

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

TOM McLUEN

Respondent.

NO. 01-58

STIPULATION AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090 between TOM MCLUEN, Respondent, and the EXECUTIVE ETHICS BOARD ("Board") through BRIAN R. MALARKY, Executive Director. The following findings, conclusions, and agreements will be binding upon the parties to this agreement, if the agreement is fully executed, and if accepted by the Washington State Executive Ethics Board, and not otherwise.

A. RELEVANT FACTS

1. The above-referenced complaint was initiated by the Board on September 14, 2001, following a referral from the Public Disclosure Commission. The complaint alleges that the respondent used state resources to lobby state legislators during the 2001 Legislative session. Specifically, the Respondent is alleged to have used his state computer to e-mail a message to state legislators.

2. In a written response to Board staff, Ms. McLuen admitted that on April 10, 2001, he used state provided computer or state provided internet access to send an e-mail message regarding community college faculty salaries and retirement plan funding to at least 30 state representatives. The subject of the e-mail was also the subject of several bills under active consideration by the legislature at that time.

3. Mr. McLuen admitted that the use of his community college provided computer to communicate on legislation was not within the performance of his official duties, and that his access to the Internet is available to him by virtue of his employment with that agency. Mr.

McLuen asserts, however, that the e-mails constitute an allowable “de minimis” use under WAC 292-110-010 and agency policy.

4. Mr. McLuen has no previous ethics violations.

5. The Community Colleges of Spokane Employee Acceptable use Guidelines for CCS Technology Resources allow occasional and limited personal use “when such use involves no cost to the district, does not interfere with employee’s official duties, is brief in duration, and otherwise complies with all applicable laws and regulations.” However, the guidelines also state that CCS Technology Resources “shall not be used for commercial, illegal or political purposes.”

6. On September 13, 2002 during its regularly scheduled session, the Board found reasonable cause to believe that Mr. McLuen had violated RCW 42.52.160(1) and WAC 292-110-010(4).

B. APPLICABLE LAW

1. RCW 42.52.160(1) states:

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.

2. RCW 42.17.190(2) states:

Unless authorized by subsection (3) of this section or otherwise expressly authorized by law, no public funds may be used directly or indirectly for lobbying: PROVIDED, This does not prevent officers or employees of an agency from communicating with a member of the legislature on the request of that member; or communicating to the legislature, through the proper official channels, requests for legislative action or appropriations which are deemed necessary for the efficient conduct of the public business or actually made in the proper performance of their official duties:

3. WAC 292-110-010(4) provides that the occasional and limited private use of state resources does not include:

- (c) Any campaign or political use;
- (d), or

(e) Any illegal activity. (Emphasis added.)

Note: WAC 292-110-010 was amended in April 2002. The amended rule prohibits the use of state facilities for political purposes, including lobbying activity.

C. AGGRAVATING & MITIGATING FACTORS

1. In determining the appropriateness of the civil penalty, the criteria in WAC 292-120-030 has been reviewed. In the case at hand, there are no aggravating factors.

2. It is a mitigating factor that Mr. McLuen's use of state resources to lobby the legislature did not involve an excessive amount of state paid time. WAC 292-120-030(4)(e).

D. RESOLUTION

1. Mr. McLuen admits that his use of state resources to send e-mail messages to state representatives regarding pending legislation was not related to the performance of his official duties for the State of Washington, in violation of RCW 42.52.160(1) and WAC 292-110, and was illegal lobbying.

2. Recognizing that he is personally responsible for his conduct, Mr. McLuen will pay a civil penalty in the amount of fifty dollars (\$50.00), comply with all terms and conditions of this Stipulation and Order, and commit no further violations of Chapter 42.52 RCW.

3. The total amount of the civil penalty (\$50.00) is payable to the state Executive Ethics Board within thirty (30) days of approval of this Stipulation and Order by the Board.

E. CONCLUSIONS OF LAW

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Tom McLuen and over the subject matter of this complaint.

2. When not related to the performance of official duties, use of state resources to lobby the state legislature regarding pending legislation is an inappropriate use of state resources.

3. Pursuant to WAC 292-100-090(1), the parties have the authority to resolve this matter under the terms contained herein.

4. Settlement of this matter on the terms herein is subject to WAC 292-100-090(2) that states 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 respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or respondent does not agree to the board's proposed modification to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussion shall not be admitted into evidence at a subsequent public hearing.

F. RELEASE/EFFECT OF ORDER

1. If the Board accepts this Stipulation, the Board releases and discharges Tom McLuen from all further ethics proceedings under chapter 42.52 RCW for matters arising out of the facts contained in this complaint, subject to payment in full of the civil penalty. Tom McLuen 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 Order.

2. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Tom McLuen and the Community Colleges of Spokane, the State of Washington, or other third party, which are now in existence or may be filed in the future.

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

G. CERTIFICATION

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

Thomas M. McLuen 12/4/02
Tom McLuen, Respondent Date

Stipulated to and presented by:

Brian R. Malarky
Brian R. Malarky, Executive Director Date

II. ORDER

Having reviewed the proposed Stipulation, WE, THE STATE OF WASHINGTON EXECUTIVE ETHICS BOARD, pursuant to WAC 292-100-090, HEREBY ORDER that the Stipulation is

 X

ACCEPTED in its entirety;

REJECTED in its entirety;

*MODIFIED. This Stipulation will become the Order of the Board if the following modifications are approved:

DATED this 10th day of January, 2003.

James M. Vaché
James M. Vaché, Chair

Marilee Scarbrough
Marilee Scarbrough, Vice Chair

Sutapa Basu
Sutapa Basu, Member

Laquita Fields
Laquita Fields, Member

Paul Zellinsky
Paul Zellinsky, Member

*I, Tom McLuen, accept/do not accept (circle one) the proposed modification.

TOM McLUEN, Respondent

Date