

Introduction

On January 1, 2000, California's Whistleblower Protection Act (WPA) (Government Code sections 8547 *et seq.*) was significantly amended. The Legislature amended this law to strengthen protections for state civil service employees and applicants for state civil service employment who claim that they have been subjected to improper personnel actions because of whistleblowing activities. This Act, together with Government Code section 19683, provides significant protections to state employees and applicants for state employment who engage in whistleblowing activities. State employees and applicants for state employment who believe they have been subjected to improper personnel actions as a result of their whistleblowing activities may file an appeal with the State Personnel Board (SPB) concerning the improper personnel action.

In addition, on January 1, 2002, the Legislature amended the "Reporting by Community College Employees of Improper Governmental Activities Act" (RCCEIGAA) (Education Code sections 87160 *et seq.*) to provide these same protections and appeal rights to community college employees and applicants for community college employment. For purposes of this document, any reference to the WPA also includes the RCCEIGAA.

In 2009, the definition of "employee" under the WPA was expanded. Specifically, the amendments to the definition permitted former employees who met the criteria of a whistleblower during their employment to bring whistleblower claims.

Effective January 1, 2011, the definition of "employee" under the WPA was expanded to include a person employed by the California Supreme Court, a court of appeal, a superior court, and the Administrative Office of the Courts.

If you believe you have experienced an adverse employment action as a result of engaging in a protected activity such as reporting improper conduct or refusing to obey an illegal order, then you may file a Whistleblower Retaliation Complaint with the SPB. If after reviewing the frequently asked questions section and the sample whistleblower complaint, you have questions, you can contact the SPB at **(916) 653-0799**.

Please note that the California State Auditor has jurisdiction to investigate complaints about improper governmental activity. If you wish to report what you believe to be improper governmental activity, please contact the State Auditor's Whistleblower Hotline at **(800) 952-5665**.

The information provided herein is descriptive of existing law as of (date) and is intended to assist the reader in better understanding how the law is applied by the SPB. *The discussion of whistleblower appeals in this publication is not all-inclusive, nor is the information regulatory in nature.* In August 2010, the SPB revised its regulations concerning the whistleblower retaliation complaint

process. Those regulations are located at California Code of Regulations, title 2, sections 67.1 through 67.8.

A copy of a Sample Whistleblower Retaliation Complaint, as well as the pertinent statutes and regulations are located on this website.

Question No. 1

What is "Whistleblowing"?

Whistleblowing is the act of disclosing wrongdoing with the intention of remedying the improper governmental activity.

A disclosure is "protected" if it is a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intent to disclose information that may evidence either (1) an improper governmental activity, or (2) any condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.

An "improper governmental activity" is any activity by a state agency or employee that (1) violates a state or federal law or regulation, including, but not limited to, corruption, malfeasance, bribery, theft of government property, fraudulent claims, fraud, coercion, conversion, malicious prosecution, misuse of government property, or willful omission to perform a duty; (2) is in violation of a Governor's Executive order, a California Rule of Court, or any policy or procedure mandated by the State Administrative Manual or State Contracting Manual; or (3) is economically wasteful, or involves gross misconduct, incompetency, or inefficiency.

In addition, the WPA protects an employee from retaliation for refusing to obey an illegal order. An "illegal order" is any directive to violate or assist in violating a federal, state, or local law, rule, or regulation or any order to work or cause others to work in conditions outside their line of duty that would unreasonably threaten the health and safety of employees or the public.

Question No. 2

What constitutes an adverse employment action based on whistleblowing activities?

Examples of improper adverse employment actions based on whistleblowing activities may include, but are not limited to, disciplinary actions, involuntary transfers, refusals to promote, denials of merit salary increases, suspensions, and terminations.

Question No. 3

Who may file a whistleblower complaint?

Any applicant or employee of a state agency, a community college, the California Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts who reasonably believes that he or she has been subjected to an improper personnel action and that improper personnel action is based, at least in part, on the fact that the applicant or employee disclosed improper governmental activities or refused to obey an illegal order or directive, may file a whistleblower retaliation complaint with the SPB.

In addition, an employee who had been dismissed from his or her employment may file a complaint with the SPB within 12 months of his or her dismissal, provided the dismissal was based, at least in part, on the former employee having participated in protected activities under the WPA.

The SPB does NOT, however, have jurisdiction over whistleblower retaliation complaints filed by employees of, or applicants for employment with, the University of California, California State University, local school districts, or local government agencies.

Question No. 4

Against whom can a whistleblower complaint be filed?

Any employee of a state agency, a community college, the California Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts, who directly or indirectly causes the complaining party to experience an adverse employment action.

Question No. 5

What are the time limits for filing a whistleblower complaint with the SPB?

The complaint must be filed with the SPB within 12 months of the most recent act of reprisal complained about.

Question No. 6

What remedies may the complaining state employee or applicant receive?

If it is determined that an employee or applicant has been retaliated against for having made a protected disclosure, the Board may order any appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit, compensatory damages, and the expungement of any adverse records of

the employee or applicant. The employee or applicant may also request that disciplinary action be taken against any state employee who retaliated against him or her for having made a protected disclosure.

Question No. 7

Who must prove what in whistleblower cases?

The complaining employee or applicant has the burden of proving by a *preponderance of the evidence* that whistleblowing was a contributing factor in the improper personnel action taken against him or her. The employee or applicant may demonstrate that whistleblowing was a contributing factor by showing circumstances such that a reasonable person would conclude that the whistleblowing was a contributing factor in the adverse employment action.

If the employee or applicant meets this burden, the appointing power and any individually named state employees must demonstrate by *clear and convincing evidence* that the complained of action would have occurred even if the complaining employee or applicant had not engaged in whistleblowing. The clear and convincing standard of proof is a higher standard than the preponderance of the evidence standard that the employee must meet.

If the appointing power and individually named employees and former employees meet this burden, the complaining employee or applicant will be afforded an opportunity to establish that the asserted reasons for the complained of actions were merely a pretext for retaliation.

Question No. 8

What should be included in a complaint filed with the SPB?

A complaint filed with the SPB's Appeals Division must: (1) identify the facts that form the basis of the complaint, including, but not limited to: (a) the protected disclosure(s) made by the employee or applicant or the illegal order which the employee or applicant refused to obey; (b) the date(s) the employee or applicant made the protected disclosure or refused to obey the illegal order; (c) the person(s) to whom the employee or applicant made the protected disclosure or whose illegal order the employee or applicant refused to obey; (d) the acts or reprisal or retaliation experienced as a result of the protected disclosure or the refusal to obey the illegal order; (e) the date on which the acts of reprisal or retaliation actually occurred; (f) all information that the employee or applicant possesses that shows that the acts of reprisal or retaliation occurred as a result of the employee's or applicant's whistleblowing activities; (2) include all non-privileged documents, records, declarations and other information in the employee's or applicant's possession that are relevant to the complaint; (3) provide the name and business address of each individual and entity alleged to

have committed retaliatory acts; (4) attach any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the employee or applicant; (5) specify the relief and/or remedies sought, including the disciplinary action, if any, requested against any individual alleged to have retaliated against the employee or applicant; and (6) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the employee or applicant to be true.

Please refer to the provisions of California Code of Regulations, title 2, section 67.2, for a more detailed description of whistleblower complaint filing requirements.

Question No. 9

What will occur after the SPB receives the whistleblower complaint?

The SPB will, within 10 business days of receipt of the complaint, notify the complaining party as to whether the complaint has been accepted or not. If the complaint is not accepted, the complaining party will be afforded an opportunity to file an amended complaint with the SPB. If the complaint or amended complaint is accepted, the parties will be notified of that fact and the matter will be set for an informal hearing before an SPB Hearing Officer. The SPB may direct that a whistleblower matter be consolidated with another separate, but reasonably related SPB appeal under California Code of Regulations., title 2, section 67.8.

The SPB, not the complaining party, will be responsible for serving a copy of the complaint, together with all accompanying documents, on each named respondent. (BUT the complaining party must provide the SPB with a sufficient number of copies of the complaint to be served on each named respondent in addition to one extra copy for the SPB Hearing Officer.)

The hearing will be conducted in accordance with California Code of Regulation, title 2, section 67.5, and the Hearing Officer will question witnesses regarding the allegations contained within the complaint and the respondent's written response. The Hearing Officer may also, in his or her discretion, afford the parties an opportunity to cross-examine witnesses. After the informal hearing has concluded, the Hearing Officer shall prepare a proposed Notice of Findings for review by the Executive Officer, who shall have the authority to adopt, modify or revoke the proposed Notice of Findings and prepare his or her own Notice of Findings based on the information presented during the course of the informal hearing. The final Notice of Findings will be issued within 60 business days of the SPB's acceptance of the complaint, and will indicate whether any of the allegations of retaliation are supported by substantial evidence and, if so, what

the appropriate remedy is under the circumstances. The Notice of Findings will also indicate what disciplinary action, if any, is recommended against any individually named employee found to have violated the WPA.

Question No. 10

What Happens if the Executive Officer Concludes that Insufficient Evidence Exists to Support a Finding of Retaliation?

In those instances where the Executive Officer concludes in the Notice of Findings that insufficient evidence has been presented to establish that the complaining party was retaliated against for having engaged in protected activity under the WPA, the complaint will be dismissed by the Executive Officer. The complaining party will be deemed to have exhausted his or her administrative remedies, and may thereafter pursue whatever judicial remedies are available to him or her under the WPA.

Question No. 11

What Happens if the Executive Officer Concludes that Sufficient Evidence Exists to Support a Finding of Retaliation?

In those instances where the Executive Officer concludes in the Notice of Findings that sufficient evidence has been presented to establish that the complaining party has been retaliated against for having engaged in protected activity under the WPA, the named respondents will be notified of their right to request an evidentiary hearing before an ALJ. If the SPB receives a timely request from one or more of the named respondents, an evidentiary hearing will be scheduled, usually within 60 days of the receipt of the hearing request. All parties to the complaint will thereafter be afforded an opportunity to conduct discovery pursuant to the provisions of California Code of Regulations, title 2, section 59.1. If a timely request for an evidentiary hearing is not received by the SPB, then the Notice of Findings becomes the SPB's final decision regarding the complaint.

Question No. 12

What happens if the Case is scheduled for an Evidentiary Hearing before an ALJ?

An evidentiary hearing will be conducted by an ALJ assigned by the SPB. The hearing may last one to several days. The hearing will be conducted in accordance with SPB rules concerning evidentiary hearings. Witnesses may be called to testify and subjected to cross-examination, and documentary evidence may be introduced.

The burdens of proof and production set forth in Question No. 7, above, are applicable to the evidentiary hearing before the ALJ. The complaining party may represent him or herself during the hearing, or may be represented by a legal representative of his or her choosing.

After the hearing has concluded, the ALJ will, present a Proposed Decision for consideration by the Board. The Proposed Decision will specifically indicate whether any of the allegations of retaliation contained within the complaint are supported by the evidence and, if so, what the appropriate remedy is under the circumstances. The Proposed Decision will also indicate what disciplinary action, if any, is to be taken against any individually named employee found to have violated the WPA.

Question No. 13

What happens after the ALJ issues his or her Proposed Decision?

The Board may adopt, modify, or reject the Proposed Decision. If the Board adopts the Proposed Decision, it becomes the Board's decision in the matter and the Board will order whatever remedy and/or disciplinary action that is set forth in the Proposed Decision.

If the Board modifies the Proposed Decision, it will specifically indicate those portions of the Proposed Decision, including the remedies and/or disciplinary action, that it is modifying. The modified Proposed Decision then becomes the Board's decision in the matter.

If the Board rejects the Proposed Decision, it will notify the parties of that fact. The case will then be scheduled for a hearing before the Board itself.

Question No. 14

What happens if the appeal is scheduled for a hearing before the Board?

Prior to the hearing, the parties will usually be given an opportunity to submit a written brief to the Board for its review. The hearing itself will usually last 30 minutes. Each side to the appeal will be given 15 minutes to present his or her case to the Board. As a general rule, the hearing will be based solely on the evidence presented during the hearing before the ALJ, and no new evidence or witness testimony will be permitted.

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Question No. 15

What happens if one or more parties to the appeal is not satisfied with the Board's Decision?

Any party to the appeal who disagrees with the Board's decision may file a Petition for Rehearing with the Board, in accordance with SPB rules. If the Petition for Rehearing is denied, the aggrieved party may file a Petition for Writ of Mandate in the Superior Court, challenging the Board's decision. *Note: It is not necessary to file a Petition for Rehearing with the SPB prior to seeking relief in the superior court.*

Question No. 16

Where can I find more detailed information?

More detailed information concerning the whistleblower complaint process can be found at Education Code sections 87160 - 87164, Government Code sections 8547 - 8547.12 and 19683, and Penal Code section 6129. You can also refer to the SPB's regulations, located at California Code of Regulations, title 2, sections 67.1 - 67.8.

For your convenience, links to the above-listed statutes and regulations are available on this website.

Question No. 17

Who can I contact at the SPB?

Individuals can telephone the **SPB at 916-653-0799** to discuss the whistleblower complaint process with SPB staff. Please note that SPB staff cannot provide legal advice to any party concerning a whistleblower retaliation complaint, but they can explain the complaint process to interested parties.

Whistleblower complaints should be submitted to the following address:

State Personnel Board
801 Capitol Mall
Sacramento, CA 95814
Attn: Appeals Division