

BEFORE THE WASHINGTON STATE
EXECUTIVE ETHICS BOARD

In the Matter of:

MARK MILLBAUER,

Respondent.

No. 13-006

STIPULATED FACTS,
CONCLUSIONS AND ORDER

I. STIPULATION

THIS STIPULATION is entered into under WAC 292-100-090(1) between the Respondent, MARK MILLBAUER, and Board Staff of the WASHINGTON STATE EXECUTIVE ETHICS BOARD (Board) through MELANIE DeLEON, 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 March 8, 2013 the Executive Ethics Board (Board) initiated a complaint against Mark Millbauer, an instructor at Green River Community College (GRCC) alleging that he may have violated one or more sections of the Ethics in Public Service Act.

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. Mark Millbauer 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. Mark Millbauer recognizes that the evidence available to the Board staff is such that the Board may conclude he 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. Mark Millbauer 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 the respondent, the board shall enter an order in conformity with the terms of the stipulation. If the board rejects the stipulation or the respondent does not agree to the board's proposed modifications to the stipulation, the normal process will continue. The proposed stipulation and information obtained during formal settlement discussions 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 Mark Millbauer 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. Mark Millbauer 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 Mark Millbauer 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 Mark Millbauer does not accept the Board's proposed modification(s), if any, this matter will be scheduled for an administrative hearing in front of the Board and Mark Millbauer waives any objection to participation by any Board member at any subsequent hearing to whom this stipulation was presented for approval under WAC 292-100-090(2). Further, Mark Millbauer 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. Mark Millbauer was an Auto Body Instructor at Green River Community College (GRCC) in the college's Trades Division for all time pertinent to this investigation.

2.2. Mr. Millbauer is the President of the Green River United Faculty Coalition (UFC), which operates under an agreement ("the Agreement") between UFC and the Board of Trustees Community College District 10 that expires on June 1, 2014.

2.3. Green River Community College has two policies regarding ethics and/or the use of technology. Policy GA-23, Ethics, states that no state employee or officer of the college may employ or use any person, money or property under the employee's official control or direction, or in his or her official custody, for the private benefit or gain of the employee, officer of the college or another. It further states that de minimis use is permitted provided that the use is not for personal gain or for political or campaign activities. Additionally, certain uses are

prohibited, regardless of whether the use is de minimis and does not interfere with the performance of official duties. These include conducting an outside business or supporting, promoting or soliciting funds for an outside group or organization without authorization or political or campaign use.

2.4. Green River Community College has a policy, GA-24 entitled Employee Acceptable Use of Technology and Data Policy. This policy provides a list of prohibited use, one of which is to support, promote or solicit for an outside organization unless authorized by the college and permissible by law. This policy also prohibits the use of technology for the purpose of private or personal business.

2.5. Section C Mail of Article XIV of the Agreement states that UFC has the right to distribute UFC information and other related materials in the *mail boxes* of the faculty and other professional employees. (Emphasis added)

2.6. Section L of Article XIV of the Agreement states that the faculty office of UFC President (Millbauer) "shall be used for the organization headquarters."

2.7. The Agreement does not set forth any language that allows the use of other state resources to complete UFC work.

2.8. Mr. Millbauer used GRCC's e-mail system and fax machine to send/receive correspondence regarding an "At-Risk" letter the union received from the IRS. The e-mail originates from the American Federation of Teachers (AFT), AFL-CIO Financial Services section in Washington DC on or about May 9, 2011, flows through to Mr. Millbauer at MMillbauer@greenriver.edu. Mr. Millbauer, in response to this e-mail faxes a copy of a 2008 Annual Electronic Notice Filing requirement from the IRS back to AFT using GRCC resources. He also used the college's e-mail system to initially correspond with an individual who agreed to

help the union with their "IRS and bookkeeping issue," including agreeing on a \$50 per hour compensation for this work.

Section 3: CONCLUSIONS OF LAW

3.1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over Mark Millbauer 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 and WAC 292-110-010(5)(d) from using state resources 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, promoting the interests of, or soliciting for a nonprofit organization unless provided for by law or authorized by an agency head or designee.

3.4. RCW 42.52.560 states:

(1) Nothing in this chapter prohibits a state employee from distributing communications from an employee organization or charitable organization to other state employees if the communications do not support or oppose a ballot proposition or candidate for federal, state, or local public office. Nothing in this section shall be construed to authorize any lobbying activity with public funds beyond the activity permitted by RCW 42.17A.635. (Emphasis added)

(2) "Employee organization," for purposes of this section, means any organization, union, or association in which employees participate and that exists for the purpose of collective bargaining with employers or for the purpose of opposing collective bargaining or certification of a union.

3.5. The Ethics Board issued Interpretive Statement 07-01 on September 8, 2006 defining the term, "Distribute" for the purpose of RCW 42.52.560. The Board stated that this term means:

to provide or disseminate information to a group of others. Nothing in this section permits the use of state resources for the purpose of composing, editing, copying or for any purpose other than distributing. Methods of distribution include, but are not limited to: electronic

mail, internal mail, facsimile, hand-to-hand exchange, placing information on desks or workstations and posting on designated and approved bulletin boards. (Emphasis added)

3.5. Based on Findings of Fact 2.3 through 2.8, Mark Millbauer used state resources in violation of RCW 42.52.160 and WAC 292-110-010(5)(b) and not consistent with the use permitted under RCW 42.52.560. The de minimis use rules under WAC 292-110-010(2)(d) do not apply to uses prohibited under WAC 292-110-010(5)(b).

3.7. 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.

Section 4: AGGRAVATING AND MITIGATING FACTORS

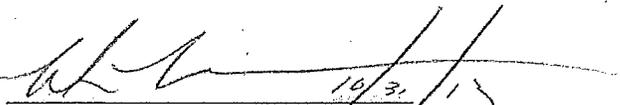
In determining the appropriateness of the civil penalty, the Board reviewed the criteria in WAC 292-120-030. It is an aggravating factor that Mr. Millbauer has committed one prior violation found by the Board.

Section 5: AGREED ORDER

Mr. Millbauer concedes that if the case went to a hearing, the Board could find that his use of state resources violated RCW 42.25.160, WAC 292-110-010(5)(b) and was not consistent with the provisions of RCW 42.52.560. The parties agree that Mr. Millbauer will accept a letter of instruction from the Board as the appropriate and sole action to be taken by the Board. The parties further agree that no civil penalties, damages, costs or other monetary or non-monetary sanctions will be imposed or sought by the Board against Mr. Millbauer stemming from the complaint for case 2013-006.

CERTIFICATION

I, Mark Millbauer, hereby certify that I have read this Stipulation and Agreed Order in its entirety; that my counsel of record, if any, has fully explained the legal significance and consequence of it; that I fully understand and agree to all of it; and that it may be presented to the Board without my appearance. I knowingly and voluntarily waive my right to a hearing in this matter; and if the Board accepts the Stipulation and Agreed Order, I understand that I will receive a signed copy.



MARK MILLBAUER 10/31/13
Respondent Date

Stipulated to and presented by:

 11-5-13

Melanie deLeon 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;

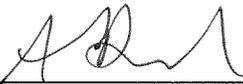
MODIFIED. This Stipulation will become the Order of the Board if the

Respondent approves* the following modification(s):

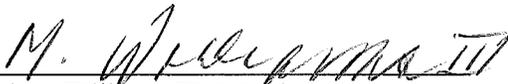
DATED this 8th day of November 2013.



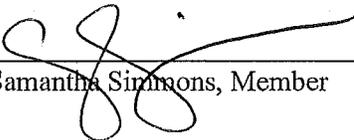
Lisa Marsh, Chair



Anna Dudek Ross, Vice-Chair



Matthew Williams III, Member



Samantha Simmons, Member

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

MARK MILLBAUER, Respondent Date