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7 **BEFORE THE WASHINGTON STATE**
8 **EXECUTIVE ETHICS BOARD**

9 In the Matter of:

10 JOSE DIAZ,

11 Respondent.

OAH Docket No. 2012-EEB-0003
EEB No. 2010-018

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
FINAL ORDER

12
13 **I. PROCEDURAL HISTORY**

14 1.1 The Executive Ethics Board (Board) staff received an agency referral from the
15 Office of Minority and Women's Business Enterprises (OMWBE) dated March 16, 2010
16 alleging that Jose Diaz, Management Analyst 4, violated the Ethics in Public Service Act,
17 chapter 42.52 RCW, by using state resources (agency time, computer, and email) during work
18 hours to conduct unauthorized and non-agency related activities from June 2008 to March 2,
19 2010. The Board reviewed the referral and issued a complaint on May 28, 2010.

20 1.2 On November 12, 2010, the Board found reasonable cause to believe that a
21 violation of the Ethics in Public Service Act occurred.

22 1.3 A prehearing conference, with all parties participating, was held on May 21,
23 2012 with an Administrative Law Judge (ALJ) presiding pursuant to RCW 42.52.500.

24 1.4 After due and proper notice, a hearing was held before the Board. The hearing
25 was held at the Board offices at Bristol Court in Olympia, Washington, convening on March 7,
26 2013, at 9:00 AM. ALJ Alice L. Haenle from the Office of Administrative Hearings conducted

1 the proceedings, and Board Chair Lisa Marsh, Vice Chair Anna Dudek Ross, and members
2 Matthew Williams III and Samantha Simmons were present. Also present was Bruce L.
3 Turcott, Assistant Attorney General, legal advisor to the Board.

4 1.5 Board staff was represented by Chad Standifer, Assistant Attorney General.
5 The Board's Executive Director Melanie de Leon and other Board staff members were present.

6 1.6 Respondent Jose Diaz was present and represented by Larry King, attorney at
7 law.

8 1.7 Board Staff offered Exhibits 1-23. All were admitted into evidence. The Board
9 was provided copies of documents that were admitted as exhibits.

- 10 1. Executive Ethics Board Complaint dated March 16, 2010 (5 pages);
- 11 2. Personal documents of Jose Diaz (19 pages);
- 12 3. Personal documents of Jose Diaz (8 pages);
- 13 4. Documents relating to the Hispanic Roundtable (26 pages);
- 14 5. Documents relating to the Hispanic Roundtable Youth Summit - 2009
15 (568 pages);
- 16 6. Documents relating to the Hispanic Roundtable Youth Summit – 2008
(313 pages);
- 17 7. Jose Diaz Position Description dated September 26, 2008 (5 pages);
- 18 8. Jose Diaz PDP Expectations signed September 26, 2008 (4 pages);
- 19 9. Jose Diaz PDP Evaluation signed December 3, 2008 (3 pages);
- 20 10. Jose Diaz PDP Expectations signed December 3, 2008 (2 pages);
- 21 11. Jose Diaz Outside Employment Form dated June 3, 2008 (2 pages);
- 22 12. Jose Diaz Outside Employment Form dated July 13, 2010 (2 pages);
- 23 13. OMWBE Internet Usage, Computer Software Usage and Electronic E-
24 Mail Usage Policies signed by Jose Diaz on June 11, 2008 and May 11,
25 2009 (8 pages);
- 26 14. OMWBE Standards of Ethical Conduct for all OMWBE Employees
Policy signed by Jose Diaz on May 11, 2009 (9 pages);
15. OMWBE Summary of Jose Diaz Computer Files (2 pages);
16. Executive Ethics Board Preliminary Investigation and Board

- 1 Determination dated November 12, 2010 (5 pages);
- 2 17. EEB Advisory Opinion 99-02 – Use of State Resources/Non-Profit
- 3 Entities (4 pages);
- 4 18. EEB Advisory Opinion 02-01 – Use of State Resources to Conduct
- 5 Union Business (4 pages);
- 6 19. Deposition Transcripts of Jose Diaz taken on January 24, 2013 and
- 7 January 31, 2013 (95 pages);
- 8 20. Jose Diaz emails relating to Union Business/Activities (8 pages);
- 9 21. Hispanic Roundtable website documents (38 pages);
- 10 22. OMWBE Outreach Policies dated October 26, 2009 and January 7, 1992
- 11 (2 pages); and
- 12 23. Letter from Jean Wheat to Cynthia Cooper dated March 11, 2010 (1
- 13 page).
- 14 1.8 Mr. Diaz offered no exhibits.
- 15 1.9 The proceedings were recorded and open to the public.
- 16 1.10 The Board heard the testimony of Melanie de Leon, Cathy Canorro, Les Ling,
- 17 Jose Diaz, Tom Zvirdys, and Jenaro Castaneda.
- 18 1.11 The hearing was adjourned on March 7, 2013.

19 Based on the evidence presented, the Board enters the following Findings of Fact,

20 Conclusions of Law and Final Order:

21 **II. FINDINGS OF FACT**

22 2.1 Jose Diaz has been employed as a Management Analyst 4 in the OMWBE's

23 Agency Support Unit since June 1, 2008. The objective of this position is to provide technical

24 assistance to state agencies to facilitate development, compliance, and execution of their

25 supplier diversity programs, as well as training and technical assistance to firms to increase their

26 access to opportunities and competitiveness. The position also analyzes agency expenditures

and prepares statistical reports to facilitate the agency's mission to "help create and sustain an

equitable business environment by promoting the participation, in public contracting and

1 procurement, of all qualified and available businesses owned and controlled by minorities,
2 women and all others who may be socially and economically disadvantaged.” Exhibit 7.

3 2.2 OMWBE noted over 320 instances in which Mr. Diaz used state
4 resources inappropriately. The following are examples of Mr. Diaz's misuse of state
5 resources:

6 a. Jose Diaz used agency time and resources, including up to five percent of his work
7 time and a state assigned computer, from June 2008 to March 2, 2010 to pursue personal
8 interests, including but not limited to:

- 9 i. The Hispanic Roundtable;
10 ii. The Latino Youth Summit; and
11 iii. The Cuban Gala.

12 b. Jose Diaz used agency time and resources, including a state-assigned computer, to
13 store personal and/or private information that is not agency-related on his state computer
14 such as:

- 15 i. Photographs and bank records;
16 ii. Recipes;
17 iii. Personal emails and jokes; and
18 iv. Various personal letters.

19 c. Jose Diaz used agency time and resources, including a state-assigned computer, to
20 engage in union activities during work hours without permission. Unauthorized union
21 activities include emails to and from Jose Diaz and Joan Gallagher of WFSE regarding:

- 22 i. Downgrading a represented position;
23 ii. All-staff meetings;
24 iii. A manager's response to a subordinate regarding his performance;
25 iv. Forwarding the director's email memos reissuing Internet policy and

26 notices, i.e. conducting union business without permission during working hours; and

1 v. Storing the union contract on the agency's computer without the
2 permission of the agency.

3 2.3 OMWBE's Standards of Ethical Conduct Policy states at Section
4 E.1.C.01, "Supporting, promoting the interest of, or soliciting for an outside organization or
5 group" is a violation of the Ethical Conduct Policy.

6 2.4 On June 11, 2008, Mr. Diaz signed the OMWBE Policy regarding Internet
7 Usage, Computer Software Usage and Electronic E-Mail Usage (effective January 30,
8 2006. On May 11, 2009, Mr. Diaz signed the OMWBE Internet Usage, Computer Software
9 Usage and Electronic E-Mail Usage policy (effective January 29, 2009) indicating that he
10 read and understood the policy. This policy establishes procedures for authorized use of
11 OMWBE computer systems to communicate outside the agency via the Internet, computer
12 software to perform job duties within the agency and communication outside the office using
13 electronic email, and defines limitations on such usage. This policy notes that state property
14 may not be used:

- 15
- 16 a. For the purpose of conducting an outside business, whether or not for
17 profit;
 - 18 b. For the purpose of assisting the campaign of any candidate for election
19 to any office, or to oppose or promote a ballot proposition;
 - 20 c. For commercial purposes such as advertising or selling; or,
 - 21 d. For illegal activities or activities which are incompatible with a
22 professional workplace, such as, but not limited to, accessing adult-oriented
23 websites, gambling on the Internet, or other inappropriate use.

24 2.5 On May 11, 2009, Mr. Diaz signed the OMWBE policy regarding Standards of
25 Ethical Conduct for All OMWBE Employees (effective January 29, 2009). This policy
26

1 contains a section entitled "Using State Resources" and states in part that the following private
2 uses of state resources are explicitly prohibited by state law or rules:

- 3
- 4 i. Conducting an outside business or private employment;
- 5 ii. Supporting, promoting the interest of, or soliciting for an outside
6 organization or group except as allowed by law, rule, or OMWBE policy;
- 7 iii. Desk-to-desk or office-to-office solicitations for profit and/or non-profit
8 organizations.

9 **III. CONCLUSIONS OF LAW**

10 3.1 The Board has jurisdiction to hear this matter pursuant to RCW 42.52.360(1),
11 which authorizes the Board to enforce the Ethics in Public Service Act, chapter 42.56 RCW,
12 with respect to employees in the executive branch of state government. The complaint was
13 filed in accordance with RCW 42.52.410, the Board found reasonable cause pursuant to
14 RCW 42.52.420, and an adjudicative proceeding was conducted pursuant to RCW 42.52.430
15 and .500. All the required procedural notices have been provided.

16 3.2 The Ethics in Public Service Act governs the conduct of state officers and
17 employees.

18 3.3 A state employee may not use state resources for the private benefit or gain of
19 another under RCW 42.52.160, which states:

20 No state officer or state employee may employ or use any person,
21 money, or property under the officer's or employee's official
22 control or direction, or in his or her official custody, for the private
23 benefit or gain of the officer, employee, or another.

24 3.4 The Executive Ethics Board rule relating to use of state resources provides
25 in WAC 292-110-010(5):

26 Prohibited uses.

...

(b) Any use for the purpose of supporting, promoting the interests
of, or soliciting for an outside organization or group, including, but
not limited to, a private business, or a political party, or supporting,

1 promoting the interests of, or soliciting for a nonprofit organization
2 unless provided for by law or authorized by an agency head or
3 designee;

4 ...
5 ...

6 (e) Any use related to conduct that is prohibited by a federal or
7 state law or rule, or a state agency policy;

8 3.5 Under RCW 42.52.480, the Board may impose a civil penalty of up to
9 \$5,000 per violation or three times the economic value of anything received or sought in
10 violation of the Ethics in Public Service Act, whichever is greater. The Board may also
11 impose the cost of investigating the complaint and order restitution for any damages
12 sustained by the state.

13 3.6 Based on the foregoing findings of fact, the Board concludes that Mr. Diaz
14 violated RCW 42.52.160 and WAC 292-110-010(5)(b) and (e) with respect to the use of state
15 resources referenced in 2.2(a) to support the Hispanic Roundtable, Latino Youth Summit, and
16 Cuban Gala, including significant amounts of his work time, use of agency email, storage of
17 documents on agency computers, and use of the OMWBE logo on fundraising letters, all in
18 violation of the Executive Ethics Act and rule and OMWBE policies. Mr. Diaz also violated
19 RCW 42.52.160 and WAC 292-110-010(5)(b) and (e) with respect to the use of state resources
20 referenced in 2.2(b) for union-related activity in violation of the Executive Ethics Act and rule
21 and OMWBE policies. The Board did not base its conclusions on the personal emails
22 referenced in 2.2(b)—although not an appropriate use of state resources, they did not rise to the
23 level of the other violations.

24 3.7 A state officer or employee is prohibited under RCW 42.52.070 from using state
25 property: “Except as required to perform duties within the scope of employment, no state officer
26 or state employee may use his or her position to secure special privileges or exemptions for
himself or herself, or his or her spouse, child, parents, or other persons.” Mr. Diaz was not
charged under this provision of the Ethics in Public Service Act, however the Board notes the
evidence may have supported finding a violation of it as well.

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APPEAL RIGHTS

RECONSIDERATION OF FINAL ORDER – BOARD

Any party may ask the Executive Ethics Board to reconsider a Final Order. The request must be in writing and must include the specific grounds or reasons for the request. The request must be delivered to Board office within 20 days after the postmark date of this order.

The Board is deemed to have denied the request for reconsideration if, within 20 days from the date the request is filed, the Board does not either dispose of the petition or serve the parties with written notice specifying the date by which it will act on the petition. (RCW 34.05.470).

The Respondent is not required to ask the Board to reconsider the Final Order before seeking judicial review by a superior court. (RCW 34.05.470).

FURTHER APPEAL RIGHTS – SUPERIOR COURT

A Final Order issued by the Executive Ethics Board is subject to judicial review under the Administrative Procedure Act, chapter 34.05 RCW. See RCW 42.52.440. The procedures are provided in RCW 34.05.510 - .598.

The petition for judicial review must be filed with the superior court and served on the Board and any other parties within 30 days of the date that the Board serves this Final Order on the parties. (RCW 34.05.542(2)). A petition for review must set forth:

- (1) The name and mailing address of the petitioner;
- (2) The name and mailing address of the petitioner's attorney, if any;
- (3) The name and mailing address of the agency whose action is at issue;
- (4) Identification of the agency action at issue, together with a duplicate copy, summary, or brief description of the agency action;

1 (5) Identification of persons who were parties in any adjudicative proceedings that
2 led to the agency action;

3 (6) Facts to demonstrate that the petitioner is entitled to obtain judicial review;

4 (7) The petitioner's reasons for believing that relief should be granted; and

5 (8) A request for relief, specifying the type and extent of relief requested.

6 Service is defined in RCW 34.05.010(19) as the date of mailing or personal service.
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8 **ENFORCEMENT OF FINAL ORDERS**

9 If there is no timely request for reconsideration, this is the Final Order of the Board.

10 The Respondent is legally obligated to pay any penalty assessed.

11 The Board will seek to enforce a Final Order in superior court and recover legal costs
12 and attorney's fees if the penalty remains unpaid and no petition for judicial review has been
13 timely filed under chapter 34.05 RCW. This action will be taken without further order by the
14 Board.
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