



Washington State Auditor's Office

Troy Kelley

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Whistleblower Investigation Report

South Puget Sound Community College

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Washington State Auditor Troy Kelley

November 26, 2014

Judy Hartmann, Board Chair
South Puget Sound Community College

Report on Whistleblower Investigation

Attached is the official report on Whistleblower Case No. WB 14-038 at South Puget Sound Community College.

The State Auditor's Office received an assertion of improper governmental activity at the College. 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
OLYMPIA, WA

cc: Ken Harden, Chief Human Resources Officer

Governor Jay Inslee

Kate Reynolds, Executive Director, Executive Ethics Board

Jacque Hawkins-Jones, Investigator

WHISTLEBLOWER INVESTIGATION REPORT

Assertion and Results

Our Office received an assertion that the president of South Puget Sound Community College failed to forward a whistleblower complaint to the State Auditor's Office, as required by state law.

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

About the Investigation

On July 14, 2014, a College faculty member filed a whistleblower complaint with the president (subject) by email. On that same day, the subject responded to the whistleblower in an email and advised:

If you believe anyone at the college has violated a law or ethics standards then you are the one who should file a whistleblower report. It is incumbent upon the individual who believes the law or ethics requirements have been violated to file the report.

Within one year of an asserted improper governmental action, state law (RCW 42.40.040(1)(a)) allows current state employees to file whistleblower complaints directly with the State Auditor's Office or with the following public officials:

- Attorney General's designees.
- Director, or equivalent thereof in the agency where the employee works.
- An appropriate number of individuals designated to receive whistleblower reports by the head of each agency.
- Executive Ethics Board.

Upon receiving a whistleblower complaint, the law requires these public officials to report it to our Office within 15 calendar days. At the College, both the subject and the chief human resources officer are the public officials authorized to receive whistleblower complaints.

The chief human resource officer said he reviewed our website and determined the issues were outside the scope of the whistleblower program and made the decision not to forward the assertion to our Office.

State law does not allow agencies the discretion whether to forward whistleblower complaints to our Office.

College's Plan of Resolution

Thank you for the opportunity to add South Puget Sound Community College's (the College) plan of resolution to whistleblower investigation report number 14-038. For the reasons discussed below, the College believes that the reasonable cause finding is without merit. Nevertheless, the College affirms its commitment to satisfying its obligations under the Washington's whistleblower laws; a commitment that was demonstrated by both the President and Chief Human Resources Officer in their whistleblower responses despite a misunderstanding of the Auditor's referral expectations.

In July, a College faculty member sent a complaint in which a number of assertions were made. The assertions included matters raised in an employee grievance, including allegations that provisions of the collective bargaining agreement between the College and the faculty member had been violated, broad allegations of discrimination, and allegations that the College improperly hired an Adjunct Professor in an emergency situation. The faculty member sent these assertions to the President (who was on extended leave at the time) and the Chief Human Resources Officer, both of whom encouraged the faculty member to file a whistleblower report if he believed violations had occurred. The College also hired an external investigator to look into the allegations of discrimination.

Unfortunately, neither the President nor the Chief Human Resources Officer realized that there was also an affirmative obligation to forward the assertions to the Auditor's office, despite their efforts to determine whether such an obligation existed. To that end, the Chief Human Resources Officer accessed the Auditor's Whistleblower Program webpage. Much like the College's response in this instance, the Whistleblower Program webpage focuses on empowering and encouraging state employees to report suspected improper governmental action and includes a method for filing an online complaint. The webpage also has guidance in the form of frequently asked questions (FAQ).

Among other items addressed in the FAQ document, the Auditor's Whistleblower Program FAQ states:

Can the State Auditor's Office investigate personnel matters?

No. The Whistleblower Act specifically states that improper governmental action does not include personnel matters, for which other remedies exist. These types of actions include, but are not limited to, employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of state civil service laws, labor agreement violations, reprimands or other disciplinary actions.

The following government agencies and labor organizations may assist state employees in dealing with personnel matters . . .

Whistleblower Program FAQ, p. 2.

Based on this information, the Human Resources Director believed that the faculty member's assertion did not fall within the parameters of a whistleblower complaint provisions. As such, beyond encouraging the faculty member to make a direct report if he felt it appropriate to do so, the Chief Human Resources Officer did not forward the assertion to the Auditor's office. Nor is it clear in the FAQ document that he was legally required to do so; the only pertinent language in the FAQ document reads: "Reports may also be filed with a public official or designee, defined as someone who is in a position to pass the assertion on to the State Auditor's Office and act with discretion and in a non-retaliatory fashion." Whistleblower Program FAQ, p. 3 (emphasis added). Nothing in Whistleblower Program FAQ makes it clear that a public official or designee is required to report whistleblower assertions, such as those involving personnel matters, that fall outside the definition of improper governmental action.

Based on the information provided to the College during this investigation, the College now understands that the Auditor's office expects all whistleblower assertions to be reported to the Auditor regardless of whether those assertions fall within the definition of "improper governmental action." This allows the Auditor's office to conduct an investigation into the merits of the allegation.

Because the College acted in good faith in its handling of the assertions and encouraged the faculty member to report the alleged violations if he felt it to be appropriate, the College believes that its failure to forward the allegation to the Auditor's office is nothing more than a minimal or technical violation. The purpose of whistleblower laws is to encourage the disclosure of "improper governmental action," which is defined in terms of egregious misconduct and specifically excludes technical and minimal legal violations. As such, the College believes that there was not reasonable cause to support the finding of improper governmental action in this instance.

Nevertheless, the College embraces the opportunity to improve its knowledge and procedures. The President and Chief Human Resources Officer now understand that they are expected to forward all whistleblower assertions, no matter the subject, to the Auditor's office rather than simply encouraging the whistleblower to file the assertion him or herself. The College will also specifically train its top and mid-level managers in their responsibility to forward all assertions of improper governmental action to the Auditor's office. In addition, the College will annually distribute information about the Whistleblower Program to the general college community.

If the Auditor's office revises its draft whistleblower report in response to the College's statement and plan of resolution, the College requests that any changes to which it was not provided an opportunity to respond are clearly delineated.

State Auditor's Office Concluding Remarks

When a public official receives a whistleblower complaint, state law requires it to be forwarded to our Office within fifteen calendar days. The law does not provide officials the discretion regarding which complaints to forward.

The Whistleblower Act (RCW 42.40) defines the responsibility of the public official who receives a whistleblower complaint, "The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion." Nowhere in this law does it instruct the public official to make a determination whether the State Auditor's Office would investigate the issue.

Regarding the College's definition of an improper governmental action as being "egregious misconduct," that terminology is not found in the law. Although the College finds this violation to be a minimal legal violation, a whistleblower, for which this law was written, who filed an assertion only to have the public official determine its validity and fail to forward the assertion, may not agree. The State Auditor's Office has sole authority to investigate an assertion of improper governmental action including those made to a public official.

Finally, the College highlights the word "discretion" as it relates to the role of the public official receiving a whistleblower assertion. When reading the FAQs, it is apparent this word is used in the context of how the public official should treat the whistleblower and the assertion, as the word is complemented by instructing the public official to act in a "non-retaliatory fashion."

We reaffirm our reasonable cause finding. We thank College 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 42.40.040 – Report of improper governmental action – Investigations and reports by auditor, agency, states in part:

(1)(a) In order to be investigated, an assertion of improper governmental action must be provided to the auditor or other public official within one year after the occurrence of the asserted improper governmental action. The public official, as defined in RCW 42.40.020, receiving an assertion of improper governmental action must report the assertion to the auditor within fifteen calendar days of receipt of the assertion. The auditor retains sole authority to investigate an assertion of improper governmental action including those made to a public official. A failure of the public official to report the assertion to the auditor within fifteen days does not impair the rights of the whistleblower.

(b) Except as provided under RCW 42.40.910 for legislative and judicial branches of government, the auditor has the authority to determine whether to investigate any assertions received.

CONTACTS

Washington State Auditor

Troy Kelley auditor@sao.wa.gov (360) 902-0360

Director of State and Performance Audit

Chuck F. Pfeil chuck.pfeil@sao.wa.gov (360) 902-0366

Deputy Director of State Audit

Jan M. Jutte, CPA, CGFM jan.jutte@sao.wa.gov (360) 902-0363

Audit Manager

Jim Brownell jim.brownell@sao.wa.gov (360) 725-5352

Lead Investigator

Cheri Elliott cheri.elliott@sao.wa.gov (360) 725-5358

Deputy Director of Communications

Thomas Shapley thomas.shapley@sao.wa.gov (360) 902-0367

Public Records Officer

Mary Leider publicrecords@sao.wa.gov (360) 725-5617

Main phone number

(360) 902-0370

Website

www.sao.wa.gov

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