7. The presentations occurred on May 25, June 16, September 12, December 5, and December 7, 2000. Mr. Fitzgerald received \$2,750.00 in compensation from the **Elan Pharmaceutical** for his speaking services. Mr. Fitzgerald asserts that most, if not all, of the money he received went towards his travel and lodging expenses.

2.8. DSHS **Personnel** Policy 531 defines "Outside Employment" as work that results in compensation and includes, but is not limited to "Employment with persons or organizations who are clients of, do business with, or try to influence policies or regulations in which the department has an interest." This policy establishes requirements for department **employees** who hold or intend to hold outside employment and requiring approval by the **assistant secretary**.

2.9. Brian Fitzgerald did not submit a Report of Outside Employment for consideration/approval by an assistant secretary of DSHS pursuant to DSHS Personnel Policy 531.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Brian Fitzgerald and over the subject matter of this complaint.

3.2. 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.

3.3. Under RCW 42.52.120 no state officer or state employee may receive anything of economic value under any contract or grant outside of his or her official duties unless each of the following conditions are met:

....
(c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;

(d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift.

....

3.4. Based on Findings of Fact 2.1 through 2.9, if proven, Brian Fitzgerald was required to obtain authorization for his outside employment from the assistant secretary. By accepting the money without obtaining formal approval, he would have been in violation of RCW 42.52.120.

3.5. Under EEB Advisory Opinion 97-03, Brian Fitzgerald is subject to the RCW 42.52.120(d) which would prohibit him from receiving compensation from a pharmaceutical company having a contractual relationship with Fircrest School.

3.6. 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. It is a mitigating

factor that: (1) Mr. Fitzgerald obtained authorization from his supervisor prior to the presentations and receipt of compensation for his speaking activities (WAC 292-120-030(4)(c)); (2) Mr. Fitzgerald stopped his speaking efforts as soon as he was asked to by Fircrest School administration; and (3) Mr. Fitzgerald's two immediate predecessors engaged in outside speaking events receiving honorarium from drug companies.

Section 4: AGREED ORDER

4.1. While not admitting he violated the Ethics Act, Brian Fitzgerald will pay a civil penalty in the amount of seven hundred fifty dollars (\$750.00) and will reimburse the Board for investigative costs in the amount of five hundred dollars (\$500.00). The Board agrees to suspend two hundred fifty dollars (\$250.00) of the civil penalty on the condition that Brian Fitzgerald complies with all terms and conditions of this Stipulation and Order and commits no further violations of chapter 42.52 RCW. The remaining civil penalty due of \$500 and investigative costs of \$500 are payable to the state Executive Ethics Board within forty-five (45) days of approval of this Stipulation and Order by the Board.

CERTIFICATION

I, Brian Fitzgerald, hereby certify that I have read this Stipulation and Agreed Order in its entirety; that I knowingly and voluntarily waive my right to a hearing in this matter; and that I fully understand and voluntarily agree to this Stipulation.

Brian Fitzgerald 2-11-04
 Brian Fitzgerald Date
 Respondent

David J. Lenci 2/4/04
 David J. Lenci Date
 Attorney for Respondent

Stipulated to and presented by:

Brian R. Malarky 2-15-04
 Brian R. Malarky Date
 Executive Director

