

**INITIAL DECISION**

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MICHAEL RURA,

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION, STATE BOARD OF AGRICULTURE,  
COLORADO STATE UNIVERSITY,

Respondent.

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Administrative Law Judge Mary S. McClatchey heard this case on February 26, 27, and 28, 2002. Cecelia Serna, of the Law Office of Norton Frickey, represented Michael Rura ("Complainant" or "Rura"). Assistant Attorney General Melissa Mequi represented Respondent Department of Higher Education ("DHE").

**MATTER APPEALED**

Complainant challenges his administrative termination under Director's Procedure P-5-10 as having been arbitrary, capricious or contrary to rule or law, specifically in violation of the Colorado State Employee Protection Act ("whistle blower act" or "Act"). He also challenges the denial of his grievance concerning a Needs Improvement evaluation and Corrective Actions imposed therewith.

For the reasons set forth below, Respondent's actions are rescinded.

**ISSUES**

1. Whether the actions of Respondent were arbitrary, capricious, or contrary to rule or law;
2. Whether Respondent violated the whistle blower act;
3. Whether Complainant is entitled to an award of attorney fees and costs.

**FINDINGS OF FACT**

1. In March 1991, Complainant commenced employment at Colorado State Forest Service Warehouse/Shop ("Forest Service Shop" or "FS Shop"), located at the Foothills campus of Colorado State University ("CSU"), as a Maintenance Mechanic.
2. The Forest Service Shop acquires excess federal military vehicles and refurbishes them to become fire-fighting equipment for the State of Colorado. As a Maintenance Mechanic, Rura built fire trucks. He also worked on fires, starting on engines, and eventually became certified in fire ground support in 1994.
3. During the summer wildfire season, Rura and other FS Shop employees work on wildfires throughout Colorado and in other states.
4. In 1991 and 1992 Rura received Good overall performance ratings. From 1993 through 1997 he received Commendable ratings.
5. In September of 1997 Rura promoted to Instrument Maker/Fabricator in the FS Shop.
6. Bernie Post, Assistant Staff Forester, was the FS Shop supervisor. Kirk Herzman was the Shop Foreman. These two men had run the shop together since the mid-1980's.

Digging Up and Re-Burying the Contaminated Oil Tank to Avoid Environmental Inspection and Clean-up

7. In the Fall of 1993 Post and Herzman ordered Rura and Michael Feltz, a heavy equipment operator at the FS Shop, to dig up an old, rusty, leaking oil tank which was contaminating the soil and water table in the field by the FS Shop. The oil tank had originally held approximately 500 gallons of oil. After Rura and Feltz dug up the leaking oil tank, Feltz used a bulldozer to smash it. Then, he and Rura buried it in a different 12-foot deep hole in the far end of the field, covering it with dirt. They put road base on top of it, so that it looked like a small parking lot.
8. Then, in another location in the field adjoining the FS Shop, Rura and Feltz dug a separate, large hole. They acquired a clean storage tank that was not leaking, put some oil into it, and buried it in the new hole.
9. Approximately one year later, while Rura was at work, environmental inspectors for a government agency came to inspect the oil tank. Rura and others were ordered to dig up the new, clean tank. Rura watched as the inspectors then checked the dirt underneath it, and determined that it was not leaking or contaminating the soil or water table.

10. At that point in time Rura and Feltz realized that they had been ordered to cover up an environmental hazard, to avoid government inspection and the cost of clean-up.
11. The original site of the oil tank, and the site to which it had been moved, both constituted environmental hazards.
12. For approximately one year, Rura and Feltz kept this information to themselves.

#### Leaking Barrels

13. Rura also noticed that there were barrels containing ethyldibromide ("EDB") near the FS Shop (along the East fence next to the nursery) that had remained there for so many years that they had rusted and ruptured, and were leaking into the ground. Many barrels had been there since before Rura started as an hourly employee in 1991. These barrels were not marked. Some were disposed of in the dumpster. They too constituted an environmental hazard.

#### Bernie Post's Misappropriation of State Property for Personal Use

14. Rura twice personally witnessed his supervisor, Bernie Post, pull his private boat up to the gas station at the FS Shop, and fill his boat with state gasoline.
15. He confronted Post about this; Post said no one would know.
16. Rura told Post about the barrels leaking and contaminating the soil. When Post did nothing, he informed Hertzman about the barrels. Hertzman indicated he would speak to Post about it, but nothing ever happened.
17. Post also utilized a Departmental Purchase Order to purchase coolers for personal use. There were other problems in the FS Shop with Post's management. At one point in 1996, Post and Feltz actually got into a fist fight.
18. At this point, Rura determined that the FS Shop management situation was so out of control that he needed to inform the Forest Service Director, James Hubbard, about the problems.
19. James Hubbard has been with the Forest Service for 31 years, and has been the Director for 17 years.

#### Rura's 1996 Disclosures to Hubbard

20. In 1996, Rura called Barbara Berg, Jim Hubbard's assistant, to set up a meeting with Hubbard. They met at the Bluebird Café in Fort Collins for approximately one hour. Rura informed Hubbard that Post and Herzman had ordered Rura and Feltz to dig up and move the leaking oil tank to another location in order to evade environmental regulator inspection and clean-up, that they had buried a new, clean tank in a different spot for the inspectors, and that there were two environmental hazard sites as yet unaddressed. Rura informed Hubbard that he had talked to Post and Herzman about his concern about the leaking barrels but nothing had been done. He informed Hubbard that Post had used state gasoline for his personal boat, and had misused purchase orders for personal use. He informed Hubbard that the work situation under Post was unsafe and had escalated to violence between Post and Feltz.
21. At the time Rura made these disclosures, he felt that Post and Hertzman had ordered him to do something illegal and harmful to the environment, and he sought Hubbard's leadership to correct the situation.
22. Rura informed Hubbard of other staff that had concerns with Post's mismanagement. Hubbard said he would participate in a follow-up meeting with other staff who had similar concerns. Rura had discussions with other staff and encouraged them to bring their concerns to Hubbard at a meeting. While many staff were fearful, some attended the follow-up meeting.
23. Less than a month after Rura's meeting with Hubbard at the Bluebird Café, Barbara Berg set up a meeting between Hubbard and other FS Shop staff at the Student Union building. Six or seven other FS Shop staff attended, including Rura and Alton Lowry, who also testified in this hearing. Staff raised a number of issues including Post stealing FS gas and the contaminated barrels in a pit at the far end of the FS Shop field.
24. Hubbard said he would look into the issues raised at the meeting.
25. After the meeting at the Student Union, an anonymous letter arrived in the CSU attorneys' office, raising allegations of FS management misconduct similar to those previously raised by Rura and other staff. The author and contents of this letter are unknown. The letter did not address environmental issues. Post and Herzman accused Rura of authoring this letter.
26. Hubbard never took any action to address Rura's or other staff concerns regarding the contaminated oil tank sites in the field or the old barrels contaminating the soil around the FS Shop.

#### Audit of FS Shop.

27. After receipt of the anonymous letter, Hubbard ordered that an audit of the

FS Shop be conducted. He had heard complaints about shop mismanagement for years, and knew that Herzman would soon retire. He viewed the audit as an opportunity to air the issues and clean house during the transition in FS Shop management.

28. When Rura was interviewed for the audit, he answered only the questions asked and did not independently raise the issue of having moved the leaking oil tank to evade inspection or the leaking barrels that had not been cleaned up.
29. The audit revealed numerous problems with the FS Shop management, including the need for better security for inventory on site; better tracking of gasoline use; improved personnel management; and encouragement of staff to bring forward concerns and taking appropriate action on those concerns.
30. After the audit report was released, FS management brought the Employee Assistance Program Coordinator to address the FS Shop employees, to help settle the turmoil at the shop. While the exact nature of this individual's statements is not clear, Rura got the clear message, and in fact thought he heard this person state, that whistleblowers don't get to keep their jobs.
31. Although Hubbard testified that he felt the audit revealed no evidence supporting the subjects of the audit, he removed Bernie Post from his position as supervisor of the FS Shop after receipt of the audit. Further, the first thing he directed the new supervisor to do was implement the audit recommendations regarding changes in the unit.

#### Greg Sundstrom

32. Hubbard recruited an old college friend, Greg Sundstrom, to take Post's place. Hubbard and Sundstrom socialize together frequently, on average once a month, and play poker together.
33. Sundstrom started at the FS Shop in early November 1997. Within a few days of assuming supervision, Sundstrom had a meeting with all staff, and announced that he was there to clean house. This statement was made at least in part in the context of responding to the audit report, which he had reviewed.
34. Sundstrom often told his employees that he was a boxer and feared no one. Most staff felt uncomfortable being in close physical proximity to him.
35. In addition, shortly after Sundstrom arrived, Hubbard addressed the FS Shop staff, informing them they needed to answer to Sundstrom and if they didn't like the way things went in the FS Shop under his management they should find another job. The message was essentially: now that the audit has been

completed, I don't want to hear any more complaints about management, "put up or shut up." At the time of this meeting, Hubbard knew that Rura and other staff's concerns about environmental hazards that still existed on the FS Shop grounds had not been addressed.

36. Sundstrom met with all FS Shop employees early in his tenure, to discuss their opinions about what was and had been going on at the shop. He took walks with staff in the field adjoining the shop, in order to assure privacy.

#### Rura's Disclosures to Sundstrom

37. A few weeks after Sundstrom's arrival, in late November or early December 1997, Rura and Feltz took a walk with Sundstrom out in the field. They informed him about having moved the old leaking oil tank and placing a new, clean one in a different spot, with the result of evading inspection and there being two environmental hazards that had never been cleaned up. They told him the old tank was buried at the south end of the field. Sundstrom asked why they had done it. They responded that Post and Herzman had ordered them to do so. (Testimony of Rura, Feltz, and Sundstrom)
38. Sundstrom did not follow up on this information. He did not ask anyone else about it, and did not contact the environmental clean-up authorities at CSU to inspect the site.
39. Rura and Feltz also told Sundstrom about the rusted, leaking barrels of EDB that were contaminating the soil under them. (Testimony of Rura, Feltz, Sundstrom)
40. Sundstrom called Environmental Health Services at CSU and had the leaking barrels removed within a few months of taking over the FS Shop. He did not inform them that the barrels had been leaking and did not request that the soil be tested.
41. Sundstrom rated Complainant an overall Good for the period January through December 1998.
42. In early 1999, a former FS Shop employee, Wade Dellmar, returned to the shop. Dellmar knew that the audit had been conducted and that Sundstrom had been brought in in part to "clean up" the shop. Dellmar sat down with Sundstrom to catch up.
43. Sundstrom said to Dellmar that he had been brought in to get rid of the troublemakers and people that don't keep their mouths shut.

#### Rura Testimony for Dellmar Workers Compensation Claim

44. In mid-1999, the height of the fire season, Wade Dellmar was injured on a fire job when he fell off a fire truck into a hole. The x-ray revealed a class three sprain. The state workers compensation doctor ordered him to keep his foot elevated 90% of the time, with no standing, kneeling or climbing. When Sundstrom read the Workers Compensation doctor's report, he demanded that Dellmar continue working in violation of his work restrictions.
45. Dellmar went to see Hubbard, and told Hubbard he felt he was being put at risk of his health and did not feel comfortable with Sundstrom's form of management. Hubbard said, "I know I've got a problem and I fear I've created a monster," or words to that effect.
46. Rura testified at Dellmar's workers compensation hearing. Sundstrom was not happy about this, and stated to Rura, "you need to know when to be political."
47. In July 1999, Sundstrom received a report of misconduct of one of Rura's co-workers on a fire, Jay Davis. Rura confirmed that Davis drank beer and shot a gun at a fire site. Sundstrom said that Davis had stated he was drinking water. Rura informed him that he had seen Davis open the beer bottles and drink out of them.
48. Sundstrom became irritated with Rura and again told him, "you need to know when to keep your mouth shut and be political," or words to that effect.
49. Soon thereafter, Sundstrom received a second report about Davis misconduct at a Florida fire. Sundstrom asked Rura about it, and Rura confirmed that Davis was so drunk when departing the Florida airport that the stewardess would not allow him on the plane without Rura's assurance he would watch over him. Sundstrom was irritated with Rura about this for a few days.
50. In 1999, Rura complained to Sundstrom periodically about the poor ventilation in the welding shop. The smoke did not evacuate the room, and it got so thick it stratified and layered at eye level. It was an eye irritant and Rura got black soot on his teeth from this problem.
51. Sundstrom said he would look into the ventilation problem. In the fall of 1999, when the ventilation issue didn't make the list of upgrades for the shop, Rura raised it again with Sundstrom.
52. In 1999, Sundstrom became increasingly hostile to Rura. He yelled and screamed at him in meetings. Other employees heard and saw this. In one instance, Sundstrom was so loud that Alton Lowry, the FS Shop administrative assistant, in the next room, talking on the phone, had to apologize to the caller on the other end of the line.

53. In 1999, Sundstrom and Rura had a very heated discussion in Sundstrom's office. As the two men exited, Sundstrom said directly to Rura, "I can get rid of anyone here, and you'll be the first."
54. In the fall of 1999, Dellmar left while still on work restrictions. In his exit interview with Hubbard, he informed him that he felt unsafe working under Sundstrom, and that Sundstrom needed personnel management classes.

#### 1999 Needs Improvement Evaluation and Corrective Actions

55. On January 7, 2000, Sundstrom and Complainant met to conduct an "initial discussion" of Complainant's overall 1999 performance evaluation. At the end of the meeting, Sundstrom informed Complainant verbally that he thought the points would add up to an overall "Needs Improvement" rating for 1999.
56. Shortly after January 7, 2000, Sundstrom was informed by someone at the FS Shop that Complainant had made statements to Bill DeCrescentis, a co-worker, about his impending Needs Improvement evaluation in connection with the FS Shop's cover-up of an environmental hazard. The record does not reveal exactly what Rura said.
57. Sundstrom called Hubbard and told him about Rura's statement about a FS Shop cover-up regarding environmental hazards caused by contaminated underground storage tanks.
58. Sundstrom did not interview Complainant about the allegation. On January 19, 2000, Sundstrom met with Rura to give him his final written Needs Improvement evaluation, outlined below. In the same meeting, he handed Complainant a Corrective Action for the alleged comment. Rura denied making the statement in the Corrective Action.
59. The Corrective Action Sundstrom imposed on Rura states in part:

"The supervisor has been told that Michael had said that he knew of some tanks buried on the CSFS Foothills Campus to cover up environmental hazards, and that if he 'went down' because of poor evaluations, so would the agency. Holding back information about potential environmental hazards is unacceptable behavior.

Corrective Action: Michael will reveal the locations of all sites he alleges there has been items buried to cover up environmental hazards. This must be completed by January 21, 2000.

"Michael Rura made threats to damage the image of CSFS by

revealing an intentional environmental hazards cover up if his evaluations resulted in his employment being terminated. Making such a threat is unacceptable behavior.

Corrective Action: Michael will cease making threats under any circumstance in relation to his duties with CSFS. Michael will attend a Fred Pryor Seminar entitled Conflict Management and Confrontational Skills in Colorado at CSFS expense. Measure of accomplishment of improvement will be his attendance and accomplishment at the seminar and an ongoing demonstration of tact and diplomacy during a one-month evaluation period after he attends the seminar. This will be completed by April 10, 2000."

60. At the time Sundstrom issued this January 19, 2000 Corrective Action against Rura, he knew that Rura and Feltz had actually informed him about having moved the leaking tank, which posed two environmental hazard sites, in November of 1997, and that Rura had never withheld information about the hazards.
61. In the January 19 meeting, Sundstrom also gave Complainant the overall Needs Improvement evaluation with a score of 247.6. A Good would have been in the 251-350 range. At hearing, Sundstrom admitted that during the entire 12-month rating period, he had given Rura no verbal or written warning regarding any of the problems cited in the evaluation.
62. Large portions of the Needs Improvement rating were unwarranted for the following reasons:
  - A. Sundstrom indicated "the quality and appearance of Michael's completed welds of mild steel seldom meet the approval of the Shop's Welder." The Corrective Action consisted of taking welding instruction from the Shop Welder. Sundstrom's failure to raise this issue at any time in the evaluation period and to provide the necessary training for Rura to improve his welding performance demonstrates that Sundstrom was biased against Rura and unwilling to give him a fair opportunity to succeed.
  - B. Sundstrom cited Rura for failing to complete a fire fighting unit between July and November of 1999. Rura was out of the shop fighting fires in Colorado and other states for the entire summer season of 1999, with the exception of two weeks. It would have been impossible for him to complete the unit by November.
  - C. Sundstrom rated Rura an overall Needs Improvement in Organizational Commitment and Adaptability, on the sole basis that Rura received one "poor performance" rating on one

Wyoming fire. In fact, Rura received superb ratings on the other six or seven fires he worked on that summer. Further, Sundstrom cites no other performance issue for the duration of the year in this category. Rura's other fire evaluations contain comments such as, "Mike was always fire ready and made sure the equipment and crew-personnel were ready as well. I appreciated your enthusiasm as did the rest of the crew and would like to commend you for your thorough understanding of pumps and engines which coupled with your strong work ethic allowed us to fix/troubleshoot problems that we had." The Needs Improvement rating for the entire year is completely unsupported.

- D. Sundstrom rated Rura an overall Needs Improvement in Interpersonal Relations. One of the bases for this rating was, "Other employees have indicated that they would rather not work one on one with him because he continually complains and comments about his job, his pay, his supervisor, and CSFS." At hearing, Sundstrom modified this, testifying that only one employee, Mike Feltz, had said this about Rura. Feltz testified credibly that he and Rura always performed the tough jobs together, worked together very well, and that he never made that statement to Sundstrom. The ALJ finds Feltz's testimony on this issue to be credible, and finds that Sundstrom's testimony lacks credibility due to his strong animosity against Rura.
- E. Sundstrom also cited Rura for objecting when Sundstrom informed Rura that he was going to hold him accountable for two misspelled words on panels. Rura was fully justified in objecting. The situation had been the following: Rura had developed an innovative means to label equipment on the fire trucks by welding the labels onto an aluminum control panel, which he then attached to the truck. Rura had had to correct his own spelling on two words, and did so before the panels were put on the trucks. He voluntarily informed Sundstrom of this. It was unduly punitive to cite Rura for this on his evaluation.
- F. Sundstrom rated Rura an overall Needs Improvement in Design and Fabrication. He cited Rura for making the above spelling errors. In addition, he cited Rura for changing "design and layout without opportunity for evaluation and monitoring." In fact, Sundstrom had ordered Rura to make the design and layout change in placing a compressor on a truck. Sundstrom penalized Rura for following his own direct order, demonstrating shocking unfairness to and hostility towards Rura.

## Rura's Grievance and Sundstrom's Harassment

63. On January 24, 2000, Rura sought out the assistance of the CSU Employee Relations counselor and filed a grievance of the January 19 actions. He grieved the "undue harassment and accusations by Supervisor (Greg Sundstrom) over the last 2 years culminating with the unfounded and manufactured performance review on January 19, 2000." Complainant sought as relief that "Mr. Sundstrom/Colorado State Forest Service shall cease and depart [sic] from continual harassment and hostilities."
64. After Rura filed his grievance, Sundstrom's hostility towards him grew, and he began to challenge Rura at every turn, often yelling at him with vulgar language. He started to take notes of every discussion he had with Rura about minor issues, some of which he typed.
65. Within days of Rura's grievance, Sundstrom accused Rura of breaking a wooden box that held a stamp set. He waived it in the air in front of another employee, saying he'd write Rura up for it. He had no factual basis for believing Rura had done it.
66. Every day Sundstrom approached Rura about errors on his work reports he had highlighted, in an effort to harass him. While Rura did have trouble with correct spelling, Sundstrom's conduct was harassing, offensive, and inappropriate. Rura noticed when he turned in his work reports that Sundstrom had not highlighted the same errors on other employees' work reports.
67. In early 2000, Sundstrom attacked Rura for having called to check the status of his order for new work shirts. Rura had ordered them eight months before. Sundstrom screamed in Rura's face about this, accusing him of making trouble, and said they don't make shirts your size. Rura had done nothing inappropriate.
68. During this hostile encounter, when Rura backed away from Sundstrom, Sundstrom accused him of being insubordinate.
69. Sundstrom went into violent rages against Rura with increasing regularity, standing so close to Rura's face that Rura could not focus on Sundstrom's face. Rura would say he had to go for a walk in the field, but Sundstrom followed him. Rura started going into the parking lot so that other people were around him. Rura feared being alone with Sundstrom.
70. In mid-2000, Sundstrom's secretary stated to one of Rura's co-workers, "We're trying to get rid of Rura."
71. In mid-2000, after Rura turned in a time sheet to be paid for performing fire

duty on a Saturday, Sundstrom stated, "You think you should get paid to sit on your fat ass and answer the telephone?" or words to that effect.

72. Sundstrom refused to approve Rest and Relaxation leave on August 25 and 26, 2000, for Rura, but approved it for the other fire fighters. It took months for Rura to obtain the approval to which he was entitled.
73. Sundstrom was nitpicky with Rura about time and leave slip issues. On October 13, 2000, for instance, Sundstrom made a full-page type-written note on time slip and leave request issues with Rura. It begins, "On October 13, 2000, Greg Sundstrom called Mr. Rura into his office to ask Mr. Rura to correct a leave slip which stated Mr. Rura had returned to work at 7:15 a.m. rather than at 7:30 a.m. on September 27, 2000."
74. Rura knew that Sundstrom intended to get rid of him, based on Sundstrom's open hostility and harassment, Sundstrom's direct threat to get rid of him, and other employee's reports about Sundstrom's intent to get rid of him.

#### Grievance Process.

75. At Step 3 of the grievance process, Hubbard held a number of meetings, first with Sundstrom, then with Rura, then with both men. Rura informed Hubbard that Sundstrom was harassing him.
76. On March 23, 2000, as part of Step 3 of the grievance process, Hubbard issued a letter with a number of directives. He ordered Rura and Sundstrom to participate in mediation with an objective third party, Randy Moench, Nursery Manager for CSFS; directed Rura and Sundstrom to accept responsibility for their performance and behavior; and directed Sundstrom to receive assistance in conflict resolution.
77. At the April 5, 2000 mediation session at which Moench presided, Sundstrom reached a point of tension that he had to excuse himself. He became red in the face, emotionally overwrought, and never returned. Moench ended the mediation. Moench later went to visit Sundstrom to assure that he was ok. Moench felt that both men were suffering from very high levels of stress and he feared for their health.
78. Moench issued a written report to Hubbard, noting Sundstrom's inability to continue, and suggesting that mediation would not be a solution. He recommended that if Sundstrom modified a few of the scores on Rura's evaluation, it would result in an overall Good.
79. After receipt of Moench's report, Sundstrom modified Complainant's 1999 evaluation by approximately 50 points so that it became an overall Good rating. On April 20, 2000, Sundstrom submitted it to Hubbard.

80. On May 24, 2000, Hubbard issued his final Step 3 grievance decision, revising the 1999 performance evaluation to an overall Good; eliminating the Corrective Action/Performance Improvement Plan as a separate document; ordering the parties to revise the 2000 performance plan no later than June 12, 2000; and ordering a review of his March 23 action plan by Mr. Homann by June 30, 2000. The decision contained no guidance or deadline for taking the grievance to step 4, and no notice of appeal rights.
81. For reasons that are unclear, Hubbard rescinded his order that Sundstrom participate in conflict resolution training.
82. Rura accepted the modified Good 1999 performance evaluation.

#### Gurnsey Letter Demonstrating Sundstrom Misconduct

83. In the course of handling Rura's grievance, Hubbard received and read a copy of a January 21, 2000 letter from Brent Gurnsey, a college student that performed hourly work for the FS Shop. (Exhibit RRRR). Gurnsey's three-and-a-half page, typed letter, raises serious issues regarding Sundstrom's unethical and inappropriate attempts to set up Rura to fail.
84. Gurnsey relates a work day at the FS Shop in which Rura asked him to get a pump ready for installation. Jay Davis handed him the gas pump key, and a secretary asked if the key had been checked out. Gurnsey didn't know about that process, so he said no. The secretary then opened a book and signed Gurnsey's name in the book. The next day Gurnsey was asked why he had not signed out the one quart of gas he used for the pump, and he indicated Rura had said if it was under a gallon there was no need to. He then signed out the gas.
85. The letter next relates that Sundstrom came to Gurnsey about these incidents, with two written statements for Gurnsey to sign: "Mike Rura told me not to record the fuel" and "Mike told me not to sign the key check out log."
86. Gurnsey's letter further states that after he refused to sign the two statements as Sundstrom had written them, Sundstrom fired him, informing him he would never work for the FS again. Sundstrom also spent the majority of the meeting with Gurnsey discussing his problems with Rura and his evaluation. The letter notes that Sundstrom had asked Gurnsey if he had discussed the situation with his parents, and that in fact he had. This detail reinforces the veracity of Gurnsey's account.
87. The letter stated in part, "I felt Greg had tried to use me against Mike and made me feel bad about not knowing the process. . . I felt Greg was a boss that was trying to intimidate me into signing a statement that was not true."

When I didn't sign his original statements ---I was told I had a bad attitude and was told to leave and never come back."

88. This letter contains allegations that Sundstrom was manufacturing evidence of Rura's poor performance to set up Rura for another poor evaluation or disciplinary action in 2000; that Sundstrom was willing to intimidate a college student hourly employee in order to achieve his goal of damaging Rura professionally; and that Sundstrom abused his position in retaliating against a young college student employee who would not assist him in damaging Rura.
89. These allegations, if proven to be true, would have demonstrated that Sundstrom was so biased against Rura as to be incapable of being a fair and objective supervisor and rater on Rura's evaluations. Therefore, the letter, if confirmed, would have provided mitigation in favor of Rura in the resolution of his grievance challenging Sundstrom's harassment of him and unwarranted Needs Improvement evaluation.
90. Hubbard never followed up on Gurnsey's letter. He did not ask Sundstrom about the contents of the letter. He did not contact Gurnsey. He did not consider it in addressing Rura's grievance, despite its mitigating nature.
91. The Gurnsey letter contained information that was highly relevant to Complainant's grievance. It made serious allegations of personal bias, misconduct, and abuse of authority that a reasonable appointing authority would have investigated.
92. Hubbard's failure to follow up on this letter demonstrates that he shared a bias against Rura that was unrelated to his actual job performance, and that he was willing to overlook Sundstrom's abuse of authority as it related to his supervision of Rura.

#### Final Grievance Decision: Transfer or Terminate Rura

93. Rura accepted the partial resolution of his grievance insofar as he received a Good overall evaluation for 1999.
94. However, during the year 2000, as related above, Sundstrom's harassment and intimidation had escalated. Therefore, Rura determined he needed to obtain further review of the harassment portion of his grievance. On September 27, 2000, with the assistance of the Employee Assistance Manager again, Rura sent a letter to Loren Crabtree, Provost of CSU, requesting further relief. He stated,

"I wish to proceed to the next step of my grievance originated on January 19, 2000. I have met with my supervisor, Greg Sundstrom,

Richard Homann, and James Hubbard, Director of the Colorado State Forest Service.

The continual harassment, discrimination, and threats by my supervisor have not been addressed. In fact, my complaints have resulted in increased retaliation.

The relief I am requesting is to have a different supervisor. My current supervisor, Greg Sundstrom, is confrontational, violent, threatening, and incapable of maintaining any level of morale and motivation in the CSFS Fire Shop."

95. On November 8, 2000, Kirvin L. Knox, Vice Provost for Agriculture and University Outreach, issued the final Step 4 Grievance Decision. Despite the fact that Rura had requested review only of the issue of Sundstrom's retaliation and harassment of him, and that Rura had accepted the modified Good 1999 evaluation, the decision focuses in large part on Rura's performance.
96. The Vice Provost concludes, "It is clear that Mr. Rura's work does not consistently meet acceptable standards of quality, that he is resistant to filing appropriate inventory and other 'accountability' forms, and that he resists direction from supervisors. Further, Mr. Sundstrom's 1999 evaluation was likely an accurate assessment of his work, i.e. that Mr. Rura has been insubordinate and resists supervision and efforts to help him improve his performance." The only possible source of this information was Sundstrom and Hubbard.
97. The Vice Provost interviewed Bill DeCrescentis, the co-worker to whom Rura made the statement about the cover-up of environmental hazards leading to the second January 19, 2000 Corrective Action. It is found that the final grievance decision encompassed the Needs Improvement evaluation and all Corrective Actions given to Rura on January 19, 2000.
98. The decision also notes, "Mr. Sundstrom's management style is 'insistent,' and one might say 'confrontational' when he doesn't receive what he considers to be an appropriate response and corrective action. He does raise his voice and to some, that might be construed as 'harassment.'"
99. The decision concludes by denying the relief and recommending that **"Mr. Rura be transferred to some other non-CSFS entity within CSU or be dismissed"** (emphasis added), and that Sundstrom undergo training in personnel management, including conflict management.
100. The Step 4 final grievance decision does not contain notice of Rura's right to appeal the decision to the Board.

101. Following this grievance decision, neither Hubbard, Sundstrom, nor any other FS manager attempted to help Rura transfer to another position at CSU.
102. After receipt of the Step 4 final written grievance decision, Rura met again with the CSU employee assistance counselor. She did not inform him of his right to appeal the grievance decision to the Board. Rura felt he needed to find another place to work at CSU, and requested help in obtaining a transfer. The counselor did some research and informed Rura that no positions were available at that time.
103. Following the final grievance decision recommending Rura's transfer or termination, Sundstrom's violent and abusive treatment of Rura dramatically intensified. Sundstrom often ordered Rura to come into his office for meetings that would last for hours, during which he screamed at Rura for miniscule issues, such as leaving a magazine on the break room table, and hanging his coat in the wrong place.
104. Rura's health deteriorated due the extreme stress he was under. His blood pressure increased to a dangerously high level.
105. On December 15, 2000, Sundstrom called Rura into his office to discuss performance issues, during which he yelled at Rura. This meeting lasted most of the morning, and at the end of it Rura left the FS Shop in his truck, feeling ill from the stress. Rura's blood pressure was so high that he felt he could not drive, and he pulled over and took a nap in his truck. He thought about not returning to work because he felt so ill from the stress.
106. When Rura returned to work Sundstrom was waiting for him. He called Rura back into his office and accused Rura of poor quality workmanship on an end gate on a fire truck, based on information received from another employee. As it happened, this information was incorrect, but Sundstrom didn't know this.
107. Sundstrom led Rura to the end gate and, in front of another employee, told Rura that he was going to take pictures of it to document his poor work. Rura became upset and said he had not performed the work.
108. Rura was so upset he had to leave. He felt so ill from his headache that he feared he would vomit, and left his keys at the FS Shop. Using his spare key, he drove himself directly to his doctor's office. His doctor took his blood pressure and ordered him to either go to the hospital or not leave his office, and to refrain from returning to work.
109. Rura saw the state's approved Workers Compensation ("WC") doctors, who ordered him to stay away from the FS Shop indefinitely and put him on stress

leave.

110. On January 12, 2001, the state's own WC doctors issued a written opinion that Rura was "able to return to modified work from January 15, 2001" forward, "OK to work but other than in State Forest Service office Shop."
111. Sundstrom read this report, as did Hubbard's assistant, Barbara Berg. Berg informed Hubbard of the contents of the report.
112. Hubbard was aware that Rura's WC claim was stress related, and that the state doctors had determined that Rura could work but not under Sundstrom's supervision.
113. Neither Sundstrom nor any other witness for Respondent rebutted any of Rura's or his witnesses' testimony regarding Sundstrom's harassment, abuse, and intimidation of Rura.
114. Respondent offered no evidence rebutting the WC doctors' determination that it was unsafe to Rura's health to work in the FS Shop environment.
115. It is found that Sundstrom's mistreatment of Rura created working conditions that were so intolerable that Rura had no other choice but to leave the work environment.
116. In December, Hubbard's assistant Barbara Berg contacted CSU Human Resources Director Bill Liley regarding how to proceed to administrative termination in the event an employee leaves the job. Over the ensuing months, Berg worked closely with Liley and his office to appropriately process Rura's sick leave, Family Medical Leave, and all other leave available to him, prior to imposing a P-5-10 administrative termination.
117. Hubbard never contacted Rura while he was out on stress leave from December 2000 through June 2001. He did not discuss with Rura what type of positions he might be interested in transferring to, which had been the mandate of the Vice Provost in the November 2000 final grievance decision, and which would have been consistent with the WC doctors' mandate.
118. As a further demonstration of Sundstrom's hostility towards Rura, during Rura's absence, Sundstrom went through Rura's mail and threw a lot of it away. After Rura called requesting that a secretary send him his mail, she bundled it up, stamped it, and put it in the outgoing mail box. When Sundstrom discovered it, he opened it and ordered the secretary not to forward any mail to Rura.
119. Rura wrote a letter to Hubbard, Sundstrom, and Bill Liley, HR Director, explaining the facts set forth in Paragraph 120. He stated in part, "Mr.

Sundstrom does not sort or discard any other employees' mail leading me to believe that his is more of his ongoing harassment and discrimination that has gone unchecked for a long time. . . There has been no communication to me from CSFS but this refusal for access to my mail denies all communications from CSFS, Colorado State University, as well as being a state employee."

120. Hubbard never responded to this letter and never ordered anyone to forward Rura his mail.
121. During the period December 2000 through June 2001, Rura met with the Workers Compensation staff at least three or four times regarding his situation. He actively pursued transfers to other state positions.
122. Complainant was unable to obtain a transfer position because, contrary to the Step 3 grievance decision, his overall "Good" 1999 Performance Evaluation had never been placed in his personnel file.
123. On March 24, 2001, Barbara Berg sent Rura a letter informing him that his FML leave would expire on May 31, 2001. It informed him that if his medical condition, 'OK to work but at CSU but other than in State Forest Service Office Shop' remains unchanged, the Forest Service would request administrative termination due to his medical condition.
124. On June 14, 2001, Hubbard sent a letter to Bill Liley, Director, Human Resource Services, CSU, requesting that Rura's employment be terminated. The letter stated in part, "Based on the attached medical information provided by Occupational Health Services, Michael was 'OK to work but other than in State Forest Service Office Shop.' Michael Rura has not been in contact with Colorado State Forest Service since December 2000. I consider him to have abandoned his job. Due to lack of contact and Mr. Rura's inability to perform his work duties with the Colorado State Forest Service I am requesting termination of Mr. Rura's employment with the Colorado State Forest Service."
125. At the time he wrote this letter, Hubbard knew that he was under no obligation to request Rura's termination. He further understood that the HR office would not undertake Rura's administrative discharge without a letter requesting it from him.
126. Hubbard testified that he "supported" Rura's termination.
127. No witness for Respondent presented any evidence regarding why it requested that Rura's employment be terminated.
128. Hubbard testified that he has not filled Rura's position at the FS Shop, that

five out of the ten permanent positions at the FS Shop remain open to this day, and that all FS Shop work is being performed to his satisfaction at its current staffing level.

129. He clarified that the reason for this is his ongoing assessment of fire service needs in the State of Colorado, given the fact that fires now threaten residential areas instead of exclusively woodlands. Until Hubbard determines exactly how to meet the needs of the Forest Service's 17 districts under his direction, via the Wildland Urban Interface program, he will keep these positions open.
130. On June 15, 2001, CSU Assistant HR Director Carol J. Shirey sent Complainant a letter informing him that the Forest Service had informed her that all of his applicable leave benefits, including short term disability and Family Medical Leave, had been exhausted. The letter stated that the Forest Service had informed her that he was "physically unable to perform your job duties." She continued, "If you believe that the information provided by your department is not accurate, please contact me within three (3) calendar days of your receipt of this letter . . . If you do not contact me within the given timeframe, I will proceed with a termination for physical inability to perform your job duties."
131. At the time Shirey sent the letter, she knew that the state's WC doctors had issued a work restriction indicating he could not work for Sundstrom; otherwise, there was no independent physical work restriction. She knew that Rura's WC stress claim was due to his supervisor's conduct, and that there were "issues" relating to the workplace, but did not investigate what those issues were.
132. After receiving this letter, Complainant called Shirey. On June 18, 2001, they had a lengthy telephone conversation. Rura informed Shirey that he felt threatened by Sundstrom, and that he was violent. They discussed what Rura meant by violence. Shirey's notes of the conversation indicate that Complainant informed her that Sundstrom yells, screams, calls him names, engages in threats of violence, face to face nose touching and challenges to fights, and that he fears bodily harm by Sundstrom. (Exhibit X, Shirey's contemporaneous notes of conversation; testimony of Shirey.) Rura also informed Shirey that he felt he was being retaliated against for being a whistle blower.
133. Rura asked Shirey if he could be transferred to another position. She pulled up what her office had on the job board at that time. She informed him there was nothing available for which he was eligible.
134. On June 19, 2001, Shirey sent Rura the standard P-5-10 administrative termination letter, stating in part,

"This letter is to notify you that, under the authority of the Colorado Personnel Board Rules and Personnel Director's Administrative Procedure P-5-10, you are being administratively discharged from Colorado State University . . . due to your continuing inability to work."

135. Rura is found to be a very credible witness, for the following reasons. Three different witnesses (Feltz, Lowry, and Dellmar) testified to Sundstrom's statements about getting rid of trouble makers, people who don't keep their mouths shut, and getting rid of Rura. They also corroborated Rura's testimony about Sundstrom screaming at him in meetings, and getting right in his face when confronting him, in a physically intimidating manner. Sundstrom did not deny having made any of the above statements, and did not deny any of the evidence concerning his harassment and abuse of Rura.
136. Sundstrom testified that although Rura and Feltz did disclose to him in November 1997 that they had dug up and hidden a contaminated oil tank and had buried a clean one in a new spot, in order to evade environmental inspection, he did not believe them. He testified that shop employees made a lot of allegations against Post and Herzman when he started as supervisor, in order to curry favor with him. This testimony is found not to be credible for a number of reasons: Rura and Feltz also disclosed information to Sundstrom about the leaking barrels, and Sundstrom did take care of that problem. It makes no sense that he would believe part of the disclosure, but not all of it. It also makes no sense that Sundstrom felt Rura and Feltz were attempting to curry favor with him by informing him that they had followed orders to break the law in covering up an environmental hazard.
137. Sundstrom's testimony concerning Rura's performance is also found to have little weight. He was evasive and often changed his answer under cross examination. He appeared to be still out to get Rura, often testifying about performance issues from 1999 that were not in his evaluation.
138. Hubbard's testimony denying that he terminated Rura because of protected whistle blower activity is found not to be credible, for a number of reasons. Hubbard's hostility towards Rura at hearing was palpable. Hubbard testified that he never took part in the Student Union meeting regarding FS Shop employees' concerns about management; but Rura and Alton Lowry testified that he was there, had no reason to make it up, and Hubbard's own secretary set up the meeting. Hubbard failed to look into the allegations in the Gurnsey letter that Sundstrom was manufacturing evidence of Rura's poor performance during his processing of the grievance. Hubbard violated the Step 4 grievance decision by failing to assist Rura in finding a transfer position. Hubbard had no independent reason to terminate Rura, because there was no need to fill his position with someone else. He was and is at the present time re-assessing the long-term goals of the FS Shop. Rura had a

performance history of Commendable and Good performance ratings, and had the benefit of nine years of service for the shop. If Hubbard had considered Rura an employee in good standing, he would have allowed him to remain on leave without pay until he determined how to utilize the five open positions at the shop. Instead, he jumped on the opportunity to get rid of Rura.

139. In March of 2000, Sundstrom contacted Environmental Health Services ("EHS") at CSU, in charge of inspecting and cleaning up hazardous waste sites. Due to the significant cost involved, he had obtained Hubbard's approval prior to making this contact. He informed EHS of the original site where the oil tank had been buried, but not the location to which the smashed tank had been moved. EHS tested the original site of the underground storage tank removed by Rura and Feltz, and found contamination. The witness for EHS testified that the site where the smashed oil tank is located could be considered an environmental hazard. It has not been tested.

## **DISCUSSION**

In this action challenging an administrative termination and the agency's response to a grievance, it is Complainant's burden to demonstrate that the Respondents' actions were arbitrary, capricious, or contrary to rule or law. Section 24-50-103(6), C.R.S. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

### **I. CSU Violated the Whistle Blower Act.**

The Colorado Employee Protection Act, section 24-50.5-101 *et seq.*, C.R.S. ("whistle blower act" or "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 Com'n*, 699 P.2d 960, 966 (Colo. 1985). The purpose behind 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." Section 24-50.5-101, C.R.S.

### Rura's Disclosures are Protected by the Act.

The threshold determination is whether Rura's disclosures fell within the protection of the Act. *Ward v. Industrial Comm'n*, 699 P.2d 960 (Colo. 1985). The Act defines "disclosure of information" as the "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." Section 24-50.5-102(2), C.R.S. Rura's disclosures to Hubbard and Sundstrom about having moved a rusted, leaking underground storage tank that was contaminating the soil and water table around it in order to evade environmental inspection and clean-up are protected by the Act. Post and Herzman's orders to Rura and Feltz were illegal, and constituted abuse of authority and mismanagement. The Act's purpose is to promote disclosures to prevent just such "illegal and unethical practices." Rura's disclosures to Hubbard and Sundstrom regarding the barrels contaminating the soil on FS Shop property were also protected by the Act.

The Act actually requires two separate disclosures in order to secure its protection. It states, "It shall be the obligation of an employee who wishes to disclose information under the protection of this article 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 its disclosure." Section 24-50.5-103(2), C.R.S. Rura's disclosures to Hubbard in 1996 at the Bluebird Café that he had moved and buried the contaminated oil tank, and had buried a clean one in a new location, in order to cover up the environmental hazard and evade inspection, and that environmentally hazardous barrels were still on FS Shop grounds, meets the requirements of subsection 103(2). Rura made a good faith effort to provide his appointing authority the information to be disclosed prior to the time of its further disclosure. At the time Rura had this meeting with Hubbard, he felt that Post and Herzman had ordered him to do something illegal and harmful to the environment, and he made a bold effort by going right to the top of the Forest Service chain of command to correct the situation.

Rura's second disclosure, to Sundstrom, in November of 1997, regarding his digging up, moving and covering up the original contaminated oil tank site, reburying the old tank, and burying a new clean oil tank to be inspected, and the leaking barrels, meets the requirement of the second disclosure, under subsection 102(2). Again, that subsection requires disclosure of the protected information to "any person" or to the general assembly. Sundstrom was "any person." Having made the initial disclosure to his appointing authority and gotten no action for over a year, Rura decided to try to correct the situation through his new supervisor.

Respondent argues that the Act's intent is to require that the second disclosure be a public one outside the agency at issue. However, rules of statutory construction, case law interpreting the Act, and policy considerations mandate rejection of this argument.

Words and phrases found in statutes are to be construed according to their familiar

and generally accepted meaning. Section 2-4-101, C.R.S.; *Pearson v. District Court, 18<sup>th</sup> Jud. District*, 924 P.2d 512 (Colo. 1996). The generally accepted meaning of "any person" is just that: any person. The words are not ambiguous. The Act contains no language supporting Respondent's contention that the second disclosure must be to an individual outside the agency. In *Lanes v. O'Brien*, 746 P.2d 1366, 1371 (Colo.App. 1987), the Colorado Court of Appeals overturned the Board's narrow interpretation of the Act, based on the plain meaning of the statutory language ("any agency" means any agency, not just the agency of employment), and on the legislative purpose of protecting those who make disclosures. The Court stated, "Nowhere within this act is there to be found any provision which would suggest that its protection is to be extended only to an employee disclosing information about the agency with which he is employed. Thus, not only does the substantive language of this statute fail to support the Board's interpretation of its provisions, but the Board's efforts to restrict a state employee from [disclosing protected information] [are counter to] its very underlying purposes." *Id.*

From a policy standpoint, it is critical that employees who never go outside their agency of employment be protected by the Act. Employees that keep protected disclosures inside the agency do so for a number of reasons, including loyalty to the agency and its management, avoiding undue negative publicity and fiscal hardship on the agency, and avoiding the limelight of publicity themselves. Disclosing information inside the agency enables the agency to correct itself without having the information spiral out of control and wreak havoc on the performance of its business. It is difficult enough for an employee to summon up the courage to inform his or her own supervisor or appointing authority about a perceived wrong - no one likes to "rock the boat." It would be contrary to the intent of the Act to force employees to take the even more frightening and bold step of going outside the agency in order to enjoy the Act's protection. Going outside the agency is tantamount to betrayal. Employees that attempt to correct a serious situation in-house should not be punished by denying them the Act's protections.

Rura's Disclosures were a Substantial or Motivating Factor in the Actions Taken Against Him.

The next determination is whether the protected disclosures were "a substantial or motivating factor" in Respondent's adverse actions taken against Rura. *Ward*, 699 P.2d at 968. Section 24-50-103(1), C.R.S. The adverse actions taken against Rura that are prohibited by the Act include "dismissal. . . corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, or the threat of any such discipline or penalty." Section 24-50.5-102(2), C.R.S. This ALJ concludes that Rura's protected disclosures were a substantial or motivating factor in Sundstrom's imposition of the Needs Improvement evaluation and attendant Corrective Actions, his harassment and abuse of Rura, and Hubbard's termination of his employment.

Rura made his protected disclosures to Hubbard in 1996. Once the audit was completed and Sundstrom was brought in to supervise the FS Shop in 1997, Hubbard was not interested in hearing any more complaints of any sort from his employees, and made this clear to them. During this period, Hubbard knew the contaminated former and current sites of the oil tank were still there, un-inspected and unaddressed. He made a conscious

choice not to go beyond the audit report recommendations and call out the environmental inspection team, choosing the less expensive path of inaction, yet aware that the issue could re-surface at any time.

Sundstrom told FS Shop staff that he was brought in to clean house, to get rid of troublemakers and those who could not keep their mouths shut. Rura was just such a person. First, he disclosed the environmental hazards to Sundstrom, demonstrating that notwithstanding the audit, he was still concerned about the spent oil tank sites where the soil and water table were contaminated, as well as the barrels. Sundstrom decided to take care of the barrels in part, but to ignore the more expensive task of having the buried site inspected and cleaned up. Then, Rura testified at the Workers Compensation hearing of Wade Dellmar, complained about the health hazard caused by poor ventilation in the shop, and simply reported the truth about Jay Davis's drinking and discharging a gun on the job. Sundstrom responded by telling Rura repeatedly he needed to know how to be "political." During this period, it became clear to Sundstrom that Rura was a person that did not know how to keep his mouth shut, and Sundstrom turned against him for his pattern of disclosing environmental hazards (the tank, the barrels, and the poor ventilation that posed a health hazard) and for telling the truth and speaking up about issues he believed in. By mid-1999 Sundstrom engaged in an ongoing and escalating pattern of harassment and abuse of Rura, at one point screaming at him, "I can get rid of anyone here, and you'll be the first."

In January of 2000, Rura mentioned the cover-up of environmental hazards to Bill DeCrescentis. While the record does not demonstrate what Rura said, the material fact is that both Sundstrom and Hubbard were reminded that Rura had made the protected disclosures about which they had done nothing, and it now appeared that he might take the highly sensitive information outside the agency. At this point, the protected disclosures moved back to front and center, and became a substantial and motivating factor to take action against Rura.

Sundstrom's January 19, 2000 Corrective Action constitutes direct evidence of retaliation against Rura for his protected disclosures. In this Corrective Action, Sundstrom attempts to cover up the fact of the November 1997 disclosure by accusing Rura of holding the information back. He states, "The supervisor has been told that Michael had said that he knew of some tanks buried on the CSFS Foothills Campus to cover up environmental hazards . . . Holding back information about potential environmental hazards is unacceptable behavior." Rura had held nothing back: Sundstrom admitted at hearing that Rura had disclosed this very information to him in November of 1997. This Corrective Action was a sham, an attempt to cover up his own culpability for not having immediately addressed the environmental contamination back in 1997.

Sundstrom then imposed as a "corrective action" on Rura that he not make any further protected disclosures: "Michael will cease making threats under any circumstance in relation to his duties with CSFS." This directive to Rura constitutes a facial violation of the whistle blower act, as it expressly prohibits him from discussing the environmental hazards with anyone else, on penalty of further disciplinary action.

Further retaliation consisted of Sundstrom's unwarranted Needs Improvement  
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evaluation and subsequent escalating harassment of Rura in 2000. This harassment and abuse became so unbearable that finally, in December 2000, Rura had to leave employment. In January, 2000, the state's own WC doctors certified that it was unsafe to Rura's health to work under Sundstrom's direction. Rura's departure on December 15 and eventual administrative discharge on June 2000 constituted a constructive discharge. Under Colorado law, a constructive discharge occurs then an employer makes or allows the employee's working conditions to become so difficult or intolerable that the employee has no other choice but to resign. The test is whether a reasonable employee under the same or similar circumstances would view the new working conditions as intolerable. *Wilson v. Board of County Com'rs of Adams County*, 703 P.2d 1257, 1259-60 (Colo. 1985). The facts of this case meet this test handily. The fact that Rura left the workplace on stress leave and was ultimately "administratively terminated," as opposed to resigned, does not change the fact that Sundstrom's conduct constituted constructive discharge.

Hubbard's hostility towards Rura was palpable at hearing. His conduct in 2000 directly following his receipt of information that Rura was soon to bring his protected disclosures regarding the environment hazards outside the agency demonstrates retaliatory intent. First, Hubbard ignored mitigating information in processing Rura's grievance by failing to address the Gurnsey letter, which demonstrated Sundstrom's clear bias against Rura and managerial misconduct. Second, after the Vice Provost issued the November 2000 final grievance decision that Rura be transferred or dismissed, Hubbard violated that decision by never taking any action to effectuate a transfer. He never discussed the possibility of a Rura transfer with Rura, Sundstrom, Liley, or any CSU official. Instead, as soon as Rura went out on stress leave, he immediately saw to it that the Forest Service took the appropriate steps towards his administrative termination.

Respondent argues that because the Human Resources office ("HR") actually terminated Rura's employment, Complainant has failed to make a causal link between Rura's protected conduct and the HR office. The whistle blower act prohibits any appointing authority or supervisor from "initiating or administering" any disciplinary action against an employee for making protected disclosures. It is undisputed that while the HR office administered the termination, it was powerless to do so without a letter requesting the termination from Hubbard. Hubbard "initiated" Rura's termination by sending the June 14, 2000 letter to HR Director Liley requesting his termination. Had Hubbard not sent that letter, Rura would never have been terminated.

Respondent has failed to prove it would have reached the same decision even in the absence of protected conduct.

Having concluded that Rura's protected disclosures were a substantial or motivating factor in Respondent's termination of his employment, the burden next shifts to Respondent to prove that "it would have reached the same decision even in the absence of protected conduct." *Ward*, 699 P.2d at 968. Respondent has failed to meet this burden.

Director's Procedure P-5-10 states, "If an employee has exhausted all sick leave and  
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is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication." Hubbard's letter requesting Rura's termination states, "Michael Rura has not been in contact with Colorado State Forest Service since December 2000. I consider him to have abandoned his job. Due to lack of contact and Mr. Rura's inability to perform his work duties with the Colorado State Forest Service I am requesting termination of Mr. Rura's employment" with the FS.

Hubbard testified that he has not filled Rura's position at the FS Shop, that five out of the ten permanent positions at the FS Shop remain open to this day, and that all FS Shop work is being performed to his satisfaction at its current staffing level. The reason for this is his ongoing assessment of fire service needs in the State of Colorado. Until Hubbard determines exactly how to meet those needs, he will keep these positions open.

At the time of Rura's administrative termination, therefore, Hubbard had no reason to terminate his employment. Hubbard's statement in the letter that he sought Rura's termination because of his inability to perform his work duties was proven hollow and false at hearing by his own testimony. In fact, no witness for Respondent offered any reason for Rura's termination at hearing, unlike most administrative termination cases where the agency needs to fill the position as soon as possible in order to perform the work of the agency. Rura, on unpaid leave of absence at the time of his termination, was not a drain on FS resources. Hubbard could easily have kept him on staff until he determined how he was going to utilize the FS Shop resources.

Respondent has failed to prove it would have reached the same decision to administratively terminate Rura in the absence of his protected conduct. Given Hubbard's long-range plans for the Forest Service and the fact that Rura's position was not needed to meet the FS Shop's workload, if a nine-year employee who had not made protected disclosures and "caused trouble" had gone out on leave, the FS would have had no independent reason to administratively separate him or her. Hubbard chose to terminate Rura because he sought to get rid of a perceived troublemaker. The P-5-10 option presented itself as an easy out. Administrative termination was a pretext for a disciplinary termination in retaliation for protected whistle blower activity.

Respondent argues that evidence regarding the 1999 Needs Improvement evaluation and Corrective Actions and Rura's grievance thereof is barred by the whistle blower act at Section 24-50.5-104(3), C.R.S. This section states in part,

"It shall be a defense in any grievance or appeal before the state personnel board that the disciplinary action against an employee was initiated in violation of section 24-50.5-103, and the issue of the violation [of the act] shall be determined by the state personnel board as a part of the related grievance or appeal. The failure to raise any such defense shall bar any subsequent cause of action for a violation of section 24-50.5-103 arising out of the same set of facts at issue in the related grievance or appeal."

Had Rura been notified of his appeal rights at Step 4 of the grievance process, this argument would have merit. However, the November 2000 final grievance decision contained no notice to Rura of his right to appeal to the Board. Further, the employee assistance counselor with whom he met after receipt of the decision testified that she did not advise him of his right to appeal to the Board. An employee's time to appeal does not run if the notice did not properly advise the employee of his or her right to appeal. *Renteria v. Colorado State Department of Personnel*, 811 P.2d 797, 803 (Colo. 1991). State Personnel Board Rule R-8-6, 4 CCR 801, states, "Once a decision is rendered by the highest level of relief in an agency, an employee may petition to the Board for discretionary review pursuant to the discretionary Board hearing section of this chapter." Board Rule R-8-8 mandates, "The grievance process is designed to address and resolve problems, not to be an adversarial process. Agencies must inform employees of how to proceed through the grievance process. . . ."

### Remedy.

The whistle blower act mandates certain remedies and actions upon a finding of violation of the Act. It states,

"If the state personnel board after hearing determines that a violation of section 24-50.5-103 has occurred, . . . the board shall order . . . the appropriate relief, including, but not limited to, reinstatement, back pay, restoration of lost service credit and expungement of the records of the employee who disclosed information, and, in addition, the state personnel board shall order that the employee filing the complaint be reimbursed for any costs, including any court costs and attorney fees, if any, incurred in the proceeding." Section 24-50.5-104(2), C.R.S.

Accordingly, Complainant is entitled to reinstatement, back pay, restoration of lost service credit, attorney fees and costs. In determining a remedy when the legal injury is of an economic character, as here, compensation should be equal to the injury. *Lanes v. State Auditor's Office*, 797 P.2d 764, 767 (Colo.App. 1990); *Renteria v. Department of Labor and Employment*, 907 P.2d 619, 622 (Colo.App. 1994). Rura is not entitled to a windfall. *Department of Health v. Donahue*, 690 P.2d 243 (Colo. 1984).

Complainant is entitled to the following relief:

- a. reinstatement to a comparable position at CSU, but not a position under Hubbard or Sundstrom;
- b. back pay with interest (*Lanes*, 797 P.2d at 767) through December 15, 2000, with no offset for the Workers Compensation settlement. This is because Respondent caused the stress condition that made it impossible for Rura to work at the Forest Service. *Renteria*, 907 P.2d at 622)(back pay award during the period of receipt of Workers Compensation benefits appropriate where employer caused the disability in constructively discharging employee);

- c. reinstatement of all paid leave utilized from December 15, 2000 through his separation, again because the Forest Service caused his inability to work. *Renteria*;
- d. attorney fees and costs.

The whistle blower act also provides,

"Whenever the state personnel board determines that an appointing authority or supervisor has violated section 24-50.5-103, the appointing authority or supervisor shall receive a disciplinary action which shall remain a permanent part of the appointing authority's or supervisor's personnel file, and a copy of the disciplinary action shall be provided to the employee. The disciplinary action shall be appropriate to the circumstances, from a mandatory minimum of one week suspension or equivalent up to and including termination. In considering the appropriate disciplinary action pursuant to this subsection (4), the appointing authority or supervisor of the appointing authority or supervisor who has committed such violation shall consider the nature and severity of the retaliatory conduct involved." Section 24-50.5-104(4).

This portion of the remedy is to be determined by CSU.

II. Respondent Constructively Discharged Rura in Violation of his Property Right to Classified Employment .

Under the Colorado Constitution, Article XII, section 13(8), "Persons in the personnel system of the state shall hold their respective positions during efficient service . . . ." Once an employee acquires certified status, the employee may be discharged or disciplined only for just cause based on constitutionally specified criteria. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The forum for establishing just cause is the disciplinary hearing before the Personnel Board. At that hearing, it is the agency's burden to prove that just cause warranted the discipline imposed. *Id.*

As discussed above, Sundstrom constructively discharged Rura. His harassment and abuse made Rura's working conditions so difficult or intolerable that Rura had no choice but to separate himself from the worksite. The state's own WC doctors determined that this was the case. Respondent offered no rebuttal of the overwhelming evidence of constructive discharge in this record. A reasonable person under the same or similar circumstances would view the working conditions as intolerable. *Wilson v. Board of County Com'rs of Adams County*, 703 P.2d 1257, 1259-60 (Colo. 1985).

While Rura did not "resign," as is the case in most constructive discharge cases, that fact does not defeat the legal conclusion that he was constructively discharged. Rura was given two choices by Respondent: work under intolerable conditions, or face administrative

termination. Such a choice is no choice at all, and constitutes a constructive discharge.

Constructive discharge is an involuntary separation from employment, and as such, entitles the employee to a hearing challenging the merits of the termination. *Harris v. State Bd. of Agriculture*, 968 P.2d 148, 152 (Colo.App. 1998); *Kinchen, supra*. Rura has been afforded no such hearing. Hence, his involuntary termination cannot stand.

Rura is entitled to reinstatement to a comparable position, back pay with interest through December 15, 2000, with no offset for the Workers Compensation settlement, *Renteria*, 907 P.2d at 622), reinstatement of all paid leave utilized from December 15, 2000 through his separation, *Renteria*, and attorney fees and costs.

Attorney fees are appropriate here because Sundstrom's constructive discharge of Rura was in bad faith, malicious, or a means of harassment. Section 24-50-125.5, C.R.S. Board Rule R-8-38 defines a personnel action as having been made in bad faith, malicious, or as a means of harassment if it was "pursued to annoy or harass, was made to be abusive, was stubbornly litigious, or was disrespectful of the truth." The facts of this case meet this standard.

### III. The P-5-10 Termination was a Pretext for Discipline.

Even in the absence of a determination that Respondent violated the whistle blower act, the evidence demonstrates that Hubbard terminated Rura's performance as a pretext for discipline. The Vice Provost's final grievance decision concluded, "It is clear that Mr. Rura's work does not consistently meet acceptable standards of quality, that he is resistant to filing appropriate inventory and other 'accountability' forms, and that he resists direction from supervisors. Further, Mr. Sundstrom's 1999 evaluation was likely an accurate assessment of his work, i.e. that Mr. Rura has been insubordinate and resists supervision and efforts to help him improve his performance." The only possible source of this information concerning Rura's poor performance is the management of the Forest Service, namely, Sundstrom and Hubbard.

The Vice Provost felt so negatively about Rura's performance that he actually went to far as to direct his termination as a resolution to his grievance. As is discussed below, this is a shocking violation of the grievance rules; an act of retaliation against the employee for filing the grievance. The retaliatory nature of the final grievance decision, based on input from Sundstrom and Hubbard, underscores the fact that the Forest Service management disapproved of Rura's performance.

If the Forest Service disapproved of Rura's performance so strongly, it was obligated under the personnel system to utilize progressive discipline to address performance issues. The Forest Service imposed a disciplinary termination against Rura in the guise of a P-5-10 administrative separation. This violated his constitutional right to due process: notice and a hearing prior to the deprivation of his property right to classified employment. *Renteria, supra; Kinchen, supra*.

Rura is entitled to the same remedies as those set forth above in the constructive discharge section. The attorney fee award is based on a finding that the administrative separation was made in bad faith, as a pretext for discipline, with the knowledge that the state's own WC doctors had certified it was unhealthy for him to work under Sundstrom and hence Sundstrom was responsible for Rura's "inability to work." Further, attorney fees are awarded because Hubbard's action was groundless: Hubbard knew at the time of the P-5-10 termination that he could operate the FS Shop without filling Rura's position. There was no factual basis upon which to base the decision (other than the impermissible one of pretextual discipline).

IV. CSU's Grievance Decision was Contrary to Board Rule R-8-8.

State Personnel Board Rule R-8-8 states, "The grievance process is designed to address and resolve problems, not to be an adversarial process." Rura had put aside the issue of his 1999 performance prior to bringing his grievance to the attention of the Vice Provost. Instead of accepting the Good evaluation as having been settled and addressing solely the retaliation and harassment issue, the Vice Provost treated the grievance process like a performance review. It culminated in his determination that Rura was such a poor employee that he should be terminated, and if not terminated, then transferred out of his position. This is an extraordinary violation of the letter and spirit of Rule R-8-8.

This final grievance decision served as a green light for Sundstrom's escalating harassment and abuse of Rura, culminating in his constructive discharge just one month later.

V. Shirey's Termination of Rura was Arbitrary and Capricious.

In *Van DeVegt v. Board of County Commissioners of Larimer County*, 55 P.2d 703 (Colo. 1936), the Colorado Supreme Court defined arbitrary and capricious agency action as:

(a) neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) failing to give candid and honest consideration of evidence before it on which it is authorized to act in exercising its discretion; or (c) exercising its discretion in such manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions. 55 P.2d at 705.

See *Lawley v. Dep't of Higher Education*, \_\_\_\_ P.3d \_\_\_\_ (Colo. No. 00SC473, December 3, 2001), slip opinion page 31, n.15.

At the time Shirey imposed the P-5-10 administrative termination on Rura, she knew the following: the state's own WC doctor had certified it would be unsafe to Rura's health to

work under Sundstrom; Rura and Sundstrom had "issues;" Rura felt threatened by Sundstrom and fears bodily harm by him; Rura felt Sundstrom was violent, and said that he yells and screams at him, calls him names, engages in threats of violence, face-to-face nose confrontations, and challenges to fights.

A reasonable person in Shirey's position would have determined that the line supervisor might be attempting to get rid of someone he hated, and that it might be an abuse of P-5-10 in this situation to use it as a pretext for discipline. Further, a reasonable person in Shirey's position would consider whether it would be a violation of the state personnel system to use P-5-10 in a situation where the direct supervisor caused the disability keeping the employee away from the worksite. Based on these clear possibilities, a reasonable person in Shirey's position would have then called the appointing authority for further information. This did not occur. Shirey failed to use reasonable diligence and care to procure evidence necessary to make a determination as to whether imposing a P-5-10 termination on Rura would be an abuse of the rule.

### **CONCLUSIONS OF LAW**

1. Respondent violated the Colorado State Employee Protection Act.
2. Respondent's actions were arbitrary, capricious, and contrary to rule or law.
3. Complainant is entitled to an award of attorney fees and costs.

### **INITIAL DECISION**

Complainant is reinstated to a comparable position under neither Sundstrom nor Hubbard; back pay with interest through December 15, 2000 with no offset for the Workers Compensation settlement; reinstatement of all paid leave utilized from December 15, 2000 through his separation, and attorney fees and costs. The November 2000 grievance decision is rescinded and shall be removed from Complainant's personnel file. The amended Good 1999 performance evaluation is to be placed in Rura's personnel file; the January 2000 Corrective Actions are rescinded and to be removed from Rura's personnel file.

DATED this \_\_\_\_\_ day of  
April, 2002, at  
Denver, Colorado.

\_\_\_\_\_  
Mary S. McClatchey  
Administrative Law Judge  
1120 Lincoln Street, Suite 1420

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is \$50.00 (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-#2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief.

An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double-spaced and on 8 2 inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the \_\_\_\_ day of April, 2002, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Cecelia M. Serna  
940 Wadsworth Blvd., 4<sup>th</sup> Floor  
Lakewood, Colorado 80215

and in the interagency mail, addressed as follows:

Melissa Mequi  
Assistant Attorney General  
Employment Law Section  
1525 Sherman Street, Fifth Floor  
Denver, CO 80203

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