



**Washington State Auditor's Office**

**Troy Kelley**

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**Whistleblower Investigation Report**  
**Washington State University**

**Whitman County**

**For the period July 1, 2013 through June 30, 2014**

**Published October 14, 2013**

**Report No. 1012786**





# Washington State Auditor Troy Kelley

October 14, 2014

Dr. Elson S. Floyd, President  
Washington State University

## **Report on Whistleblower Investigation**

Attached is the official report on Whistleblower Case No. WB 14-008 at Washington State University.

The State Auditor's Office received an assertion of improper governmental activity at the University. This assertion was submitted to us under the provisions of Chapter 42.40 of the Revised Code of Washington, the Whistleblower Act. We have investigated the assertion independently and objectively through interviews and by reviewing relevant documents. This report contains the result of our investigation.

Questions about this report should be directed to Whistleblower Manager Jim Brownell at (360) 725-5352.

Sincerely,

TROY KELLEY

STATE AUDITOR

cc: Heather Lopez, Director, Internal Audit  
Governor Jay Inslee  
Kate Reynolds, Executive Director, Executive Ethics Board

# WHISTLEBLOWER INVESTIGATION REPORT

## Assertion and results

Our Office received a complaint that a scuba instructor at Washington State University was using state resources to promote his outside business.

We found reasonable cause to believe an improper governmental action occurred.

## Background

Washington State University provides scuba instruction as part of its physical education courses; the subject of this investigation began teaching this course in 1982. The subject also owns a business that sells and rents scuba equipment and offers certification dives. The subject said he started this business in order to supply University students with equipment necessary to complete the course; if he had not opened the business, the University would not have continued to offer the course after 1987.

## About the investigation

We conducted interviews and reviewed documentation provided by the University, the subject and witnesses.

During our investigation we found the University had addressed concerns in the past regarding the subject's business and how it was associated with the University.

In 1995 a memorandum of understanding was established between the University and the subject, which outlined conditions that needed to be met by the subject in order to sell and rent his equipment on campus. The memorandum was in place for one year. Once that memorandum expired, there was no written agreement that authorized the subject to sell or rent his equipment on campus. The subject said he had been told that even though the memorandum was not in effect after 1995, the conditions were to remain in place while his company continued to operate at the University. We spoke with the University's current Assistant Attorney General regarding this memorandum, who said that from what information she could gather there was no additional written agreement and it appeared the sales and rentals were going to be offered to students by providing a list of vendors from which equipment could be purchased or rented.

In 2008 the University had concerns regarding its potential liability should a student have an accident due to malfunctioning equipment provided by the subject's company. Additionally, the University had concerns that one of the course handouts provided by the subject to students read as if the University endorsed the company. After minor adjustments were made by the subject to the handout, the administration was satisfied the potential liability issue had been corrected.

At the beginning of the course students are given handouts regarding class information, costs for equipment and background information for the subject and lab instructors. Within the background information, the subject discloses that he is a managing partner for his company. One handout compares the subject's company with "Brand X", which, according to the subject, is a combination of prices he gathered from various scuba businesses in Seattle. One handout reads,

If you are interested in renting gear locally, please request a price list from an independent company from your instructor. WSU is not affiliated with any companies that rent scuba equipment and makes no recommendation regarding which company, if any, to use.

Although this statement serves the purpose of disassociating the University with the company, the use of the word "independent" is not accurate as the price list is for the subject's company. Instructions are provided directing the students to place their orders for equipment during class labs and pay the lab instructors for their orders. The instructors are employees of the University.

Although the subject, at the request of the University, clearly states that certification is not part of the course, he nevertheless includes the certification costs in the class handouts and accepts the money for this on campus. The subject lists the certification as part of a package deal. In the comparison document referenced in the previous paragraph, the subject lists all costs associated with the certification.

When making his pricing comparisons between Brand X and his company, the subject added in the course fees, even though the fees have nothing to do with the costs of the equipment. The subject has been directed not to associate the University with his business. In this same document he also lists the costs of certification, adding \$170 for two nights' accommodation to Brand X and including accommodations in his business' package deal. As part of his business, the subject conducts certification dives from his home on Hood Canal. According to witnesses the accommodations included bunk beds built in the subject's garage, a portable heater and a portable toilet with no shower facilities. The subject provided costs of \$1,543 associated with Brand X and \$719 associated with his business; clearly stating a savings of \$824.

We asked the subject why he used prices from Seattle dive shops and not from a particular dive shop in Spokane. He said the Spokane shop was closed. We found the shop was open and has been for many years and used its prices to compare with the prices the subject provided to the students in his price comparison document. We contacted the owner of the Spokane dive shop and found he has contracts with two universities located in eastern Washington to teach scuba. As with the University, scuba certification is not included in these classes. The owner said any students who wish to get certified contract with his shop outside of the universities.

We found the Spokane company charges up to \$499 for classes, which includes all equipment, books and certification. For the courses taught at the two universities the total charge is \$204, which includes all equipment and books. Certification, as stated above, is not included with the course; however, certification would cost the student up to an additional \$135.

The subject said he was, "explicit and forthcoming about total costs during our first week of class. Students have all cost information so that they can make an informed decision about whether to invest in our scuba classes or not." Considering the disparity between Brand X and the costs of the Spokane dive shop, we question whether the figures provided to the students actually allowed them to make an "informed decision."

We interviewed former scuba students regarding whether they were aware of the subject's relationship to the company. Even though his association is disclosed in a course handout, none of the students were aware he owned the company. Some students believed they were purchasing or renting equipment from the University, while others thought it was a company the University used. Regarding the Brand X versus the subject's business price comparison, one student described the subject as "pushing" his company. Another witness did not think they had a choice to purchase elsewhere. Students said the subject came across as having worked with the business for years, which is why he was able to get them a good deal on equipment. Regarding the certification, three witnesses believed this was part of the class fee paid to the University.

After learning the subject owned the company from which their equipment purchases were made, one witness said, "Now that I know it was for his own business it seems like a pretty good deal. He got a lot of money." Another said, "If I had known that, I would have been more skeptical about the prices he gave and would have done some research to see if I could have gotten better prices somewhere else. I assumed he was looking out for the students and had already done the research. He made it sound as though he had worked with [the company] for years and that's why they offered the students such good prices. He never said he owned it."

Regarding certification, "[subject] said we could go to other dive classes, but they would cost more than getting certified through him, so I did the trip to his house."

Regarding the witnesses statements, the subject said that he cannot control how much, if anything, the students retain or remember from his introductory information. In addition to the information presented in the course handouts, the subject said he also talks about it at the beginning of the course. However, the fact that seven students did not remember the subject telling them he owned the company leads us to question the manner in which he is conveying the information.

In conclusion, we found the subject provided information that is clearly beneficial to his company and has gained a special privilege based on his association with the University. He

uses state resources to store, rent and sell his equipment. Additionally, the subject is using state resources for his company when he "sells" the certification package, which has nothing to do with the course. The University has specifically directed that the certification process not be associated with the course.

## Recommendations

We recommend:

- The University remove the subject's business and all activities relevant to certification from the campus.
- The University provide the students a price list or equipment options for companies, located within 150 miles of the University, in addition to the subject's company's list.
- The subject clearly disclose his ownership of the company on the price list provided to the students.

## University's Plan of Resolution

*We thank the State Auditor's Office for the time and effort invested in investigating this issue. As noted within the report, the University had addressed concerns more than once in the past regarding the subject's private business and the University scuba program.*

*In January 1995, in light of issues raised by the 'new' ethics law that went into effect that year, legal counsel evaluated the University's options for the provision of scuba equipment for scuba courses. One of the three options was to consider the University directly acquire or lease the equipment students would need for the courses (e.g. scuba tank and the equipment to inspect and fill the tanks). Though this seemed viable from a legal perspective, this option was still deemed to incur liability for the University and did not address potential ethics concerns. The other two options, in summary:*

- *Eliminate University involvement in scuba equipment sale or rental. Rather than have a vendor on campus selling or renting equipment to students, have a compensated instructor provide a list at the beginning of class of the various places where equipment may be purchased or rented. The list could include Spokane-area scuba dealers.*
- *Set criteria to select a vendor to come on campus to rent and sell equipment. This would result in a contractual arrangement. Under this option, the subject's private business was determined to be most likely ineligible as a vendor as the new ethics law was interpreted to prevent University employees from receiving anything of economic value from a contract authorized by the University. [Note the current interpretation of the ethics law*

*provides that if a state employee contracts with a state agency, including his/her own employer, the contract may be permissible if it has been reviewed and approved by the Executive Ethics Board as not presenting a conflict with the duties required of the employee's position].*

*In its determination to retain the scuba program the University had, in practice, blended the options presented by legal counsel in 1995. Significantly, because it was determined to be in conflict with the new ethics law, the contract with the subject's private business was not renewed and he was put on appointment as a paid instructor. Further, the subject was instructed to provide students with a list of businesses that rent or sell equipment, and, based on evaluation in 2008, the subject was further instructed to clarify language in handouts to address potential liability and commercial endorsement concerns. The subject did provide a list to students, albeit that list included his private business and a generic company that he argues was meant to be representative of true costs for the program. It is acknowledged the letter of the instruction was not fully met, neither was the intent. However, as the subject and others at the University have indicated, this was due at least in part to the absence of multiple viable vendors in this geographical area over the years, as businesses have changed hands or closed.*

*In 2002, College (of Education) leadership expressed concern with the potential appearance that a faculty member may be receiving a special privilege in the arrangement enabling his private business to provide the tanks and air fills to students, and, allowing this equipment to be housed at the facility. The department evaluated the feasibility of having businesses other than the subject's provide both the tanks and air fills, and provide them on campus for convenience of the students. After contacting local businesses, the department found other scuba businesses in the Spokane-area that would either not supply equipment to Pullman or the cost (to the students) was unreasonable as compared to what the subject's private company was charging. The department made the decision to continue the current arrangement with the subject's private business and permit the business to rent scuba tank and fill to students. This determination was independent of the continued requirement to provide students a list of other businesses that provide the course-required equipment for sale or rent.*

*WSU's scuba program has a reputation as one of the best in the region, and its success has been beneficial to the unit and to the University. The current arrangement, while imperfect, has evolved over time with input from numerous sources, including legal counsel, and appears to have resulted at least in part from a good faith attempt to comply with state ethics laws and to address liability concerns. In light of the current concerns, management has again evaluated the scuba program and explored options for its continued success for the benefit of our students. With this evaluation in mind, our response and corrective action plan is as follows:*

- *The University had long ago determined not to take on the liability associated with acquiring or leasing the scuba equipment. The subject's private business has been providing the scuba tanks (and inspection and fill after every use) to students for rent since at least 1984. Because it is unsafe and inconvenient for the students to bring the tanks on and off campus for each class, a space within the facilities has been made available to house the tanks and fill equipment. For all other equipment individually acquired or rented, lockers have been made available to the students. The department will perform and document periodic price comparisons for provision of this equipment. An agreement will be drafted specific to the scuba tanks and air fill, with clarification for the continued need to house the equipment at University facilities for the safety and convenience of the students.*
- *Students will be provided a full listing of equipment required for completion of the course. Contact information for businesses that rent or sell the equipment may be included in handouts but only if at least one of the businesses is other than the subject's and is within 150 miles of Pullman, and, the contact information is complete and current.*
- *If the subject's private business continues to be included in the list then the subject's ownership interest will be made very clear in any handouts (large font, bold, and at the top of the page(s)). In addition, an obvious disclaimer will be included to make it clear to students that the subject's business is independent of the University.*
- *No further detail on qualifications of any of the businesses in the list will be provided – including qualitative information specific to the subject's historical business relationship with the University.*
- *We agree the 'sell' of certification activities should not be engaged in on campus – even if the activity occurs before and after classes are held. Certification is not part of the University-offered scuba program. However, because certification may be an ultimate goal for those taking the class, it is not considered unreasonable for additional information to be provided to students, including minimum requirements for certification and contact information for local businesses providing the services. Again, the names of more than one business may be provided, with no endorsement of any particular one, so that students who wish to pursue certification may choose how to do so.*

## **State Auditor's Office Concluding Remarks**

We thank University officials and personnel for their assistance and cooperation during the investigation.



## WHISTLEBLOWER INVESTIGATION CRITERIA

We came to our determination in this investigation by evaluating the facts against the criteria below:

### RCW 42.52.070 – Special Privileges.

Except as required to perform duties within the scope of employment, no state officer 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.

### RCW 42.52.160 – Use of persons, money, or property for private gain.

(1) No state officer or state employee may employ or use any person, money, or 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.

### WAC 292-11-010 – Use of state resources.

#### (5) Prohibited uses:

(a) Any use for the purpose of conducting an outside business, private employment, or other activities conducted for private financial gain;

