BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of: KEITH GILBERTSON, Respondent.	No. 03-110 STIPULATED FACTS, CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, KEITH GILBERTSON, through his attorney, Michael Rosenberger of Yarmuth Wilsdon Calfo, 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 October 10, 2003, the Board initiated a complaint, alleging that the Respondent, University of Washington Head Football Coach Keith Gilbertson, accepted free transportation for his wife and two minor children to attend the 2003 Washington v. Ohio State football game. The transportation was provided by a University supporter and Seattle attorney, Wayne Gittinger, on a private jet. The complaint further alleges that Mr. Gilbertson did not reimburse Mr. Gittinger for the Gilbertson family's use of the private jet.

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. Mr. Gilbertson 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. Mr. Gilbertson denies that he violated State ethics laws, but he recognizes that the Board would likely conclude that his actions, in accepting the free transportation for his two minor children, would have violated the Ethics in Public Service Act. 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. Mr. Gilbertson 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 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.

1.6. If the Board accepts this stipulation, the Board will release and discharge Mr. Gilbertson 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 of the full amount of the civil penalty due and owing, any other costs imposed, and compliance with all other terms and conditions of the agreed order. Mr. Gilbertson 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 Mr. Gilbertson 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 Mr. Gilbertson does not accept the Board's proposed modification(s), if any, Mr. Gilbertson 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), except James M. Vaché, who has recused himself. Further, Mr. Gilbertson 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 Board initiated the complaint in this matter, and at all times material hereto, the University of Washington Athletic Department employed Keith Gilbertson as its Head Football Coach. The University employed Mr. Gilbertson in various capacities for approximately nine years. Mr. Gilbertson was a graduate assistant coach in 1975, an assistant coach from 1988-1991, and an assistant coach from 1999 until becoming the Head Football Coach on July 29, 2003.

2.2. Mr. Gilbertson's employment contract with the University provides compensation in the form of spousal travel and an annual travel budget. Paragraph 4(h) of the contract's compensation and benefits section provides that:

> Travel expenses will be provided for Employee's spouse for all away football games, all post-season events in which the University's football team participates, and two additional business-related trips each fiscal year. In addition, the University will grant to Employee an annual budget of $20,000 for the expenses of Employee's family relating to reasonable airline fare, lodging and other necessary and proper expenses for travel related to University athletics. Reimbursement for expenses shall be in accordance with established University policies. Any unexpended balance will be paid to Employee at the end of each year.

2.3. Wayne Gittinger is a partner in the firm Lane, Powell, Spears, Lubersky in Seattle. Mr. Gittinger and his wife Anne have also been substantial supporters of, and financial contributors to, the University of Washington and the Intercollegiate Athletics Association (ICA) for many years. In addition to providing financial support to the University, Mr. Gittinger serves on several University of Washington Law School and ICA associated boards and commissions, including the Intercollegiate Athletics Camp Committee; Co-Chair, Campaign 2000 – ICA Committee; Vice-Chair, Tyee Board of Advisors, and the Don James Center Board of Advisors. In addition, Mr. Gittinger has served on informal University groups, including executive committees that advised the University President in hiring the Athletic Director and the Athletic Director in hiring the Head Football Coach.

2.4. As a financial contributor to ICA and participant in groups that support ICA activities, such as the Tyee Club, Mr. Gittinger is considered a University of Washington Representative of Athletics Interests (Booster). As such, he is bound by certain NCAA bylaws, interpretations, rules or regulations related to student-athlete recruitment.

2.5. Mr. Gittinger and two members of the Nordstrom family are partners in a private corporation, JBW Aircraft Leasing Company Inc. (JBW). JBW owns a Canadair CL-600-2B16 twin-engine turbo jet aircraft. The aircraft seats ten passengers and two crewmembers. In addition, to using JBW's jet for personal travel, JBW leases the jet to the Nordstrom Flight Department for

use in travel related to Nordstrom business. In 2003, the Nordstrom company leased the jet from JBW at a fair market rate of $2,700.00 per hour plus fuel and aircrew costs.

2.6. There appear to be no current contracts or other business agreements between the ICA and Nordstrom or JBW.

2.7. The University of Washington football team flew via charter airplane to Columbus, Ohio on Friday, August 29, 2003 to play a football game against Ohio State University the following day. As the head football coach, Mr. Gilbertson flew on that airplane. The University of Washington's contract with Mr. Gilbertson required it to provide Barbara Gilbertson, Mr. Gilbertson's wife, with free transportation to that football game. However, Mrs. Gilbertson had decided not to fly to Columbus in order to stay home and care for the two Gilbertson children.

2.8. The Gittingers planned to fly to the Ohio State football game on the JBW plane. Initially, Mr. Gittinger invited Mrs. Gilbertson to travel with him, his wife, and their friends, but Mrs. Gilbertson declined, in order to stay home with the Gilbertson children. Mr. Gittinger then informed the Gilbertsons that there was room on the plane for the children. Mrs. Gilbertson then accepted Mr. Gittinger's invitation. Prior to the flight but at a later University function Mrs. Gilbertson mentioned that she would be flying on the Gittinger's plane to University Athletics Director Barbara Hedges. Ms. Hedges expressed no objection or concern about the Gilbertsons flying on Mr. Gittinger's plane.

2.9. The JBW flight manifest for the Ohio State trip states that the roundtrip fuel cost totaled $5,309.50. The total flight time was 7.8 hours. The JBW aircraft carries ten passengers and two crewmembers.

2.10. Mr. Gittinger has known Mr. Gilbertson for over 20 years, and acted as Mr. Gilbertson's attorney when he was the University of California's head football coach in 1994

and 1995. The two men have occasionally played golf, most often at University or Seahawks sponsored events, such as the Dog Days in the Desert (Dog Days) events. Soon after accepting his University assistant coaching position Mr. Gilbertson flew with Mr. Gittinger on the JBW jet to Palm Springs, California. The trip was related to Dog Days and included several fund raising and golfing events. All the Gilbertson's travel on the JBW jet was related to official University functions, such as away games or the Dog Days fundraising events.

2.11. Mr. Gittinger and his wife have been friends with Mrs. Gilbertson for more than ten years. During this time, the Gilbertsons and Gittingers socialized at numerous official University and Seahawks events. However, they have not socialized outside of official events nor have they visited each other's homes, taken vacations together, or traveled independently. The Gilbertsons and Gittingers have occasionally exchanged gifts of nominal value.

2.12. Mrs. Gilbertson and the Gilbertson children flew on the JBW plane to and from the Ohio State football game. Mr. Gittinger and the Gilbertsons assert that they did not know that providing free transportation to and from an official event may violate state ethics laws or other statutes or regulations. In addition, there is no evidence that Mr. Gilbertson knew about, or inquired into, the ownership of the JBW jet.

2.13. Mr. Gilbertson asserts that the University of Washington was contractually obligated to provide his wife with free transportation to the Ohio State game, and is contractually obligated to a travel allowance for other members of the head coach's family on an occasional basis. Moreover, Mr. Gilbertson contends that Mr. Gittinger's provision of free transportation was not a gift because it was not "made as any part of any design [by Mr. Gittinger] to gain or maintain influence in the [University of Washington]," per RCW 42.52.010(10)(a).

2.14. Mr. Gilbertson attended a one and half hour ethics training in July 1999. The training included a brief discussion of gifts. At the training, all participants received a listing of permissible gifts under RCW 42.52.150.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Keith Gilbertson 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. The Ethics Act prohibits receipt of any item with a value greater than $50, even if the gift would not be reasonably expected to influence state officers and employees, except for certain specified items. RCW 42.52.150(1) states:

> No state officer or state employee may accept gifts, other than those specified in subsections (2) and (5) of this section, with an aggregate value in excess of fifty dollars from a single source in a calendar year or a single gift from multiple sources with a value in excess of fifty dollars. For purposes of this section, "single source" means any person, as defined in RCW 42.52.010, whether acting directly or through any agent or other intermediary, and "single gift" includes any event, item, or group of items used in conjunction with each other or any trip including transportation, lodging, and attendant costs, not excluded from the definition of gift under RCW 42.52.010. The value of gifts given to an officer's or employee's family member or guest shall be attributed to the official or employee for the purpose of determining whether the limit has been exceeded, unless an independent business, family, or social relationship exists between the donor and the family member or guest.

3.4. In EEB Advisory Opinion 01-05, the Board advised that use of a private suite at a sporting venue has an economic value that exceeds the face price of the ticket by at least $50. The Board further advised that this value shall hold, unless the state employee can provide specific evidence that shows otherwise. Similarly, travel in a private jet holds an economic value that exceeds the first class fare on a commercial air carrier going to the same destination. Like the private suite, the presumption of a gift may be overcome by determining the actual value of the gift (or in this matter the value of the two children to fly on the private plane). Based on the above

Findings of Fact, the fair market value of the JBW plane rental is $2,700 per hour, the roundtrip flight to the Ohio State football game lasted 7.8 hours, the cost for fuel was $5,309.50 and the plane seated ten passengers and two crewmembers. Thus, the value of the flight for the two children was $5,273.90 ($2,700 x 7.8 + $5,309.50 ÷ 10 passengers x 2 children).

3.5. RCW 42.52.010, however, provides an exemption which is pertinent in this matter. RCW 42.52.010(10)(a) provides that "Gift" does not include:

> Items from family members or friends where it is clear beyond a reasonable doubt that the gift was not made as part of any design to gain or maintain influence in the agency of which the recipient is an officer or employee;

3.6. Based on Findings of Fact 2.1 through 2.14, the Board would likely conclude that Mr. Gilbertson's acceptance of free transportation for his children violated RCW 42.52.150.

Section 4: AGREED ORDER

4.1. Although he denies that he violated RCW 42.52.150, Keith Gilbertson recognizes that the Board would likely find that accepting free transportation on a privately owned aircraft for members of his family who are not contractually entitled to free travel would, under these circumstances, be construed as a gift in violation of the Ethics in Public Service Act.

4.2. Mr. Gilbertson will pay a civil penalty in the amount of two thousand five hundred dollars ($2,500.00), which includes investigative costs in the amount of one thousand five hundred dollars ($1,500.00). The civil penalty shall be paid to the Executive Ethics Board within forty-five (45) days of the entry of this Order.

4.3. Mr. Gilbertson will pay Wayne Gittinger or a third party designated by Mr. Gittinger five thousand two hundred and seventy-three dollars and ninety cents ($5,273.90) within forty-five (45) days of the entry of this Order.

4.4. Mr. Gilbertson agrees that no member of his family shall accept free transportation to University of Washington football games except as provided in his employment agreement with the University of Washington.

4.5. Mr. Gilbertson agrees to work with the University of Washington and the Board to reach agreement on a written policy describing the procedures by which free transportation and other benefits may be provided to the University of Washington for use by University employees and their families in compliance with the Ethics in Public Service Act.

4.6. Mr. Gilbertson agrees to remain familiar with and in compliance with the state ethics laws in the performance of his official duties.

CERTIFICATION

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

6/10/04

Keith Gilbertson Date
Respondent

6/10/04

Michael Rosenberger Date
Attorney for Respondent

Stipulated to and presented by:

6/10/04

Brian R. Malarky Date
Executive Director

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

___✓___ ACCEPTED in its entirety;

_____ REJECTED in its entirety;

_____ MODIFIED. This Stipulation will become the Order of the Board if the Respondent approves* the following modification(s):

_____

_____

_____

DATED this ~~14~~ 11th day of ~~May~~ June 2004.

Marilee Scarbrough, Chair

Paul Zellinsky , Vice Chair

Trish Akana, Member

Evelyn Yenson, Member

*I, Keith Gilbertson, accept/do not accept (circle one) the proposed modification(s).

Keith Gilbertson, Respondent Date

Michael Rosenberger Date
Attorney for Respondent