

BEFORE THE WASHINGTON STATE  
EXECUTIVE ETHICS BOARD

In the Matter of:

MICHAEL S. SMITH.

No. 99-27

STIPULATION AND ORDER

**I. STIPULATION**

THIS STIPULATION is entered into under WAC 292-100-090 between MICHAEL S. SMITH 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.

**A. FACTS**

1. From 1994 to 1999, Michael S. Smith was a supervisor at the Department of Labor and Industries ("L&I").
2. In 1998-99, L&I conducted two worker safety inspections at Ballard Pattern and Brass Foundry ("Ballard Brass").
3. Mr. Smith was the immediate supervisor of L&I staff member, Gabrielle Toutonghi, who actually conducted the Ballard Brass safety inspections.
4. Mr. Smith does not recall advising Ms. Toutonghi on the first inspection, but does recall Ms. Toutonghi keeping him advised on the second inspection and getting his permission to conduct air monitoring at Ballard Brass.

5. The second inspection led to a L&I citation against Ballard Brass. Mr. Smith was not involved in the actual issuance of the citation, as he had resigned from L&I several months before it was issued.

6. After resigning from L&I, Mr. Smith went to work for a company called EHS International, Inc. Ballard Brass was a client of EHS International. As an EHS International employee, Mr. Smith assisted Ballard Brass in responding to the L&I citation. EHS International received \$8,752.11 from Ballard Brass for the firm assistance, including Mr. Smith's work.

7. Mr. Smith states that he did not know that his subsequent work for EHS International on the Ballard Brass L&I citation was a violation of state ethics laws.

8. Understanding that Mr. Smith was working with Ballard Brass on behalf of the firm, EHS International has indemnified Mr. Smith in this matter.

## **B. APPLICABLE LAW**

1. RCW 42.52.080(4) states:

No former state officer or state employee may at any time subsequent to his or her state employment assist another person, whether or not for compensation, in any transaction involving the state in which the former state officer or state employee at any time participated during state employment.

2. RCW 42.52.010(13) defines "participate" as follows:

[t]o participate in state action or a proceeding personally and substantially as a state officer or state employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation, or otherwise .... (emphasis added)

## **C. CONCLUSIONS OF LAW**

1. As used in this statute, a "transaction involving the state" includes any "determination" that is the "subject of state action". See RCW 42.52.010(21). Accordingly, an L&I citation would be a "transaction involving the state" subject to the prohibition of RCW 42.52.080(4).

Therefore, under RCW 42.52.080(4), if Mr. Smith "participated" in the Ballard Brass citation during his state employment, he would be prohibited after leaving state employment from assisting Ballard Brass in responding to the citation.

2. Though it appears that Mr. Smith was not involved in L&I's actual issuance of the citation itself, he was involved in the inspection (or "investigation") that led to the citation. Specifically, he personally supervised the inspector who conducted the Ballard Brass inspection by reviewing her progress and by approving her request to conduct air monitoring at the company. Because of his role in the investigation, Mr. Smith "participated" in L&I's decision to issue a citation to Ballard Brass.

#### D. AGGRAVATING & MITIGATING FACTORS

1. In determining the appropriateness of the civil penalty, Board staff reviewed the criteria in WAC 292-120-030. In the case at hand, the violation involved private gain to Mr. Smith's employer EHS International, Inc. (WAC 292-120-030(2)(f)).

2. It is a mitigating factor that Mr. Smith's <sup>violation was unintentional.</sup> ~~was unaware that his post state assistance to Ballard Brass violated the Ethics in Public Service Act.~~ Mr. Smith now understands that he should not assist another firm with an L&I citation that resulted from an investigation that he supervised.

#### E. RESOLUTION

1. Pursuant to chapter 42.52 RCW, the Executive Ethics Board has jurisdiction over MICHAEL S. SMITH 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.

4. Michael S. Smith does not admit that he violated RCW 42.52.080(4). However, based on the facts outlined above, he agrees that in the event this matter were to have proceeded before the Board, the Board could have concluded that his actions in assisting Ballard Brass in its compliance with the L&I citation would be in violation of RCW 42.52.080. Because of the costs involved in litigation, Smith agrees that resolution under the terms set forth in this agreement is preferable to litigation.

5. Mr. Smith agrees to reimburse the Executive Ethics Board in the amount of two hundred and fifty dollars (\$250.00) for costs of investigation associated with this matter. The reimbursement of \$250.00 is payable to the *State of Washington* which will be remitted to the Executive Ethics Board within thirty (30) days of approval of this Stipulation and Order by the Board.

6. By this Order, the Board imposes a civil penalty of two hundred and fifty dollars (\$250.00) with the entire penalty suspended on the condition that Mr. Smith 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 (3) years from the date this Stipulation and Order is accepted by the Board.

**F. RELEASE/EFFECT OF ORDER**

1. If the Board accepts this Stipulation, the Board releases and discharges Michael Smith 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 costs of investigation reimbursement owed in the amount of \$250.00 and compliance with all other conditions of this Stipulation. Michael Smith agrees to release and discharge the State of Washington, the Board, its officers, agents, and employees and the Department of Labor and Industries, its officers, agents, and employees from all claims, damages, and causes of action arising out of this complaint and this Stipulation and Order.

2. If this Stipulation is accepted, this Stipulation and Order does not purport to settle any other claims between Michael Smith and the Department of Labor and Industries, the State of Washington, or other third party, which are now in existence or 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.

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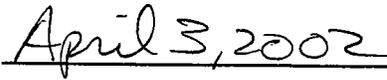
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**G. CERTIFICATION**

I, Michael Smith, 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.



\_\_\_\_\_  
Michael Smith

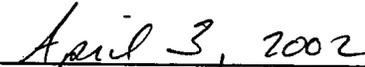


\_\_\_\_\_  
Date

Stipulated to and presented by:



\_\_\_\_\_  
Brian R. Malarky  
Executive Director



\_\_\_\_\_  
Date

**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 following modifications are approved by May 1, 2002

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DATED this 12<sup>th</sup> day of April, 2002.

Laquita Fields  
Laquita Fields, Chair

Marilee Scarbrough  
Marilee Scarbrough, Vice Chair

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Sutapa Basu, Member

James M. Vaché  
James M. Vaché, Member

I, Michael Smith  accept /  do not accept (circle one) the proposed modification.

Michael Smith  
Respondent

April 29, 2002  
Date