

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2012G041

PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE

SUZANNE R. SIGONA,
Complainant,

vs.

DEPARTMENT OF HEALTH CARE POLICY & FINANCING,
Respondent.

Complainant petitions the State Personnel Board (Board) to grant a discretionary, evidentiary hearing to review the appointing authority's response to her grievance. The question presented for purposes of this preliminary recommendation is whether valid issues exist which merit a full evidentiary hearing. It is the recommendation of the undersigned administrative law judge that a hearing be **denied**.

SUMMARY

Complainant, a certified General Professional (GP) IV employed by Respondent Department of Health Care Policy and Financing (DHCPF), filed a petition for hearing on November 10, 2011, asserting that her supervisor, Dr. Judy Zerzan, has been arbitrary and capricious in Complainant's performance evaluation and that Dr. Zerzan has demonstrated her abuse of power in instructing Complainant to remove comments from the performance evaluation. Complainant is also disputing the accuracy of claims made by Susan Birch, her appointing authority, as to the investigation of Dr. Zerzan's alleged dishonesty. Complainant filed a Whistleblower Act complaint with her petition for hearing, alleging that Respondent retaliated against her for certain disclosures of information she made regarding Dr. Zerzan. As relief, Complainant requests that: Dr. Zerzan be disciplined for dishonest and unprofessional actions, that Complainant's performance evaluation reflect her work and contributions and be done in a fair and equitable manner, that DHCPF provide financial compensation for the losses endured by Complainant, and that DHCPF restore her trial service grade of GP V, salary and benefits retroactive to July 11, 2011.

Respondent argues that Complainant failed to meet her burden of showing that grounds exist under § 24-50-123(3), C.R.S. and/or Board Rule 8-46 that merit a full hearing; the Board does not have statutory authority to grant a hearing in this matter regarding Complainant's Whistleblower allegations because Complainant has failed to demonstrate any "disclosure of information" as defined by § 24-50.5-102(2), C.R.S.; Complainant's alleged "disclosure of information" is not a matter of public concern because it is a personal dispute with a supervisor; Complainant has failed to demonstrate any "disciplinary action," as defined by § 24-50.5-102(1), C.R.S. or that any disclosure of information was a substantial and motivating factor of a disciplinary action; Complainant has failed to demonstrate that her appeal was filed in a timely manner; Complainant has failed to demonstrate a good faith effort to provide to her supervisor or appointing authority the information to be disclosed prior to the time of its disclosure; and an employee who fails to perform satisfactorily in trial service does not have a right to a hearing.

UNCONTROVERTED FACTS

The following facts were either included in both parties' information sheets, were contained in exhibits that were not disputed by either party, or were not controverted by either party:

Procedural Background

1. Complainant filed the petition for hearing that forms the basis of this appeal on November 10, 2011. The petition for hearing appeals Respondent's final written grievance decision dated November 2, 2011. Complainant's grievance was focused on a performance evaluation issued to her by Respondent.

2. Complainant previously filed a petition for hearing with the Board on July 21, 2011 ("first petition for hearing" or "Case No. 2012G007"). The first petition for hearing challenged Respondent's decision to revoke Complainant's trial service. Both parties filed information sheets, and the ALJ issued a Preliminary Recommendation on December 8, 2011. The Preliminary Recommendation recommended that a hearing be denied. Footnote 1 of the Preliminary Recommendation noted that Complainant had filed a new petition for hearing on November 10, 2011, and that the Preliminary Recommendation addressed only the factual allegations up to the date of Complainant's first petition for hearing. On December 21, 2011, the Board issued an Order approving the Preliminary Recommendation and denying Complainant's first petition for hearing.

3. In her information sheet for this appeal, Complainant repeats many of the factual allegations and arguments that were the subject of the first petition for hearing and the December 8, 2011 Preliminary Recommendation. To avoid confusion and unnecessary repetition, this Preliminary Recommendation will focus on the factual allegations and arguments relative to Complainant's November 10, 2011 petition for hearing - those factual allegations which were not addressed in Case No. 2012G007.

Factual Contentions

4. Until July 11, 2011, Complainant's supervisor was Dr. Judy Zerzan, Chief Medical Officer and Deputy Medicaid Director for DHCPF.

5. Complainant had a six-month trial service period in a GP V position - Manager of the Quality and Health Improvement Unit. The trial service period was from January 10, 2011, until July 10, 2011. Respondent asserted that Complainant performed unsatisfactorily in this position. On July 10, 2011, Complainant was reverted to a GP IV position within DHCPF's HR Department. This transfer removed Complainant from Dr. Zerzan's supervision. The alleged facts relative to the trial service reversion are fully set forth in the December 8, 2011 Preliminary Recommendation for Case No. 2012G007.

6. Complainant received an overall "Needs Improvement" performance evaluation for the trial service period ending July 11, 2011.

7. Based on the accusations contained in Complainant's first petition for hearing, DHCPF retained an outside third-party investigator, Cathy Havener Greer, an attorney with Wells, Anderson & Race, LLC, to review Complainant's claims of abusive, bullying and

dishonest behavior, which purportedly created a hostile work environment. The investigator met with Complainant on August 9, 2011.

8. On September 9, 2011, Complainant filed a grievance regarding her performance evaluation. The performance evaluation was signed by Dr. Zerzan on August 22, 2011 and by Complainant on September 8, 2011. Dr. Zerzan and Suzanne Brennan, Medicaid Director, met with Complainant several times to respond to her requested revisions to the performance evaluation. Certain modifications were made to the performance evaluation. On October 3, 2011, Complainant filed a step II grievance with Ms. Birch, her appointing authority. Within the grievance, Complainant alleged that Dr. Zerzan was dishonest and bullied her, and that she was "exercising her authority to harm me as an employee of the Department."

9. At the time Complainant filed her step II grievance, the third-party investigator was reviewing Complainant's allegations of bullying, dishonesty, and hostile work environment.

10. Due to a personal health condition, Dr. Zerzan was out of the office for most of October 2011, and was unable to finalize the modifications to the performance evaluation. In addition, DHCPF was awaiting the findings from the third-party investigator.

11. On October 31, 2011, Ms. Birch contacted Complainant and requested an extension of time to review the step II grievance. Complainant denied the request. On November 2, 2011, based on the information she possessed, and absent the completed investigation, having found no evidence of misconduct, Ms. Birch denied Complainant's request that Dr. Zerzan be disciplined. Ms. Birch granted Complainant's requested relief for a performance evaluation that accurately reflected performance specific conduct. In the final grievance decision, Ms. Birch stated that Dr. Zerzan and Ms. Brennan were working with Complainant on revising the performance evaluation.

12. On November 7, 2011, Ms. Greer completed her investigation and report. Ms. Greer found no evidence supporting Complainant's claim that Dr. Zerzan acted in an abusive or bullying way toward Complainant. On November 10, 2011, Complainant filed the petition for hearing based on the investigator's findings and the final grievance decision.

13. On November 30, 2011, after a request from the Board for additional information regarding the basis for appeal, the Complainant alleged Whistleblower violations and attached a Whistleblower complaint to the petition for hearing.

14. On January 26, 2012, Complainant met with Ms. Brennan to discuss Complainant's performance evaluation. During the meetings with Complainant, Dr. Zerzan and Ms. Brennan revised Complainant's performance evaluation. Complainant's evaluation was finalized on January 26, 2012, and remained as an overall "Needs Improvement."

15. Complainant timely appealed the November 2, 2011 written grievance decision to the Board.

16. Both parties timely filed information sheets.

COMPLAINANT'S CONTENTIONS

As relief, Complainant requests that a hearing be granted. If the hearing is granted, Complainant offers to prove the following allegations at hearing:

1. Dr. Judy Zerzan has instituted bullying activities to continue to negatively impact Complainant since Complainant's transfer from her unit.

2. Dr. Zerzan's actions are in retaliation for the April 2011 and June 2011 disclosures to Complainant's acting director (Laurel Karabotsos) that Dr. Zerzan was misusing her power and failing to perform her job.

3. Information was disclosed to Janice Smuda, the HR Director, through the third party investigator, that Dr. Zerzan had abused her power by conducting business for her part-time employment at the DHCPF office, including having personal patient information faxed to DHCPF's office in violation of HIPAA regulations. Dr. Zerzan has escalated actions against Complainant for Complainant's disclosing that Dr. Zerzan was conducting personal business at DHCPF.

4. Judy Zerzan's actions constitute a waste of state funds by conducting the work of her outside employment while being paid by the state. She has abused her authority by manufacturing claims in Complainant's performance evaluation to substantiate a rating that is inaccurate. She demonstrates her abuse of power and arbitrary and capricious activities by assigning Complainant a negative rating in the face of evidence to the contrary. She presents information as though it is fact. All of these acts contribute to her mismanagement as an appointing authority in DHCPF.

5. Dr. Zerzan has retaliated against Complainant for this disclosure through arbitrary and capricious actions and by orchestrating a "needs improvement" evaluation.

6. Judy Zerzan failed to comply with Board Rule 6-3 by failing in her responsibility of "evaluating performance in a timely manner in accordance with rule." Complainant transferred from her area of supervision on July 11, 2011. Although the system shows a "modification date" of September 7, 2011, the performance plan was not completed in the time frame required by Board Rule. Although Complainant's initials appear in the area of the modification, this document was not presented to Complainant at that time. Complainant has copied the page as it existed when it was presented to her at the end of August 2011. In Complainant's comments section, she references the possibility that her initials may appear because the electronic system may not allow her to access the document without completing that step. The electronic system does not provide a notation of the date Complainant electronically completed that field on the form.

7. Dr. Zerzan abused her power by directing Complainant to remove specific comments in the document. This directive was given to Complainant during an informal session related to this grievance. When Complainant failed to remove the comments, the comments of the supervisor and Complainant's comments were deleted at Dr. Zerzan's direction. This electronic copy remained in that status until the afternoon of January 25, 2012.

8. Judy Zerzan continued her violation of Board Rule 6-3 by not having Complainant's evaluation completed in the time frame, only to manufacture a new evaluation that was presented to her on January 25, 2012. The document was given to Complainant during a meeting on that date – more than six months after leaving the supervision of Dr. Zerzan. It was completed by Dr. Zerzan on November 21, 2011, in violation of Director's Administrative Procedure 6-4

9. Ms. Birch condoned and endorsed this violation of Administrative Procedure 6-4 by "reviewing" the document (with electronic signature) on January 21, 2012. Administrative Procedure 6-4 provides that "If an employee moves to a position under another appointing authority or department during a performance cycle, an interim overall evaluation shall be completed and delivered to the new appointing authority or department within 30 days of the effective date of the move."

10. Judy Zerzan was presented with facts, emails, and details that clearly demonstrate that her claims are false, but she arbitrarily and capriciously has maintained her position even in the presence of facts to the contrary. In a further abuse of power she has not applied the same standards to all employees she supervises.

11. Complainant filed a grievance based on Judy Zerzan's failure to be trained as a rater in violation of Administrative Procedure 6-4A. Training may allow her to comprehend the structure of truth-based, performance-specific reference in a rating tool versus the philosophical banter that she has calculated to support her position. The comments within the evaluation presented to Complainant on January 25, 2012, further demonstrate that she concurs with Complainant's ability to perform her duties, but she has continued her pattern of retaliation by identifying an isolated activity as the hinge for a negative rating.

12. If a hearing is granted, Complainant may call the following witnesses:

A. Laurel Karabotsos, Deputy Medicaid Director, will testify regarding conversations and concerns raised by Complainant. She will also testify to the deadlines missed by Judy Zerzan due to her commitments of outside employment.

B. Judy Zerzan, Deputy Medicaid Director, will testify to her receiving confidential medical documents to DHCPF's fax machine and leaving them in public area. She will also testify to the use of those documents. Further, she will testify to information provided on various ratings and the lack of accuracy of the information. She will also testify to directing Complainant to remove information in the comment section of the Performance Plan and her eventual actions to delete the employee comments.

C. Patricia Connelly, Assistant to Judy Zerzan, will testify to the frequency of Judy Zerzan's use of Ms. Connelly's personal resources to manage the work of Ms. Zerzan's outside employment and the activities she observed related to Ms. Zerzan's outside employment while at DHCPF. She will also testify to Judy Zerzan's schedule availability on behalf of DHCPF from January 1, 2011, through July 11, 2011.

D. Katie Brookler, QHI Acting Manager, will testify to personal observations and complaints regarding the activities of Judy Zerzan, her expressed concerns over Ms. Zerzan's lack of availability and knowledge of the work. She will also testify to her conversation with Complainant over her observation that Ms. Zerzan was attempting to drive Complainant out of position 4191. Ms. Brookler will also testify to the issues of performance by the prior manager (John Barry) who eventually became the obstacle to performance of the QHI unit.

E. Gina Robinson will testify to the efforts made by Complainant to supervise the position and the failure of Judy Zerzan to comply with Board Rules.

F. Suzanne Brennan will testify that she was party to deleting the comments in the Performance Plan and that the comments were not in the Performance Plan electronic record until January 25, 2012. She will also testify to the performance of John Barry while managing the Long Term Care Benefits unit that prevented Complainant from being successful with the intervention in that unit.

G. Cathy Havener Greer, Attorney, Wells, Anderson & Race, LLC, will testify that Complainant did seek another appointment with her but that she prepared her report without responding to Complainant's request. She will also testify that she did not interview anyone who could support Complainant's testimony. She will also testify to her lack of familiarity with state policy related to bullying in the workplace and the conduct that constitutes bullying.

H. Janice Smuda, Manager of Human Resources, will testify that Complainant disclosed the activity of Judy Zerzan by receiving paperwork of her outside employment and the related HIPAA violation. She will further testify that she provided direction to give the information to the outside investigator.

I. Human Resources Timekeeper will testify that Judy Zerzan did not use leave during the times that she is involved with outside employment.

J. Susan Birch, Executive Director, will testify to the number of days Judy Zerzan was available in DHCPF to perform her duties during the period from January 1, 2011, through July 11, 2011. She will also testify that she had full knowledge of Judy Zerzan's outside employment and her lack of availability and that these actions were sanctioned by the Executive Director. She will also testify to the performance of John Barry while managing the Long Term Care Benefits unit that prevented Complainant from being successful with the intervention in that unit, thus demonstrating the arbitrary rating for Complainant.

13. As exhibits, Complainant proffers the following:

- A. PDQ file original filing;
- B. Copy of GP V exam and responses used to rate Complainant's qualifications for Position 4191;
- C. Performance Plan presented (in written form) by Suzanne Brennan on January 25, 2012, with comments prepared by Complainant.

14. As relief, Complainant seeks the following remedy:

- A. DHCPF will institute measures to prevent Judy Zerzan from having supervisory responsibilities until she has been properly trained on state rules and human resources regulations.

- B. DHCPF will be judicious in monitoring Judy Zerzan's activities so that she can no longer be disruptive to Complainant's work through her bullying and controlling conduct.
- C. DHCPF will maintain equity in expectations related to work and outside employment in dealings with all employees of DHCPF.
- D. DHCPF managers will comply with Board Rules related to performance management.
- E. DHCPF will restore Complainant's grade of GP V and the related pay to the position.
- F. DHCPF will remove all negative documents from records for Complainant.
- G. Judy Zerzan will be restricted from ever providing a professional reference for Complainant.
- H. DHCPF will restore funds and related benefits for the period subsequent to the initial personnel action that reduced pay and related benefits.
- I. DHCPF will provide additional settlement funds (\$15,000.00) that will allow Complainant's recovery from ancillary losses related to the initial action.

RESPONDENT'S CONTENTIONS

As relief, Respondent requests that Complainant's petition for hearing be denied, as Complainant has failed to meet her burden of showing that valid issues exist that merit a full hearing. Respondent offers to prove the following allegations at hearing:

1. Complainant's petition presents the question of whether valid issues exist that merit a full evidentiary hearing. Complainant continues to appeal her July 10, 2011 trial service reversion for unsatisfactory performance, appealed in Case No. 2012G007. Complainant makes new claims of Whistleblower Act violations, which do not fall under the Act and which are barred under § 24-50.5-104, C.R.S. (2011). Complainant did not file a written complaint with the Board within 10 days of the alleged actions, nor has she demonstrated any reasonable communication regarding the alleged violations. *Id.* Complainant makes new Whistleblower allegations pertaining to alleged misconduct from July 2011, and yet never raised these new allegations as a basis for her trial service reversion in her first appeal on July 21, 2011. Moreover, Complainant did not disclose her current Whistleblower allegations for incidents that allegedly occurred in July 2011 within the step II grievance submitted to Ms. Birch in October 2011.

2. Complainant reasserts similar, if not identical, claims she made in Case No. 2012G007. Specifically, she claims that she is entitled to reinstatement to her GP V position. In addition, Complainant fails to cite any statutory authority to grant a hearing on the asserted issues and has failed to establish grounds that merit a hearing pertaining to the newly contrived Whistleblower claims.

3. The third-party investigator interviewed Complainant and spent considerable time reviewing documents provided by Complainant that she claimed supported her allegations. Complainant submitted over 100 pages of documents to the investigator – none contains any written or verbal disclosure of alleged Whistleblower violations claimed in this appeal. Simply, Complainant never provided or disclosed information to the third-party investigator that Dr. Zerzan violated the Whistleblower Act, as she now alleges in this appeal. The third party investigator's report does not make any reference to allegations concerning Dr. Zerzan's use of state time or resources for a part-time business.

4. Complainant's information sheet does not identify the date the alleged Whistleblower Act violations were allegedly disclosed to Ms. Smuda.

5. Dr. Zerzan has conducted some outside employment approved by DHCPF directly and for the direct purpose of her position as the Chief Medical Officer and Deputy Medicaid Director for DHCPF. Dr. Zerzan was approved for outside employment because it directly improves her job knowledge for DHCPF. Dr. Zerzan's outside employment does not implicate the Whistleblower Act, or otherwise support Complainant's contentions.

6. Dr. Zerzan denies using state time or resources for outside employment, or having patient information faxed to her at DHCPF's offices. Dr. Zerzan denies receiving any information regarding Complainant's allegations of misuse of state time or resources until she reviewed Complainant's November 30, 2011 Whistleblower complaint.

Legal Argument

7. Complainant has the burden of demonstrating the existence of valid issues which merit a hearing by showing that there is an evidentiary and legal basis that would support a finding that the action was arbitrary, capricious, or contrary to rule or law, and that the relief requested by Complainant is within the Board's statutory authority. Board Rule 8-50(G). The action that is the subject of the petition for hearing will not be reversed or modified unless it is found to be arbitrary, capricious, contrary to rule or law, or in violation of the grounds set forth in § 24-50-123, C.R.S. Board Rule 8-49.

8. The Board does not have the statutory authority to grant Complainant a hearing in this matter because Complainant continues to appeal her trial service reversion under Board Rule 4-44, only under newly created Whistleblower claims. Further, Complainant has failed to demonstrate that any valid legal issues exist that merit a hearing under the new allegations.

I. The Board Does Not Have Statutory Authority to Grant a Hearing in this Matter Regarding Complainant's Whistleblower Allegations.

9. Complainant fails to define any action by DHCPF that merits a full evidentiary hearing within the Board's jurisdiction, and fails to provide any legal or statutory authority to grant a full evidentiary hearing based on her claims, or that the Board can grant the relief she has requested to reinstate her to a GP V position.

10. When reviewing a petition for hearing for a grievance decision, the Board may "grant the petition only when it appears that the decision of the appointing authority violates the employee's rights under the federal or state constitution, part 4 of article 34 of this title [the Colorado Anti-Discrimination Act], article 50.5 of this title [the Whistleblower Act], or the grievance procedures...." § 24-50-123(3), C.R.S. (emphasis added).

11. Complainant's appeal demonstrates that she continues to appeal her July 2011 trial service reversion for unsatisfactory performance under Board Rule 4-44. Colorado law and Board Rules are explicit – an employee who is reverted for unsatisfactory performance during a trial service period is not entitled to a hearing. C.R.S. § 24-50-112.5(5)(b) (2011) (“Unsatisfactory performance shall be grounds for dismissal of the person by the appointing authority during such probationary period without right to an appeal. Any certified employee who is promoted to a different class or position and who fails to perform satisfactorily during the probationary period shall be reverted to a position in the former certified class or be disciplined.”) (emphasis added); see also Board Rules 3-14(A), 4-43, and 4-44.

12. Further, Complainant has not made any allegation of discrimination. Because Complainant's claims either do not fall within § 24-50-123(3), and she has failed to demonstrate any violation of the Whistleblower Act or grievance procedures, the Board may only grant a hearing in its discretion under Board Rule 8-46(A). Here, it appears that Complainant is disputing her performance evaluation and alleges that DHCPF violated the Whistleblower Act by reverting her to a GP IV position based on a purported disclosure of information that implicated the Act.

A. Complainant Has Failed to Demonstrate Any “Disclosure of Information” as defined by § 24-50.5-102(2), C.R.S.

13. For Complainant to have protection under the Act, she must have made a “disclosure of information.” See § 24-50.5-102(2) C.R.S. “Disclosure of information” is defined as the “written provision of evidence to any person or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency.” A disclosure of information may also be verbal. *Ward v. Indus. Comm’n*, 699 P.2d 967, 968 (Colo. 1985).

14. Although the statutory definition for disclosure does not use the phrase “public concern,” the Whistleblower Act clearly contemplates that such disclosures by state employees must relate to information about agency conduct contrary to the public interest. Therefore, disclosures that do not concern matters in the public interest, or are not of public concern, do not invoke this Act. See *Ferrel v. DOC*, 179 P.3d 178, 186 (Colo. App. 2007).

15. Here, Complainant has failed to produce any evidence in her appeal or Information Sheet of a disclosure of information protected under the Act. Instead, she alleges that Dr. Zerzan “has escalated actions against me for disclosing that she was conducting business of her outside employment at the office of Health Care Policy and Financing.” Other than the vague claim that she spoke to Ms. Smuda, there is no documented evidence of any disclosure of information protected under the Act. Neither Complainant's Whistleblower Complaint nor Complainant's Information Sheet provides any detail regarding this alleged conversation. Dr. Zerzan has stated that she has no awareness of any disclosure of information regarding her outside employment and that her outside employment benefits DHCPF and was approved when she was hired. Affidavit, p. 4. Dr. Zerzan's outside employment at the University of Colorado Clinic for eight hours per month is not a matter of public concern or public interest, and therefore does not invoke the Act.

16. Moreover, there is no evidence that Complainant ever spoke with Dr. Zerzan regarding her allegations presented in this appeal. If so, it is reasonable to presume that Dr.

Zerzan would have explained to Complainant that her outside employment has been approved since the beginning of her employment with DHCPF in 2011. Other than the vague assertions above without any detail about the alleged disclosure, Complainant has altogether failed to provide any facts supporting a disclosure of information. See *Ferrel*, 179 P.3d at 187-88 (“vague and sweeping generalities” do not constitute a disclosure of information on a matter of public concern).

B. Complainant’s Alleged “Disclosure of Information” as defined by § 24-50.5-102(2) is Not a Matter of Public Concern because it is a Personal Dispute with a Supervisor.

17. In reviewing a whistleblower complaint and deciding how to classify the speech, the court focuses on the speaker’s motive and whether the speech was calculated to redress personal grievances or whether it had a broader public purpose. Individual personal disputes, internal policy concerns or issues with supervisors typically fall under the personal grievance category and not as a whistleblower disclosure. *Gansert v. Colorado*, 348 F.Supp.2d 1215, 1222 (D. Colo. 2004) citing *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996).

18. Complainant never disclosed anything that the Act protects. Complainant’s allegation embodies an individual personal dispute, internal policy concern, and issues with a supervisor. See Complainant’s Information Sheet. Complainant makes several vague allegations of “bullying” and “abusive behavior” from Dr. Zerzan. Complainant claims that there was a violation of the Whistleblower Act because Dr. Zerzan allegedly took “calculating actions towards me that resulted in harm to me personally and professionally” and that Dr. Zerzan “instituted bullying activities to continue to negatively impact me since my transfer from her unit.” Based on the accusations, it is easy to deduce that this appeal is intended to address a personal grievance with Dr. Zerzan, and is not driven based on Complainant’s potential public concern.

19. Complainant further claims “Judy Zerzan’s actions are in retaliation for the disclosure to her acting director (Laurel Karabotsos) that Judy Zerzan was misusing her power and failing to perform her job.” Even in these allegations, she makes no claims that form a legal basis for granting a hearing pursuant to § 24-50-123(3), C.R.S. Complainant’s Information Sheet demonstrates that Complainant’s allegations are personal in nature and appear as a retributive response for her trial service reversion in July 2011. Moreover, Complainant’s Information Sheet does not allege anything that rises to the level of protection under the Act. Complainant’s personal grievance against Dr. Zerzan and her frustration that she was not successful during her trial service period falls under the personal grievance category and is not a Whistleblower disclosure.

C. Complainant Has Failed to Demonstrate Any “Disciplinary Action” as defined by § 24-50.5-102(1), C.R.S., or that Any Disclosure of Information was a Substantial and Motivating Factor of a Disciplinary Action.

20. For Complainant to have protection under the Act, she must demonstrate she was subject to a “disciplinary action.” See § 24-50.5-102(1), C.R.S. The Act defines a disciplinary action broadly, but it must be initiated or administered “on account of the employee’s disclosure of information.” See § 24-50.5-103(1). Complainant was reverted during her trial service for unsatisfactory performance. Affidavit, pp. 1-3. Complainant has not demonstrated any evidence she was reverted to a GP IV on account of a “disclosure of information” as defined in the Act. Complainant has not provided any dates regarding her alleged disclosure or that Dr.

Zerzan was aware of any disclosure, much less any evidence that she was reverted “on account of” a disclosure of information protected under the Act. Complainant has both failed to demonstrate a disclosure of information and has failed to demonstrate any basis to believe that any alleged statements were a substantial or motivating factor behind Dr. Zerzan’s decision to revert Complainant to a GP IV.

21. Complainant was reverted to a GP IV position after she performed unsatisfactorily as a supervisor in the Quality and Health Improvement Unit. DHCPF was entitled to review Complainant’s performance in her new role under Colorado law and Board Rules. See *Martinez v. DPA*, 159 P.3d 631, 633 (Colo. App. 2006) (“The legislature ... has determined that probationary periods are important to ensure the suitability of an employee for a new class or position that is obtained by promotion, requested transfer or reallocation. The statute reflects legislative recognition that a person who is competent in one job may not perform satisfactorily in a different position”) (internal citation omitted). Complainant demonstrated that she was not competent to perform the duties of a GP V Manager. Thus, DHCPF was within its right to revert Complainant to a GP IV. There was no retaliation.

D. Complainant Has Failed to Demonstrate that Her Appeal was Filed in a Timely Manner.

22. For Complainant to assert a claim under the Whistleblower Act, it must be timely appealed. Section 24-50.5-104(1), C.R.S. provides in part,

[a]ny employee may file a written complaint with the state personnel board within ten days after the employee knew or should have known of a disciplinary action alleging a violation of 24-50.5-103 if the employee demonstrated that reasonable communication to the employee’s supervisor, appointing authority, or member of the general assembly has occurred in regards to the alleged violation.

23. According to Complainant’s Information Sheet and Whistleblower Complaint, the alleged disciplinary action for her disclosure of information was her trial reversion in July 2011, and possibly in August 2011 when she claimed she made an additional disclosure of information under the Whistleblower Act. For her allegations specific to this appeal, Complainant did not file a written complaint with the Board within 10 days after she knew or should have known of her claimed disciplinary action due to disclosure. Thus, her appeal is untimely and should be dismissed on this basis alone.

E. Complainant Has Failed to Demonstrate a Good Faith Effort to Provide to Her Supervisor or Appointing Authority the Information to be Disclosed Prior to the Time of its Disclosure.

24. The Act states that a prerequisite to disclosure must be fulfilled. The statute requires the employee to “make a good faith effort to provide to his supervisor or appointing authority or member of the general assembly the information to be disclosed prior to the time of disclosure.” See § 24-50.5-103(2), C.R.S.

25. Complainant’s Whistleblower Complaint refers to conversations with Medicaid Director Laurel Karabatsos, Dr. Zerzan’s supervisor, and a purported conversation with Janice Smuda, DHCPF’s Director of HR, on an unspecified date. Complainant’s claimed communication appears to have followed her trial service reversion in July 2011, demonstrating that the alleged disclosure of information does not qualify as a good faith communication made

prior to the time of disclosure. To further support the lack of good faith from Complainant, there is no evidence that she ever spoke to or provided information to Dr. Zerzan regarding the alleged Whistleblower violations. It was not until responding to this appeal that Dr. Zerzan was made aware of Complainant's allegations. Complainant has not met her burden regarding disclosure of the waste of public funds, abuse of authority, or mismanagement of any state agency. See § 24-50.5-103(2).

II. An Employee that Fails to Perform Satisfactorily in Trial Service Does Not Have a Right to a Hearing.

26. As stated above, Board Rule 4-44 provides that “[a]n employee who fails to perform satisfactory during trial service shall revert to an existing vacancy in the previously certified class in the current department with no right to a hearing...” Complainant does not have a right to a hearing because she was reverted to a GP IV position after her unsatisfactory performance during the trial service period. The rule is explicit – when an employee demonstrates unsatisfactory performance, the appointing authority can either revert the employee to the previously held class or administer corrective or disciplinary action. Dr. Zerzan considered all of the information regarding Complainant's poor supervision and determined reversion was appropriate and necessary considering all of the circumstances.

27. If a hearing is granted, Respondent may call the following witnesses:

A. Joan Henneberry, Health Management Associates, will testify about hiring Dr. Zerzan and the advantages of the Chief Medical Officer maintaining clinical time for DHCPF.

B. Sandeep Wadhwa, MD, 3M. Mr. Wadhwa will testify about his clinical time while he was Medicaid Director/Chief Medical Officer at DHCPF.

C. Judy Zerzan, Chief Medical Officer/Deputy Medicaid Director, will testify to her supervision of Complainant, the trial service reversion decision, the Board Rule 6-10 meeting, and any other information that she may have regarding Complainant.

D. Suzanne Brennan, Medicaid Director, will testify about her meetings with Complainant as part of the grievance processes.

E. Janice Smuda, Director of HR, will testify to DHCPF's policies and procedures, the Board Rule 6-10 meeting held with Complainant, and any other information that she may have regarding Complainant.

F. Susan Birch, Executive Director, will testify to meetings she had with Complainant regarding performance related issues and exit interviews with employees who worked under Complainant and discussed issues they had with Complainant's supervision, responding to Complainant's step II grievance, and any other information that she may have regarding Complainant.

G. Laurel Karabatsos, Deputy Medicaid Director, will testify to meetings with Complainant, discussions and coaching she had with Dr. Zerzan about Complainant's performance issues, about her conversations with Complainant and her lack of knowledge about any of Complainant's concerns regarding the

waste of public funds, abuse of authority, or mismanagement of DHCPF under the Whistleblower Act, and any other information that she may have regarding Complainant.

H. Patricia Connelly, Administrative Assistant, will testify about Dr. Zerzan's appropriate use of DHCPF resources, observations regarding Complainant's performance and scheduling meetings for Ms. Brennan and Dr. Zerzan for Complainant.

I. Sue Williamson, Colorado Children's Campaign, will testify about discussions about Gina Robinson's transfer to the QHI unit, and any other information that she may have regarding Complainant.

J. Maggie Reyes-Leczinski, Physician Health Partners, will testify to her experience with Complainant's supervision, her reasons for leaving DHCPF, and any other information that she may have regarding Complainant.

K. Kimberly deBruynKops, Physician Health Partners, will testify to her experience with Complainant's supervision, her reasons for leaving DHCPF, and any other information that she may have regarding Complainant.

L. Alex Peck, Physician Health Partners, will testify to his experience with Complainant's supervision, his reasons for leaving DHCPF, and any other information that he may have regarding Complainant.

M. Katie Brookler, QHI Acting Manager, will testify to her experience with Complainant's supervision and any other information that she may have regarding Complainant.

N. Lisa Waugh, Health Initiatives Policy Specialist, will testify about her experience with Complainant's supervision and any other information that she may have regarding Complainant.

O. Jerry Ware, Quality Improvement Compliance Specialist, will testify about his experience with Complainant's supervision and any other information that he may have regarding Complainant.

P. Marceil Case, Behavioral Health Contract Manager, will testify about supervisory issues she observed with Complainant, her concerns about how this was affecting DHCPF employees, and any other information that she may have regarding Complainant.

Q. Gina Robinson will testify about her experience with Complainant's supervision and any other information that she may have regarding Complainant.

R. Julie Collins will testify about her experience with Complainant's supervision and any other information that she may have regarding Complainant.

28. If a hearing is granted, Respondent may offer the following exhibits:

A. Complainant's July 21, 2011 Appeal;

- B. E-mail from Sue Birch to Complainant dated April 19, 2011;
- C. Complainant's Step I and Step II grievances;
- D. Confidential Investigation Report dated November 7, 2011;
- E. E-mail from Suzanne Brennan to Complainant dated September 28, 2011;
- F. Step II grievance response dated November 2, 2011;
- G. Complainant's Final Performance Evaluation;
- H. Attachment A Conflicts of Interest/Gifts and Gratuities/Secondary Employment dated January 18, 2011;
- I. Affidavit of Dr. Judy Zerzan;
- J. Any exhibit endorsed by Complainant;
- K. Any exhibit necessary for impeachment or rebuttal.

29. As relief, Respondent respectfully requests that this Board deny Complainant's petition for hearing.

DISCUSSION

The Board may use its discretion to grant a hearing for actions that do not adversely affect a certified employee's current base pay, status, or tenure, and where the employee does not have a right to a hearing, appeal, or review by law or rule. Board Rule 8-46, 4 CCR 801. The Board's authority to review the grievance decision of an appointing authority is limited by state statute. Under § 24-50-123(3), C.R.S., "[t]he Board may grant the petition only when it appears that the decision of the appointing authority violates an employee's rights under the federal or state constitution, part 4 of article 34 of this title, article 50.5 of this title, or the grievance procedures adopted pursuant to subsection (1) of this section." This statute limits the Board's review to matters presenting a constitutional issue, an alleged violation of Colorado's Anti-Discrimination or Whistleblower Acts, or an alleged violation of the Board's or agency's rules governing grievance procedures.

Complainant asserts that Respondent violated Board Rule 6-3 and Director's Administrative Procedure 6-4 in its performance management review of Complainant's trial service. As noted above, however, the Board's grievance review authority does not encompass alleged violations of all Board Rules or Director's Administrative Procedures. Rather, the statute limits the Board's authority in this regard to violations of the grievance procedures. Therefore, the Board does not have the statutory authority to review Complainant's allegations regarding the performance management dispute.

Additionally, it should be noted that, according to Complainant's information sheet, the performance evaluation was modified and reissued on January 25, 2012. Complainant was dissatisfied with the final version of the performance evaluation. No information was presented to indicate that Complainant appealed the final version of the performance evaluation to the State Personnel Director in accordance with Director's Administrative Procedure 8-98, 4 CCR 801. Moreover, the final version of the performance evaluation was issued months after Complainant filed this appeal.

Complainant has not alleged a violation of the federal or state constitution or Colorado's Anti-Discrimination Act. Although Complainant alleged a violation of the Board's rules governing grievance procedures in her petition for hearing, Complainant failed to identify any particular grievance procedure violations in her information sheet. Complainant's written grievance appeal was filed on October 3, 2011. Respondent requested additional time to

respond to permit the completion of the third party investigation, but Complainant refused to grant the extension. Respondent therefore issued its final grievance decision on November 2, 2011, within the 30-day timeframe required by Board Rule 8-8(A)(6), 4 CCR 801. Complainant therefore has not provided any information warranting a hearing on a grievance rule violation.

I. Whistleblower Claim

Complainant has alleged that Respondent violated the Colorado State Employee Protection Act (Whistleblower Act), and discussed the alleged Whistleblower Act violations in her information sheet. Complainant filed a Whistleblower complaint with the Board on November 30, 2011. The complaint alleges that Dr. Judy Zerzan has continually demonstrated an abuse of power, which Complainant disclosed to Dr. Zerzan's supervisor, Laurel Karabatsos, in a discussion that led Dr. Zerzan to retaliate against Complainant. Complainant also states that Dr. Zerzan abused her power by conducting business for her part-time employment at DHCPF's state office, including having personal patient information faxed to DHCPF's office. The complaint alleges that this disclosure was made to DHCPF's HR Director Janice Smuda when the third party investigator was engaged.

The Whistleblower Act protects state employees from retaliation by their appointing authorities or their supervisors because of disclosure of information about state agencies' actions which are not in the public interest. *Ward v. Industrial Commission*, 699 P.2d 960, 966 (Colo. 1985). The purpose of the Act appears in the legislative declaration, which states,

The general assembly hereby declares that the people of Colorado are entitled to information about the workings of state government in order to reduce the waste and mismanagement of public funds, to reduce abuses in governmental authority, and to prevent illegal and unethical practices. The general assembly further declares that employees of the state of Colorado are citizens first and have a right and a responsibility to behave as good citizens in our common efforts to provide sound management of governmental affairs. To help achieve these objectives, the general assembly declares that state employees should be encouraged to disclose information on actions of state agencies that are not in the public interest and that legislation is needed to ensure that any employee making such disclosures shall not be subject to disciplinary measures or harassment by any public official. § 24-50.5-101, C.R.S.

The Act provides that "no appointing authority or supervisor shall initiate or administer any disciplinary action against an employee on account of the employee's disclosure of information." § 24-50.5-103(1), C.R.S. At the preliminary review stage, a state employee need only present sufficient information to establish an evidentiary and legal basis for hearing on whether the Act has been violated. The elements of a *prima facie* Whistleblower claim are:

- (1) Whether the appeal was filed in a timely manner;
- (2) Whether there has been a "disciplinary action" as defined by § 24-50.5-102(1), C.R.S.;
- (3) Whether there has been a "disclosure of information" as defined by § 24-50.5-102(2), C.R.S.; and
- (4) Whether the disclosure of information was a substantial and motivating factor of the disciplinary action (causality).

Ward, 699 P.2d at 967-68; § 24-50.5-101 *et seq.*, C.R.S.

A. The Appeal Was Not Filed in a Timely Manner

An employee in the state personnel system alleging violation of the Whistleblower Act must file a written complaint with the Board within ten days after the employee knew or should have known of a disciplinary action. § 24-50.5-104(1), C.R.S. In her Whistleblower complaint, filed with the Board on November 30, 2011, Complainant alleges that Dr. Zerzan retaliated against her by revoking her trial service and by issuing a performance evaluation that did not reflect Complainant's performance.

The trial service revocation occurred on July 10, 2011, more than ten days prior to the filing of the Whistleblower complaint. Moreover, Complainant challenged the trial service revocation in Case No. 2012G007, which included a Whistleblower Act claim. Based on the Preliminary Recommendation, the Board denied Complainant's request for a hearing on that claim.

Dr. Zerzan completed Complainant's performance evaluation for the period April 1, 2011 through July 10, 2011 on September 8, 2011. Complainant challenged the performance evaluation through the grievance process. The grievance appeal does not include the alleged Whistleblower Act violations. In the November 2, 2011 final grievance decision, Ms. Birch granted Complainant's request for modification of the performance evaluation, and directed Dr. Zerzan and Ms. Brennan to modify the performance evaluation. The Whistleblower complaint, filed on November 30, 2011, was filed more than ten days after Complainant signed the performance evaluation on September 8, 2011. Accordingly, the information presented by both parties demonstrates that Complainant's Whistleblower claim was not filed in a timely manner under § 24-50.5-104(1), C.R.S. Complainant's petition for hearing should be denied on this basis.

Assuming, for purposes of a thorough review, that Complainant's Whistleblower complaint was timely, the other elements of a *prima facie* Whistleblower claim are discussed below.

B. Disciplinary Action

Section 24-50.5-102(1), C.R.S. expressly provides that an "unsatisfactory or below standard performance evaluation" constitutes a "disciplinary action" for purposes of the Act. Complainant has alleged that Respondent issued her a "needs improvement" performance evaluation in retaliation for her protected disclosures. Therefore, Complainant presented sufficient information to demonstrate Respondent issued a "disciplinary action" for purposes of the Act.

C. Protected Disclosure

To trigger the protection of the Act, an employee must make a "disclosure of information." § 24-50.5-103(1), C.R.S. The Act defines "disclosure of information" as the "written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." § 24-50.5-102(2), C.R.S. A disclosure of information must be of public concern to warrant protection under the Act. *Ferrel v. Colorado Department of Corrections*, 179 P.3d 178,

186 (Colo. App. 2007). Despite the statute's "written provision" clause, the Colorado Supreme Court has held that the disclosure may be oral. *Ward*, 699 P.2d at 967.

Whether a disclosure falls within the scope of the Whistleblower statute is a question of fact. *Ferrel*, 179 P.3d at 185; *Lanes v. O'Brien*, 746 P.2d 1366, 1370 (Colo. App. 1987). At the preliminary review stage, Complainant must show that there is an evidentiary and legal basis for her whistleblower claim. Board Rule 8-50(G), 4 CCR 801. At this level, the inquiry is whether the factual statements presented, if true, would constitute a waste of public funds, abuse of authority, or mismanagement of a state agency. § 24-50.5-102(2), C.R.S.

In the Whistleblower complaint, Complainant asserts that she made two disclosures of information protected by the Act. First, Complainant states that Judy Zerzan has continually demonstrated an abuse of power, and that Complainant shared this information with her supervisor, Ms. Karabatsos, in a discussion. Neither the Whistleblower complaint nor Complainant's information sheet provides additional detail regarding this conversation. Complainant therefore has provided insufficient information to demonstrate that the disclosure related to a waste of public funds, abuse of authority, or mismanagement of a state agency. See *Ferrel*, 179 P.3d at 187 (to prevail on a whistleblower claim, a claimant must show facts, rather than "vague and sweeping generalities"). In short, without additional explanation as to Dr. Zerzan's alleged abusive behavior disclosed to Ms. Karabatsos, there is insufficient information to conclude that the conversation constituted a "disclosure of information" regarding an issue of public concern.

Second, Complainant states that information was disclosed to Janice Smuda, the HR Director, through the third party investigator, that Dr. Zerzan had abused her power by conducting business for her part-time employment at the DHCPF office, including having personal patient information faxed to DHCPF's office. The information sheet does not identify the date this information was disclosed to Ms. Smuda. Further, neither the Whistleblower complaint nor the information sheet states that Complainant personally made the disclosure to Ms. Smuda. Rather, the Whistleblower complaint only alleges that the information was disclosed to Ms. Smuda through the third party investigation. The third party investigator's report does not make any reference to allegations concerning Dr. Zerzan's use of state time or resources for a part-time business.

Complainant therefore has provided insufficient information to demonstrate she made a "disclosure of information" under § 24-50.5-102(2), C.R.S. There is no allegation that she personally disclosed the allegations to Ms. Smuda, either in writing or orally. No information has been provided to support this alleged disclosure, nor was the information included in Complainant's grievance.¹

D. Substantial or Motivating Factor

¹ If sufficient information was provided to provide a factual basis that a disclosure occurred, the allegation that Dr. Zerzan conducted personal business using state time and resources, including having personal patient information faxed to DHCPF's offices, would constitute a practice involving the waste of public funds, abuse of authority, or mismanagement of a state agency under § 24-50.5-102(2), C.R.S. In an affidavit, Dr. Zerzan states that she received approval to conduct the part-time business, and denies using state time or resources for the business, or having patient information faxed to her at DHCPF's offices. These are factual issues which would have to be resolved in a hearing had Complainant provided sufficient information to demonstrate a viable Whistleblower claim.

The Whistleblower Act prohibits the imposition of discipline or penalty "on account of" an employee's disclosure of information. § 24-50.5-103(1), C.R.S. Here, Complainant contends that she was served with a performance evaluation that does not reflect her performance and was reverted to her prior classified position "for claims that a reasonable person would clearly see are manufactured for the purpose of driving me out of my position." The trial service revocation was addressed in Case No. 2012G007. The question is therefore whether there is sufficient information to infer that Complainant made a disclosure of information relating to Dr. Zerzan's part-time employment that was a substantial or motivating factor in Dr. Zerzan's negative performance evaluation issued to Complainant in September 2011.

Based on the conclusion that Complainant provided insufficient information to demonstrate that she made a "disclosure of information," there is insufficient information to conclude that a protected disclosure was a substantial or motivating factor in the negative performance evaluation.

II. Conclusion

Complainant has presented insufficient information to demonstrate an evidentiary basis for her Whistleblower claim. Specifically, insufficient information has been provided regarding the timeliness of the claim, whether a disclosure of information was made, and whether a disclosure was a substantial or motivating factor for the performance evaluation. Further, Complainant has not identified any other basis permitting a hearing under § 24-50-123(3), C.R.S. Accordingly, the ALJ recommends that Complainant's petition for hearing be denied.

RECOMMENDATION

For the foregoing reasons, it is the preliminary recommendation of the undersigned administrative law judge that Complainant's petition for hearing be **denied**.

Dated this 2nd day
of May, 2012,
Denver, Colorado.



Robert R. Gunning
State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202-3640
(303) 866-3300

CERTIFICATE OF MAILING

This is to certify that on the 2nd day of May, 2012, I electronically served true copies of the foregoing **PRELIMINARY RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE**, addressed as follows:

Suzanne R. Sigona

[REDACTED]

Micah R. Payton A.A.G.

[REDACTED]

[REDACTED]

Andrea C. Woods

