BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of: DANIEL M. WARNER, Respondent.	NO. 01-91 STIPULATION AND ORDER

THIS STIPULATION is entered into under WAC 292-100-090 between the Respondent, Daniel M. Warner, 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.

I. STIPULATION

A. FACTS

1. On September 17, 2001, the Public Disclosure Commission referred a complaint to the Executive Ethics Board alleging that the Respondent, Daniel M. Warner, a professor at Western Washington University (WWU), Greg Kuhn, a WWU graduate student, and Linda Luttrell, a WWU employee, may have violated RCW 42.17.130 by using a WWU e-mail account to assist the campaign of Mr. Warner for Commissioner of the Port of Bellingham.

2. Mr. Warner is an employee of WWU subject to the jurisdiction of the Washington State Executive Ethics Board under RCW 42.52.360. Mr. Warner is an attorney and professor who teaches business legal studies, contracts, corporate law, and government regulations of business.

3. Linda Luttrell is an employee of WWU subject to the jurisdiction of the Washington State Executive Ethics Board under RCW 42.52.360. Linda Luttrell is the Assistant to the

Executive Director/Data Manager of WWU. Ms. Luttrell also served as Mr. Warner's campaign manager. There was no supervisory relationship between Ms. Luttrell and Mr. Warner.

4. Greg Kuhn was a graduate student at the WWU. As such, he is not subject to the jurisdiction of the Washington State Executive Ethics Board. He also worked on Mr. Warner's campaign as a "campaign helper." He had a WWU student email account. Mr. Kuhn used his WWU student account to send out campaign-related materials.

5. On January 16, 2002, the State Auditor's Office (SAO) issued a Report of Whistleblower Investigation regarding improper governmental action at WWU. The investigation results indicated that Mr. Warner used state resources for the purpose of assisting his own campaign for Port Commissioner and to conduct private consulting work for a local non-profit (501(c)(7)) organization.

6. The SAO review of email items that were sent or received between June 1, 2001 and August 2, 2001 from Mr. Warner's WWU computer indicated that there were 32 campaign-related messages contained in a folder labeled "port race" and 68 deleted campaign-related messages. Other campaign–related messages included three messages in his email in-box received on August 3, 2001. An additional 24 campaign-related messages were located in his sent items folder dated from July 27, 2001 and August 3, 2001. There were a total of 127 emails related to campaign issues found in Mr. Warner's WWU computer mailbox. On a number of campaign messages, Mr. Warner used his WWU email address, facsimile number, phone number and mailing address as contact information. Not all of the emails were initiated or requested by Mr. Warner.

7. The Board staff review of the SAO investigation also revealed several email exchanges between Mr. Warner and Ms. Luttrell relating to campaign issues. These emails consisted of exchanges regarding campaign potlucks/kickoffs, brochure drafting, contacts and volunteer support, publicity/press releases, campaign name tags, port issues, excel spreadsheets of mailing lists (including comments regarding looking up the WWU "folks").

8. On September 14, 2001, Mr. Warner sent a letter to the Public Disclosure Commission (PDC), with copies to the Bellingham Herald, Whatcom County PDC file, and the Dean of WWU, Dennis Murphy, which stated in part:

> ... Since the start of the campaign on July 23, I did receive and send some email from my University Computer. It was perhaps 50 emails—at any rate, more than zero, which is what it should have been. I also used the phone on my desk for some fewer number of local calls related to my campaign (perhaps 20). I printed six pages on the printer that were related to my campaign. I have stopped such activity, of course. I will reimburse the University for those costs, and accept such consequences from the PDC as appropriate.

9. In addition to the campaign-related emails, the SAO found that Mr. Warner sent or received 15 email messages relating to a private consulting engagement for which he received compensation in excess of $1,200. Attached to one of the consulting messages were various legal documents. The time frame for these email documents was from April 13, 2001 to May 10, 2001. Mr. Warner's correspondence regarding this engagement gave his WWU email address, mailing address, phone number and fax number as his contact information for this business matter.

10. On December 5, 2001 in a letter from Mr. Warner to the SAO, in relation to his outside employment, Mr. Warner asserted:

> ... As do all us faculty at the College of Business, I report this consulting/service activity to the Dean every year. We are encouraged to engage in consulting relevant to our teaching. .... The amount of University time it takes is very small: truly, in the typical year, I would say it averages less than ten minutes a month. That is, probably two hours a year.

Mr. Warner also indicated that he donates about one-half of the income he receives from this outside consulting business to the University's fund-raising campaign, ear-marked for "the College of Business"—and gives about $1,100 a year to the Western Foundation.

11. Part XII.B.6 of the WWU University Faculty Handbook provides, in relevant part, that:

> University facilities (equipment, space, computers) may not be used for compensated outside work unless they are unique and unavailable in the private

sector. Faculty members must seek prior approval for use of facilities for a specific project and a limited duration and fee schedule must be filed with the Vice President for Business Affairs.

Board staff review of the SAO investigation and Mr. Warner's correspondence indicates that Mr. Warner used a University desktop computer for his private consulting work and this work, drafting legal documents and sending emails, did not require him to use unique or non-standard software. In addition, Board staff review of the SAO investigation revealed no evidence that Mr. Warner had sought or received University approval to use University facilities to support his private consulting work.

12. Mr. Warner asserts that his action related to the outside business finding was "made in flat ignorance of its impropriety and indeed with the (mistaken) belief that it was proper."

13. Mr. Warner asserts that he received a verbal and written reprimand from WWU for using a University computer and email account to support his campaign for elected public office. The State Auditor's report did not contain any official letters of reprimand or any WWU memoranda which document Mr. Warner's receipt of a verbal reprimand, therefore, Board staff can not verify this assertion.

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 42.52.180(1) states:

> No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, **for the purpose of assisting a campaign for election of a person to an office** or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency. [Emphasis added.]

3. RCW 42.52.120 prohibits state officers and employees from receiving any thing of economic value from private organizations unless all conditions under RCW 42.52.120(1)(a)-(f) are met. One of these conditions is RCW 42.52.120(1)(c), which provides that:

> 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.

In addition, in EEB Advisory Opinion 98-07, the Board advised that while outside employment may be permissible under RCW 42.52.120, a state officer or employee may not use state resources to conduct the outside business.

4. "Facilities of an agency" include the state owned and operated e-mail system and the agency computers and other equipment upon which the email system operates. RCW 42.52.180(1); WAC 292-110-030(1).

5. WAC 292-110-010(3) allows state officers to make occasional but limited personal use of state resources in certain limited circumstances. WAC 292-110-010(4)(c), however, prohibits even an "occasional and limited" use of state resources if that use is for "any campaign or political" purpose.

6. WAC 292-110-010(6)(a) prohibits at all times the use of state resources for "the purpose of conducting an outside business or private employment."

C. AGGRAVATING AND MITIGATING FACTORS

1. In determining the appropriateness of the civil penalty, Board staff reviewed criteria in WAC 292-120-030. In the case at hand: (1) the violations were continuing in nature (WAC 292-120-030(2)(a)); (2) the violation significantly reduced the public respect for, and the confidence in, state government employees (WAC 292-120-030(2)), (3) the violations involved personal gain to Mr. Warner (WAC 292-120-030(2)(f); and (4) Mr. Warner's conduct caused another state employee to violate the Ethics in Public Service Act.

2. As a mitigating factor, Mr. Warner cooperated fully in the Board's investigation of this matter.

D. RESOLUTION

1. Mr. Warner admits that he violated provisions of RCW 42.52.180 by:

   a) using his state computer to promote his campaign for Port Commissioner;

   b) using his state computer to send and/or receive over 127 emails related to campaign related issues;

   c) acquiescing in the use of University facilities to conduct email exchanges regarding campaign issues with Linda Luttrell, a WWU employee who was also working for Mr. Warner as his political campaign manager;

   d) using the state telephone to make calls related to his campaign; and

   e) using his state printer to print campaign related materials.

2. Mr. Warner admits that he violated provisions of RCW 42.52.160(1) and RCW 42.52.120 by using state resources to engage in a private consulting business in a manner that violated State law and University policy.

3. Recognizing that he is personally responsible for his conduct, Professor Warner will pay a civil penalty in the amount of seven thousand five hundred dollars ($7,500). The Board agrees to suspend two thousand five hundred dollars ($2,500) of this amount on the condition that Mr. Warner complies with all the terms and conditions of this Stipulation and Order and commits no further violations of chapter 42.52 RCW while he is employed by the State of Washington.

4. The civil penalty in the amount of five thousand dollars ($5,000) is payable to the *State of Washington,* which will be remitted to the Executive Ethics Board in ten (10) equal installments of five hundred dollars ($500) with the first payment due on October 30, 2002, and the 30th day of each month thereafter. Failure to make timely payment will cause the entire amount of the civil penalty to become due and payable within ten (10) days of the missed payment.

II. CONCLUSIONS OF LAW

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

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

3. Settlement of this matter on the terms herein is subject to WAC 292-100-090(2) which 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.

III. RELEASE / EFFECT OF ORDER

1. If the Board accepts this Stipulation, the Board releases and discharges Daniel Warner 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 owed in the amount of five thousand ($5,000) dollars and compliance with all other conditions of this Stipulation. Daniel Warner 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 Mr. Warner agrees to pay the penalty as follows:

2. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Daniel Warner and the Washington State Executive Ethics Board, the State of Washington, or other third party, which 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.

4. If this Stipulation and Order is not accepted, it shall be null and void, and may not be used for any purpose in connection with the above-entitled action.

IV. CERTIFICATION

I, Daniel Warner, 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 voluntarily agree to this Stipulation.

Daniel M. Warner
Daniel Warner
Respondent

Sept 23, 2002
Date

Stipulated to and presented by:

Brian R. Malarky
Brian R. Malarky
Executive Director

September 27, 2002
Date

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V. 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 by Daniel Warner.

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DATED this 11th day of ~~September~~ October, 2002.

Laquita Fields

Laquita Fields, Chair

Marilee Scarbrough, Vice-Chair

James M. Vaché by LF

James M. Vaché, Member

Sutapa Basu, Member

Paul Zelinsky

Paul Zelinsky, Member

I, Daniel Warner, accept/do not accept (circle one) the proposed modification.

Daniel Warner, Respondent

Date