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Annual Report of State Personnel Board to the Governor

Pursuant to State Employee Protection Act, § 24-50.5-107, C.R.S.

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FY 03 Cases¹

Patricia Jones v. Department of Corrections, 2003B165 – no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- The Court of Appeals issued its Mandate, Appeal Dismissed on January 13, 2007.

FY 04 Cases²

Timothy Bennett v. Department of Corrections, Colorado Territorial Correctional Facility, 2003B150, 2004G052 [2003B0150(C)] – no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- The State Personnel Board remanded the matter to the Administrative Law Judge on two issues: the amount of attorney fees to be awarded to Complainant for litigating the abolishment of his position and the amount of the disciplinary reduction of his base pay.
- After remand, and upon appeal of that remand order to the Board, the Board then issued an order adopting the findings of fact, including the supplemental findings of fact; the conclusions of law, including the calculation of hours awardable to Complainant's attorney, as amended on remand to 127 hours by the Board (and agreed to by the parties), and the assessment of a total of \$4,000.00, as a disciplinary pay reduction against Complainant's base salary; and the ALJ's order on remand, as modified.
- Complainant filed his Notice of Appeal at the Court of Appeals on June 14, 2007.

FY 05 Cases³

Toni R. Lucci-Wolgamott v. Department of Natural Resources, Board of Land Commissioners, 2005G044 – no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Following a hearing, the Administrative Law Judge issued an Initial Decision on July 5, 2007, determining that Respondent did not violate the Whistleblower Act, as follows: (1) Complainant's statements about a lease application backlog were not disclosures, since this information was already known; (2) liquidating purchase orders to allow a project manager to purchase computers did not violate procurement and fiscal rules, although Complainant believed that it did; (3) any statements Complainant made about a contract employee's contracts were not disclosures of any practices or actions that constituted the waste of public funds, abuse of authority, mismanagement, illegal or inappropriate activity, and cannot, therefore, be considered to be "disclosures" under the Act; (4) Complainant's report of the loss of purchase orders was not a disclosure because this information was already known; (5) it was not illegal or improper, as Complainant asserted, to reduce purchase orders to \$5,000 or less to assure that contractors were timely paid; (6) the temporary employee who

¹ These matters remain open or reached resolution before the Board during FY 07; see previous reports.

² These matters remain open or reached resolution before the Board during FY 07; see previous reports.

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Complainant thought was illegally hired was not; (7) Complainant was incorrect in her assertion that a contract employee began working before his purchase order was approved; and (8) Complainant's complaints about a contractor's receipt of a sole source justification were unfounded and did not disclose any public waste, mismanagement, abuse of authority, or any other inappropriate or illegal practice, and were, therefore, not "disclosures." Affirming Respondent's termination and dismissing Complainant's appeal with prejudice, the ALJ did not award attorney fees and costs.

Saadia E. Naiman v. Department of Public Safety, Colorado State Patrol, 2005G101– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- On August 22, 2006, the Administrative Law Judge issued a dismissal order for Complainant's failure to respond to an order to show cause as to why this matter should not be dismissed due to Complainant's failure to file an information sheet.

FY 06 Cases⁴

Edward L. Donaldson v. Department of Public Safety, Colorado State Patrol, 2006B026, 2006B051 [2006B051(C)] – no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- On May 16, 2007, the Administrative Law Judge issued an Initial Decision, concluding that Complainant committed some of the acts for which he was disciplined, including failing to give status checks during his first day on the dayshift; leaving his assigned work area for forty-one minutes to go to the State Personnel Board and changing out of his uniform shirt to complete the errand; refusing to answer and leaving his supervisor's office, which constituted insubordination; making allegations of discrimination in the form of a written report against a coworker, as directed by his supervisor; and failing to return the fitness-to-return to work in a timely manner. However, the ALJ also found that Respondent's actions were arbitrary, capricious, or contrary to rule or law. The ALJ held that issuing a corrective action to Complainant for the contents of his discrimination report when he had been ordered by his supervisor to prepare that report would have a chilling effect on future reports. The ALJ further found that the corrective action and two disciplinary actions were not within the range of reasonable alternatives, were imposed without consideration of mitigating circumstances, or were too severe. Although no attorney fees were awarded, the ALJ modified Respondent's actions to rescind the corrective action and the five-day suspension, imposing an alternate disciplinary action of a one-day suspension; to rescind the termination, imposing an alternate disciplinary action on Complainant of a thirty-day suspension; and to award Complainant back pay and benefits to the date of reinstatement.
- Respondent filed an appeal to the Board of the Initial Decision. The matter is scheduled for Board review on October 16, 2007.

Frank David Kinder v. Department of Transportation, Staff Services Branch, 2006B093– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- On November 8, 2006, following a Notice of Settlement, the Administrative Law Judge dismissed this matter with prejudice.

⁴ These matters remain open or reached resolution before the Board during FY 07; see previous reports.

Paul H. Ortega v. Department of Transportation, 2006B108– no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.

- On February 2, 2007, following settlement, the Administrative Law Judge dismissed this matter with prejudice.

Kevin W. Cook v. Regents of the University of Colorado, University of Colorado at Boulder, Housing Facilities Services, 2006G012– no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.

- On September 19, 2006, following settlement, the Administrative Law Judge dismissed this matter.

FY 07 Cases

Purnendu Sarkar v. Department of Education, Colorado Community College System, 2007B019– no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed his agency's demand that he resign or face disciplinary action in the form of 3 months of paid administrative leave, alleging discrimination based on national origin/ancestry, sex and other alleged as discrimination, and retaliation for reporting an award of \$10 million contract on a sole source basis November 2004, in violation of the Whistleblower Act.
- On October 5, 2006, following settlement, the Administrative Law Judge dismissed this matter.

Joseph MacDonald v. Department of Transportation, 2007 B030 – no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed his termination, alleging discrimination and retaliation for reporting safety violations and unsafe working conditions, in violation of the Whistleblower Act.
- On March 16, 2007, after hearing, the Administrative Law Judge issued the Initial Decision of the Administrative Law Judge, determining that Complainant had refused to participate in temporary assignments to take snowplow training and to go to the Empire Junction Maintenance Yard to perform welding work on sanders located at that site because he believed that these orders are in violation of the terms of his 2003 Settlement Agreement. This case originally appeared before the Board as an appeal of a significant disciplinary sanction imposed in May of 2006 for the same actions, which Complainant had appealed to the Board. In September 2006, the ALJ in the earlier case issued a ruling which affirmed Respondent's interpretation of the 2003 Settlement Agreement and allowed the imposition of discipline for failure to perform the temporary assignments. Once the ALJ's order was issued, but prior to the Board's consideration of Complainant’s appeal of that order, Respondent held a 6-10 meeting with Complainant and asked Complainant if he was going to accept the disputed assignments. Complainant told Respondent that he had appealed the order to the Board and that he believed the order was incorrect. Respondent terminated Complainant's employment based upon his refusal to comply with the ALJ's order. The ALJ in this current appeal held that termination of Complainant's employment for refusal to obey an ALJ order which was on appeal to the Board was an arbitrary and capricious act because Complainant has a right under the state Administrative Procedures Act to ask the Board for a final agency order and only a final agency order would be binding under these

circumstances. Additionally, the ALJ in this case held that imposition of discipline under these unusual circumstances would constitute imposition of two instances of discipline for the same act, a violation of Board Rule 6-8. Rescinding the termination, the ALJ ordered that Complainant be reinstated with back pay and benefits.

- The Respondent appealed the Initial Decision to the Board.
- On August 21, 2007, the Board adopted the Initial Decision.
- The matter is before the Board at its October 16, 2007 meeting for consideration of Respondent's motion to stay the Board's August 21, 2007 order and Complainant's objection thereto.

Bobby L. Williams v. Regents of the University of Colorado, Colorado Community College System, 2007B040– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed his termination, alleging discrimination based on race/color/creed and an unspecified violation of the Whistleblower Act.
- On February 6, 2007, the Administrative Law Judge dismissed this action with prejudice on the grounds of lack of jurisdiction.

James L. Hewen v. Department of Transportation, 2007B072, 2007B048 [2007B048(C)] – no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- In separate actions, Complainant appealed both his disciplinary pay reduction and his termination, alleging discrimination based on race/color/creed and age and retaliation for reporting constant unsafe working conditions, procedures, and unsafe vehicle, in violation of the Whistleblower Act.
- The cases were consolidated by the Administrative Law Judge and set for hearing.
- On July 3, 2007, following a settlement, the Administrative Law Judge dismissed this matter with prejudice.

Annmarie Maynard v. Department of Healthcare Policy and Financing, 2007B073– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed her demotion, alleging discrimination based on race/color/creed and sex, and an unspecified violation of the Whistleblower Act.
- On May 4, 2007, Complainant filed with the Board a verification of having filed a charge of discrimination with the Colorado Civil Rights Division (CCRD).

Timothy Lybarger v. Colorado State University, Department of Housing & Dining Services, 2007B079– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed his termination, alleging discrimination based on race/color/creed, sex, religion, age and disability and an unspecified violation of the Whistleblower Act.
- On May 23, 2007, following a settlement, the Administrative Law Judge dismissed this matter with prejudice.

Ava A. Scudder v. Department of Revenue, Division of Motor Vehicle, Driver's License Section, 2007B103– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant appealed her termination, alleging retaliation for reporting employee mistakes and unethical procedures, in violation of the Whistleblower Act.
- The matter has been set for hearing on November 28, 2007.

Jeff Anthony v. Department of Revenue, Division of Motor Vehicle, Driver License Administration, 2007G006– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing following his termination during the probationary period, alleging discrimination based on race/color/creed, sex, and age, and retaliation for exposing abuse of authority, mismanagement, threats, inappropriate fines, and inadequate training in the Northglenn license office, in violation of the Whistleblower Act.
- The Administrative Law Judge recommended to the Board that a hearing be denied.
- The Board issued an order granting the petition for hearing.
- After the matter was set for hearing, the Administrative Law Judge dismissed the case with prejudice, but did not award attorney fees and costs. The dismissal was based on the discretion afforded to the court by C.R.C.P. 37(b)(2) regarding Complainant’s flagrant disregard of his discovery obligations, as a sanction for failing to obey the ALJ’s order to the Complainant to attend his deposition.
- The Complainant appealed the dismissal order to the Board.
- On July 17, 2007, the Board adopted the dismissal order.

Scott Horak v. Department of Natural Resources, 2007G007– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation and violations of Fair Labor and Standards Act, among other things, in violation of the Whistleblower Act.
- On October 17, 2006, the Administrative Law Judge issued a dismissal order for Complainant's failure to respond to an order to show cause.

Diane Luck v. Department of Public Health and Environment, Laboratory Services, 2007G014– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation for disclosure of a legal drug and alcohol test, in violation of the Whistleblower Act.
- The Administrative Law Judge issued a preliminary recommendation recommending that a hearing be denied.
- On November 29, 2006, the State Personnel Board issued an order denying the petition for hearing.

Christine Paulsen v. Department of Transportation, 2007G015, 2007G031 [2007G015(C)] – *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation for disclosing, verbally and by e-mail, concerns with legality of new direction of the Programmatic Environmental Impact Statement project, which violates two or more federal laws and/or regulations, in violation of the Whistleblower Act.
- Complainant filed a second petition for hearing, alleging retaliation for disclosing, verbally and by e-mail, concerns with legality of new direction of the Programmatic Environmental

Impact Statement project, which violates two or more federal laws and/or regulations, in violation of the Whistleblower Act.

- The cases were consolidated.
- The Administrative Law Judge issued a Preliminary Recommendation of the Administrative Law Judge, recommending that a hearing be granted.
- The State Personnel Board issued an order granting the petition for hearing.
- On June 22, 2007, the ALJ dismissed this matter with prejudice.

CrisEllen Wegner v. Department of Labor and Employment, Labor Market Information, 2007G018– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation for an unspecified violation of the Whistleblower Act.
- The Administrative Law Judge issued a preliminary recommendation recommending that a hearing be denied.
- On January 17, 2007, the State Personnel Board issued a Notice of Lack of Quorum, stating that, due to the lack of a quorum, the ALJ's recommendation denying the petition for hearing is a final agency action.

Daniel Marchand v. Department of Personnel and Administration, Central Collection Services, 2007G042– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation for filing a complaint for being called a racist in front of two individuals and other violations of the department, including security violations, in violation of the Whistleblower Act.
- On February 12, 2007, the Administrative Law Judge dismissed this matter for Complainant's failure to respond to an order to show cause.

John B. Pacheco v. Department of Corrections, Fremont Correctional Facility, 2007G044– *a hearing has been granted on the grounds that it appears that a prima facie case of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S., as been established.*

- Complainant filed a petition for hearing, alleging retaliation for providing written evidence to the United States Department of Labor in support of his complaint that the department had violated his rights under Fair Labor Standards Act, in violation of the Whistleblower Act.
- The Administrative Law Judge issued a preliminary recommendation recommending that a hearing be granted, finding that a *prima facie* case of a whistleblower violation may have been established.
- The State Personnel Board issued an order granting the petition for hearing.
- The matter was set for evidentiary hearing, but that hearing has been vacated pending settlement discussions. A status report is due from the parties on or before November 7, 2007.

Kim Fenske v. Department of Transportation, 2007G057– *no finding of a violation of Colorado’s whistleblower statute, 24-50.5-101, et seq., C.R.S.*

- Complainant filed a petition for hearing, alleging retaliation for an unspecified violation of the Whistleblower Act.

- On July 5, 2007, the Administrative Law Judge dismissed this matter for Complainant's failure to respond to an order to show cause.

Ruben Urrutia v. Department of Human Services, Wheat Ridge Regional Center, 2007G062– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant filed a petition for hearing, alleging retaliation for his communication made during the interview regarding a complaint and for declarations made to the appointing authority and residential director, in violation of the Whistleblower Act.
- On March 13, 2007, the Administrative Law Judge dismissed this matter with prejudice on the grounds of lack of jurisdiction.

Roberta Monchak v. Department of Corrections, Division of Adult Parole, Community Corrections and Youthful Offender System, 2007G066– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant filed a petition for hearing, alleging retaliation for disclosure of alleged mismanagement & fiscal improprieties since Spring 2006, in violation of the Whistleblower Act.
- The Administrative Law Judge issued an Order Staying Preliminary Review Pending Final Agency Grievance Decision.
- The matter settled, and is currently awaiting a motion to dismiss.

Kathleen Pignato v. Regents of the University of Colorado, University of Colorado at Boulder, Division of Continuing Education and Professional Studies, 2007G067– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant filed a petition for hearing, alleging retaliation for disclosures made 1/17/07 regarding misdeeds of Assistant Director, in violation of the Whistleblower Act.
- On May 15, 2007, the Administrative Law Judge dismissed this matter with prejudice for Complainant's failure to file an information sheet.

Albert P. Phillips v. Department of Regulatory Agencies, Division of Insurance, 2007G069– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant filed a petition for hearing, alleging retaliation for the disclosure of his intent to file a grievance regarding hostile work environment against a manager, for which Human Resources had copies of emails and other detailed correspondence in support of the grievance, in violation of the Whistleblower Act.
- The Administrative Law Judge issued a preliminary recommendation recommending that a hearing be denied.
- On June 25, 2007, the State Personnel Board issued an order denying the petition for hearing.

Eric Gillespie v. Department of Labor and Employment, Division of Oil and Public Safety, 2007G072, 2007G096– no finding of a violation of Colorado's whistleblower statute, 24-50.5-101, et seq., C.R.S.

- Complainant filed a petition for hearing, alleging retaliation for disclosure of information regarding agency action violating the public interest, in violation of the Whistleblower Act.

- On May 15, 2007, in case 2007G072, the Administrative Law Judge dismissing Complainant's petition on the grounds that Complainant had failed to respond to Respondent's motion to dismiss his whistleblower complainant.
- On June 11, 2007, Complainant filed a second petition for hearing, alleging retaliation for numerous written and verbal disclosures made between November 2006 and the present regarding widespread mismanagement, in violation of the Whistleblower Act.
- The second whistleblower complaint was referred to the agency for a response.
- The cases were consolidated and, following a response to the whistleblower complaint by the agency, the matter has been set for preliminary review.

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