BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of: LEILANI WHITEHURST, Respondent.	No. 03-120 STIPULATED FACTS, CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, Leilani Whitehurst, by and through her union representation, Romy Garcia, Senior Field Representative, 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 September 17, 2003, the Executive Ethics Board received a referral from the State Auditor's Office (SAO) alleging that Leilani Whitehurst, an employee of the State of Washington, Department of Corrections (DOC), used her state computer, e-mail and Internet for personal use. The Executive Ethics Board reviewed this referral and issued a complaint in November 2003.

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. Leilani Whitehurst 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. Leilani Whitehurst recognizes that the evidence available to the Board staff is such that the Board may conclude Ms. Whitehurst 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. Leilani Whitehurst waives the opportunity for a hearing, contingent upon acceptance of this stipulation by the Board, or her 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 Leilani Whitehurst 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. Ms. Whitehurst 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 Leilani Whitehurst 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 Leilani Whitehurst does not accept the Board's proposed modification(s), if any, Ms. Whitehurst 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, Ms. Whitehurst 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, DOC employed Leilani Whitehurst as an Office Assistant Senior. Ms. Whitehurst was hired by DOC on August 31, 2002.

2.2. A review of Ms. Whitehurst's Internet usage revealed that she logged onto non-work related sites on a daily basis. She accessed Yahoo's gamehouse, E-online and TV Guide for information on movie stars and soap operas, and department stores where she downloaded pictures of furniture.

2.3. From November 2001 to August 2002, Ms. Whitehurst worked at a state agency that by policy allowed de minimis use of the Internet and downloading of webshots.

2.4. DOC Policy No. 280.820 states that "Access and postings to the Internet using Department equipment and/or equipment that is part of the Department's wide area network shall be made solely for official business." This policy also prohibits downloading entertainment software or games, or playing of games against opponents over the Internet. DOC Policy

No. 800.010 states that: "Employees are to avoid actions that use or create the appearance of using their position for personal gain or private advantage for themselves or another person." DOC Policy No. 280.100 states that "Department employees shall use state-provided electronic message systems and storage media only for state business purposes."

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Leilani Whitehurst 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. A state officer or employee is prohibited under RCW 42.52.160(1) from using state 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."

3.4. The Ethics in Public Service Act allows for de minimis personal use of state resources. WAC 292-110-010(4) states that employees may make occasional but limited personal use of state resources such as electronic messaging systems and the Internet if the use conforms with ethical standards and the employee's agency has adopted a policy authorizing Internet access consistent with the Board's de minimis rule.

3.5. Based on Findings of Fact 2.1 to 2.4, Ms. Whitehurst used state resources to access the Internet for personal interests in violation of RCW 42.52.160, WAC 292-110-010 and agency policy. Ms. Whitehurst's use of her state computer to access the Internet for personal interests violated agency policy and exceeded the de minimis standards.

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. There are no aggravating factors in this matter.

3.7. It is a mitigating factor that Ms. Whitehurst was previously employed by an agency that allowed de minimis use of the Internet and that this violation was inadvertent and unknowing.

Section 4: AGREED ORDER

4.1. Leilani Whitehurst will pay a civil penalty in the amount of four hundred dollars ($400.00), which includes reimbursement of investigative costs in the amount of eighty dollars ($80.00). The Board agrees to suspend two hundred dollars ($200.00) of the civil penalty on the condition that Ms. Whitehurst complies with all terms and conditions of this Stipulation and Order and commits no further violations of chapter 42.52 RCW for a period of three years.

4.2. The civil penalty of $120.00 and investigative costs of $80.00 is payable to the state Executive Ethics Board in four equal monthly installments of fifty dollars ($50.00) beginning on September 30, 2004 and ending with the last payment on December 30, 2004.

CERTIFICATION

I, Leilani Whitehurst, 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.

Leilani Whitehurst Aug. 24, 2004
Leilani Whitehurst Date
Respondent

Romy Garcia 8/24/04
Romy Garcia Date
WFSE Senior Field Representative

Stipulated to and presented by:

Aug 19, 2004
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;

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

4.1 civil penalty of $750, suspend $250 (no investigative costs)
4.2 total penalty of $500 is payable by December 30, 2004.

DATED this 10th day of September, 2004.

Marilee Scarbrough , Chair

Paul Zellinsky , Vice Chair

James M. Vaché, Member

Trish Akana, Member

Evelyn Jenson, Member

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

_____
Leilani Whitehurst, Respondent Date