

STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2010B015(C)

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

JOHN REDDING,

Complainant,

vs.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

Administrative Law Judge Mary S. McClatchey held the hearing in this matter on February 23, 24, and 25 and March 2, 2010, at the State Personnel Board, 633 17th Street, Denver, Colorado. The case was commenced on the record on February 2, 2010. The record was closed on March 13, 2010 upon receipt of the parties' written Closing Arguments. First Assistant Attorney General Vincent E. Morscher and Assistant Attorney General Monica Aldridge represented Respondent. Respondent's advisory witness was Dick Wolfe, State Engineer, Colorado Department of Natural Resources (DNR). Patricia Bangert, Esquire, represented Complainant.

MATTERS APPEALED

Complainant, John Redding (Complainant or Redding), asserts that the Department of Natural Resources (DNR or Respondent) has retaliated against him for making protected disclosures under the State Employee Protection Act, by creating a hostile work environment, giving him a Needs Improvement evaluation and Corrective Action Plan in May 2009, and terminating his employment in July 2009.

For the reasons set forth below, Respondent's action is **affirmed**.

ISSUES

1. Whether Complainant committed the actions upon which the disciplinary action was based;
2. Whether Respondent's actions were arbitrary, capricious or contrary to rule or law;

3. Whether Respondent violated the whistleblower act;
4. Whether Complainant is entitled to an award of attorney fees and costs.

FINDINGS OF FACT

General Background

1. Complainant was hired at DNR in April 2002 as a Professional Engineer (PE) I in the Water Resources section of the Division of Water Resources (DWR).

2. Complainant has a Bachelor of Science degree in Aerospace Engineering with a focus on Mechanical Engineering, a Masters degree in Civil Engineering with a focus in Water Resources, earned in 1993, and a Masters degree in Operations Research with a minor in Mathematics, earned in 1998. He is a licensed engineer in Colorado.

3. Prior to employment at DNR, Complainant held the following positions (in reverse chronological order): software engineer for Aras Corporation for fourteen months, software engineer for Raytheon for fourteen months, Water Resources Engineer for the City of Thornton for over five years, and Mechanical Engineer at Northrop DSD for nine years.

4. As a PE I in the Water Resources section from April 2002 through February 2006, Complainant performed dam safety inspections, reviewed reports, plans and specifications of existing dams by other engineers, performed miscellaneous engineering analyses, issued water well permits, had frequent contact with dam owners and members of the public, and maintained Water Resources databases and spreadsheets.

5. In 2003, Complainant received a Customer Service award from Hal Simpson, State Engineer. During the years 2003 to 2005, Complainant received several letters of commendation from attorneys and other members of the public for his excellent customer service.

6. Complainant received Commendable ratings on his annual performance evaluations for the periods of 2002/2003 and 2003/2004. He received a Satisfactory rating for the 2004/2005 period. This evaluation included an Unsatisfactory rating in the Individual Performance Objective (IPO) for timeliness in his completion of well permit evaluations. To receive a Satisfactory timeliness rating, Complainant needed to have completed over 80% of his well permit evaluations within 45 days; he had completed 66% within 45 days. Complainant signed the "Agree" box on the evaluation.

7. Complainant's 2005/2006 annual evaluation was an overall Satisfactory. He was rated Unsatisfactory in three IPO's: the timeliness of completion of well permit evaluations; the quality of his well permit evaluations; and the quality of his Supply Plan Reviews. Complainant received Commendable ratings on three IPO's: Leadership; Planning, Organizing and Coordinating; and Application Comments.

8. Complainant's supervisor, Craig Lis, wrote lengthy comments on the 2005/2006 evaluation. He stated that Complainant has excellent customer service skills, but spends an "inordinate amount of time on this duty, which severely detracts from his ability to complete other tasks." He also noted that Complainant regularly worked overtime to complete his tasks timely, but that the root cause of his task completion problem was his unmet need to prioritize his workload.

9. Complainant refused to sign this evaluation. This angered Lis, who then lowered Complainant's overall evaluation score twice.

Relationship with Dick Wolfe

10. Complainant was a personal friend of Lis' direct supervisor, Dick Wolfe, then the Chief of Water Supply (soon to become State Engineer). Complainant had served on the Colorado Water Officials Association (CWOA) with Wolfe, and they had performed committee work together. The two men became friends, often had lunch together, and attended annual holiday concerts together with their wives.

11. Redding complained to Wolfe about Lis's poor supervisory skills. Wolfe responded by recommending that Redding move to the Dam Safety Branch (DSB) of DWR. Complainant had worked with the Chief of the DSB, Mark Haynes, previously and was enthusiastic about the idea. He applied for an open competitive position and was hired.

Complainant's PE I Position in the DSB

12. In March 2006, Complainant started work in the DSB as a PE I, Dam Safety Engineer I, under the supervision of Haynes.

13. Haynes has worked in the DSB since 1980. In January 2006, he became Chief of DSB. As chief of dam safety, Haynes is responsible for the mission of the DSB, protecting the general public from the consequences of a dam failure; providing technical oversight over all dam safety engineers; reviewing all dam safety reports, plans, and specifications performed by staff; and serving on state and national boards (such as Homeland Security and the Army Corp of Engineers).

14. Haynes supervised twelve PE II's throughout the state and only one PE I, Complainant. Complainant's position is exempt from overtime.

15. The DSB enforces all safety requirements governing the design, construction, modification, and inspection of dams in the state of Colorado. The Denver office consists only of Complainant, Haynes, and Paul Perri, a PE II. All remaining PE II's were in other district offices.

16. The Class Series Description of the Professional Engineer I position describes it as "a fully-operational, professional (licensed) engineer. Positions in this level apply the engineering sciences and mathematics to analysis or design of projects or programs with engineering components." The Decision Making section states that the PE I position determines "sets of inspection, testing, fiscal review, or safety compliance review operations to be used in analyzing engineering plan designs for new facility construction. The general pattern, program, or system exists but must be individualized. This individualization requires analysis of data that is complicated. Analysis is breaking the problem or case into parts, examining these parts, and reaching conclusions that result in process. This examination requires the application of known and established theory, principles, conceptual models, professional standards, and precedents in order to determine their relationship to the problem."

17. Complainant's Performance Plan contains six IPO's: Dam Safety Inspections and Reports (25%); Design Review and Construction Inspections (15%); Engineering Analysis (10%); Response to Public Records Management (10%); Emergency Response (0%); and Office Support (40%).

18. Under the Dam Safety IPO, to achieve a Satisfactory rating, dam safety inspection reports are to be completed within 10 working days of the inspection 90 percent of the time, and within 15 working days 100 percent of the time. IPO 2, Engineering Analysis, requires proficiency with available tools (such as Dam Break software, Slope Stability software, database management) to complete studies such as hydrology, hazard analysis, slope stability, database management and other projects, as assigned, to achieve a Satisfactory rating.

March 2006 Email to Haynes

19. At the time Complainant was hired in the DSB, he had Water Division work to complete. Complainant agreed to spend personal time after work hours finishing tasks from his prior position.

20. One evening in March 2006, Haynes returned to the office after the office had closed and noticed that all of the work on Complainant's desk appeared to be that of his prior position. Haynes was concerned that

Complainant was spending work time completing Water Supply tasks. He put a sticky note on Complainant's desk, "Dam Safety???"

21. Complainant responded to Haynes' note the following day with an email, stating in part, "I can't tell if you're kidding or not. If not, I'm starting to get kinda irritated about this whole thing!" He stated he had been spending evenings and weekends on Water Supply work, "and instead of people showing any kind of gratitude, I just keep getting this kind of crap. Anyhow, forgive my rant, but I'm beginning to get really resentful, and that's not a good way to start a new position. John."

22. Haynes responded, "Sorry. I guess I need to be more respectful of how you are handling you[r] work. We need to talk. Mark."

23. Complainant complained to Haynes' supervisors about the note and Haynes learned of this.

June 2006 Complaint Regarding Lis

24. On June 16, 2006, Complainant wrote a memo to Human Resources in response to his 2005/2006 evaluation. He emailed it to Wolfe for review prior to sending it. The memo indicated that his performance appraisal "was not structured in a way that mirrored the way which I had to spend my time while under Craig's supervision," that Lis had never met with Complainant to discuss performance issues, that Lis initiated too many social interactions which hurt his productivity, and that Lis insulted him five-to-ten times per day "so that the rest of the team could hear and laugh with him at my expense."

First Year at DSB

25. During Complainant's first year of employment at DSB, he accompanied Haynes and the other PE II's on numerous dam safety inspections and dam construction inspections. Haynes had Complainant write inspection reports on all of the dams they inspected together, so that he could begin learning the job right away. Haynes personally reviewed all of Complainant's dam inspection reports, making hand written notes on them to provide feedback and indicate editing changes to be made.

26. Complainant spent a week in the field with Durango PE II Dennis Miller, attended training sessions at DSB meetings, and attended several sponsored trainings. These included a week training in Safety Evaluation of Existing Dams; a course in HEC RAS ("river analysis system" software used to analyze the hazard classifications of dams by anticipating the potential effects of dam flooding); HEC HMS, a software program used to analyze hydrology studies and determine the drainage basin characteristics of dams; and others.

27. During this period, Complainant also helped edit the dam safety rules governing all work of the DSB, and reviewed hydrology reports and hazard classification reports performed by the PE II's.

28. Haynes' supervisor was Jack Byers, Deputy State Engineer. Byers reported to Wolfe.

29. In 2006, Complainant and his wife were having difficulty conceiving a child. Complainant, Haynes, Byers and others sometimes made fertility jokes at work and at work parties. Byers left a sperm-shaped liqueur bottle on Complainant's desk as a joke during this period.

30. Complainant's wife had a miscarriage. He then asked Haynes and Byers to stop making jokes about fertility at work.

31. Complainant felt that Byers and Haynes treated him in a retaliatory manner after he asked them to stop joking about fertility at work. He felt that they ostracized him from office conversations.

January 9, 2007 Interim Evaluation Meeting and Memo Regarding Flextime

32. On January 9, 2007, Haynes met with Complainant to present a written interim performance evaluation and a memo regarding flextime hours. The "Satisfactory" evaluation stated that Redding needed to improve in three areas: timeliness of the completion of assignments, accuracy and completion of assigned projects, and responding to requests by others. It stated, "John apparently is not concerned with datelines and needs to improve on budgeting his time on projects. He seems to concentrate on the easier assignments first."

33. The memo regarding flextime stated that due to Complainant's "recent timecard inconsistencies, task performance, and inconsistent work and attendance schedule as we discussed today in your interim performance evaluation meeting," Haynes was requesting that Complainant choose a regular flex schedule in accordance with the State of Colorado Flextime policy, attached to the memo. The memo required Complainant to select a standard schedule with a daily start and end time that was the same for each two-week period, and prohibited Complainant from working outside the normal schedule, at home, or on weekends, without prior written approval by Haynes.

34. The memo stated that flextime is not a right, but a business arrangement that should benefit the employee and the employer, and, "At the present time, I do not see how your flexible hours benefit the Dam Safety Branch in carrying out our mission and achieving our goals."

35. Both Haynes and Complainant perceived the other to be confrontational during the January 9, 2007 meeting.

36. After the meeting, at 6:15 p.m., Haynes emailed Byers to report that the meeting had not gone well. He said Complainant had become "very defensive and tried to deflect the blame on me. When I pointed out the abuse of the time sheet and vacation time, he became very silent and did not try to defend his actions. We can talk about this when you get back. Of course, we have not heard the end of this. I was not too proud of the way I handle[d] the meeting but I am on a very steep learning curve. Mark."

37. Byers responded that it had probably gone better than he thought and, "you are doing very well dealing with a very difficult situation."

Paul Perri

38. Paul Perri was hired in the Denver office of the DSB in October 2006 as a PE II, Design Review Engineer, to review plans, specifications and designs for new dams and modification and repairs to existing dams. He had a good relationship with Complainant, brought him on many site visits, collaborated with him on several of his work projects, and often reviewed his work.

39. In the spring of 2007, Perri noticed that the atmosphere in the Denver office had become tense. He knew there was tension between Haynes and Complainant, and that they were not talking to each other very much, but did not know why. Perri also observed that the stress Haynes was under made him short-tempered at times.

2006/2007 Annual Evaluation

40. On April 20, 2007, Haynes gave Complainant a Commendable rating for the April 2006 to March 2007 year, with a score of 175 (out of a 175 – 269 scale for Commendable). Haynes felt that Complainant had begun to budget his time better and to complete his work on a more timely basis. In addition, Haynes was aware that Complainant would be eligible for performance pay with a Commendable rating.

41. On this evaluation, Haynes stated that Complainant had shown "much improvement since the interim evaluation in the performance of his assigned duties. He has provided a considerable amount of administrative support to the Branch Chief and Deputy State Engineer. Appears to have improved in the budgeting of his time to complete assignments but still needs to improve on the timeliness of the completion of his assignments. Needs to develop his technical skills in the area [of] dam design and construction which should come from additional training." Complainant signed "agree" on this evaluation.

42. During the next performance cycle, Complainant was assigned to review the hydrology reports performed by other engineers, and to perform the hydrology portion of hazard classification studies.

June 2007 Email Exchanges Between Complainant and Haynes

43. On June 7, 2007, Haynes sent an email to Complainant regarding "Timesheet Discrepancies." Haynes stated that Complainant had taken 18 hours of sick and annual leave in May 2007, which was different than the amount Haynes had pre-approved. He asked Complainant to explain the discrepancies and reminded him that all leave had to be pre-approved by him.

44. Complainant responded by suggesting they talk about it face-to-face when Haynes returned from his trip. Haynes replied that that would be fine, and also stated, "Sorry, but I thought your preferred method of communication was by e-mail messages based on the amount of e-mails I get from you. Mark Haynes."

45. Complainant responded that he did like using e-mail but there had been emails Haynes had not had time to answer, "so occasionally it makes sense for one of us to walk the 10 feet into the other's office. Regarding my hours, I *did* post appointments on Outlook as you requested, so hopefully that will answer most of your questions. Regards, John." (Emphasis in original).

46. That evening, June 7, 2007, at 9:09 p.m., Complainant sent Haynes a second email entitled, "jacket, etc." It stated, "Hi Mark, You were going to tell me where you bought your Reuter Hess jacket and how much you paid for it. Do you recall? Also, where did that gift basket come from that you got around Christmas?" Complainant stated he wanted to get one for his father-in-law for Father's Day and they could talk about it when Haynes returned from his trip.

47. On June 8, 2007, at 7:25 a.m., Complainant sent a third email to Haynes entitled, "Speaking of morals . . ." It stated, "Is it ever allowable for a State employee to have a consultant pay for things like tickets to sporting events, greens fees, etc.? To me this sounds like a huge conflict in interest. . . especially when our responsibility in Dam Safety is to protect the public, and these kinds of 'gifts' could be perceived as compromising our integrity to do our job without bias. That would be great if you could respond to this before you leave for your trip." Haynes did not respond.

48. On June 8, 2007, at 5:24 p.m., Complainant sent Haynes a fourth email. He forwarded his previous email, "Speaking of morals" to Haynes with a new message, "I'm sure you were busy getting stuff done before your trip, so I'll get answers to these questions elsewhere while you're gone. Have a good trip! John."

49. Haynes felt that Complainant was retaliating against him for holding Complainant accountable for his work time when he received the emails on June 8, 2007. He consulted Byers about the emails and was informed that he was within the state ethics code to receive the type of gifts raised by Complainant. Byers told Haynes that he could respond to the emails but did not have to do so. Haynes did not respond.

50. The consultants to whom Complainant was referring were private design engineers who worked for dam owners. In 2004, after the DSB staff had approved the design of the Reuter-Hess Dam for construction, the company had one hundred jackets made for its employees who had worked on the project. An extra one was given to Haynes.

Application for PE II Positions; July 2007 Board Appeal

51. In March 2007, Complainant had applied for two open competitive PE II positions (in Durango and Greeley), placing first and second on the eligibility lists.

52. In April 2007, Complainant's wife gave birth to a son.

53. In July 2007, Byers hired two other individuals for the PE II positions.

54. Complainant appealed his non-selection for the positions to the State Personnel Board, alleging sex discrimination. He asserted that Byers and Haynes had retaliated against him after his wife miscarried the previous year and he had asked Byers to stop making fertility related comments to him at work. Complainant stated that when he made this request of Byers, "Jack didn't respond with anything but a stern glare, and I left his office in the uncomfortable silence. Almost immediately after this confrontation, I noticed escalating retaliatory behavior from Jack and Mark."

55. Complainant asserted in his Board pleadings that Byers had reprimanded Complainant for sending inappropriate emails, copying the entire DSB staff; Byers and Haynes were giving him the "silent treatment"; Byers and Haynes had engaged in criminal libel by making slanderous statements about him to other DSB employees; Haynes had sent antagonistic, confrontational and insulting emails to him; Haynes had refused to permit him to make up sick time while allowing others to do so; Haynes had failed to respond to emails inquiring about the state's policy of accepting gifts from consultants; and Haynes had required Complainant to fill out a flex-time form while not requiring it of others. Complainant asserted that Byers "often looked like he was 'after me.'"

56. The Board denied Complainant's petition for hearing.

57. On October 22, 2007, Complainant sent an email to Wolfe with a copy of a letter he intended to send to the Governor concerning his perceived mistreatment by Haynes and Byers. He stated, "Hi Dick, Just so you won't be caught off guard, I will be contacting the Governor's office tomorrow morning about the abuse that I've been getting from Mark and Jack. Thanks, John." Complainant sent the letter to the Governor, describing the fertility jokes, his request that they stop after his wife's miscarriage, and referring to the "series of blatantly retaliatory actions that are still in motion."

Wolfe Appointed State Engineer

58. In November 2007, Wolfe was appointed by Governor Owens to be State Engineer and Director of the Division of Water Resources. This appointment placed him four levels above Complainant on the chain of command. As State Engineer, Wolfe advises the Governor on water issues, oversees all water administration, financing, and policy for the state, sits on five interstate compacts and several state boards, such as the Colorado Water Conservation Board, hears appeals of water permitting and other decisions, manages budgeting and personnel at the agency, and acts as the delegated appointing authority for personnel decisions. Wolfe supervises the Deputy State Engineer, who supervises two Assistant State Engineers.

April 2008 DSB Meeting

59. The DSB has a meeting twice a year at which all of the engineers meet to reconnect as a group, discuss policy issues, technical issues, receive updates on training and other professional activities, etc. The work culture in the DSB is such that the professional engineers are expected to attend the meetings; there is a presumption that DSB staff would want to learn about the group's activities and not miss any of the meeting.

60. The Spring 2008 branch meeting was scheduled on April 1 and 2, in Montrose, Colorado. March 31 was scheduled to be a travel day for all staff throughout the state.

61. Complainant informed Haynes he was planning to use March 31 as an alternate holiday leave day; therefore, he would be absent on Tuesday, April 1, the first day of the meeting. Haynes erroneously assumed that since April 1 was a work day, instead of driving to Montrose on March 31, Complainant would drive on April 1, departing in the morning and arriving in the early afternoon.

62. Haynes sent out the meeting agenda, listing Complainant as a co-presenter on the first day. Complainant emailed Haynes to remind him of his absence. Haynes responded that he kept forgetting "that you will not be there on Tuesday. I will adjust the agenda to have your presentations later in the meeting." Haynes re-scheduled Complainant for the late afternoon on April 1.

63. Complainant arrived in Montrose in the early evening on Tuesday, April 1 and therefore missed the entire first day of the meeting. Bill McCormick, PE II from Colorado Springs, was disappointed with Complainant and Complainant could tell that he was not pleased.

64. Complainant believed after this meeting that Haynes informed the PE II's on April 1 that Complainant was supposed to be at the meeting in the afternoon but that he had reneged on the commitment.

65. Byers arrived at the meeting on Wednesday in the early afternoon, and Haynes mentioned to him that Complainant had not participated in the meeting on Tuesday.

66. On April 2, 2008, Complainant emailed Haynes, stating, "I don't want to ruffle any feathers here, but I overheard you talking to Jack today about my absence on Tuesday. You may have forgotten, but you were definitely aware that I wasn't going to be present."

67. Haynes responded on April 7 that he had expected Complainant to arrive between 1 and 3, after driving there during the morning for the five-hour trip, as Byers had done on Wednesday. He stated that he had rescheduled Complainant's presentation in the late afternoon. He then stated, "Since you did not arrive in Montrose until Tuesday evening and missed a full day of the branch meeting, can you tell me what you plan to charge your time to on Tuesday April 1st? It is my understanding that you were working at home, which was not approved by me and the State vehicle that you used" was not checked out until after noon.

68. Complainant forwarded this response to Wolfe at 8:00 p.m. that evening, pointing out that Haynes knew he would be absent on Tuesday, and noting that he had tried to raise this issue diplomatically with Haynes. Complainant asked Wolfe to do something about Haynes' unprofessional and retaliatory behavior.

69. At 11:30 p.m. on April 7, 2008, Wolfe forwarded the email to Kim Burgess, Human Resources Director for DNR, asking for her advice and noting that one of their biggest problems was the continual communication via email. He said he would be out of town the rest of the week and wanted to respond, "as soon as possible before one of them makes any more statements that causes more damage."

70. On April 8, 2008, Redding sent Wolfe an email stating in part, "Because of retaliatory treatment I have been receiving from Mark since filing the complaint with the State Personnel Board, I will be filing the Whistleblower Complaint Form, under the State Employee Protection Act . . . , per Board Rule 8-

22.” He indicated that he considered his April 2, 2008 email to Wolfe and a statement he would be sending to Representative Andrew Romanoff, his “reasonable communication of the alleged violation” as required by the Whistleblower Act. Redding also stated that his previous statements to Wolfe “about feeling uncomfortable about Mark’s receiving gifts from consultants whose dam construction drawings are reviewed by him (HUGE conflict of interest), qualifies as disclosure of actions that violate public interest (i.e., potential threat to human life, especially in a high snowpack year like present).”

April 10, 2008 Meeting with Wolfe and Haynes

71. Wolfe responded to the email the same morning, indicating he was confused about the basis for the email, and suggesting that he, Haynes, and Redding meet within the next day or two. He stated, “Is it possible that the three of us can sit down and talk about this before this goes any further?”

72. Wolfe set up a meeting with Complainant and Haynes at a restaurant on April 10, 2008, in order to try to get their relationship back on track.

73. On April 9, 2008, Complainant responded to Wolfe stating in part, “Something substantial has to be done about Mark. I’m finished with the way he is treating me. It is unacceptable and illegal, and it’s about time the State stepped in and did something about it.” (Emphasis in original). He agreed to meet with Wolfe and Haynes, but noted that immediately following mediation Haynes had “pounced” on him for giving old dam inspection reports to dam owners, something other PE II’s in the office did routinely. He demanded that Wolfe take the following actions against Haynes: place a letter of reprimand in his file; enroll him in management and communication skills training; email other PE II’s to retract negative things he had said about Redding and admit he had been in the wrong; agree not to accept gifts from dam consultants anymore; write a formal letter of apology for his behavior; sign a contract that lists specific behaviors he has to follow; treat Redding like the other engineers.

74. Complainant also stated, “I will be filing the Whistleblower Complaint form this week and I will be filing a slander case (at a minimum against Mark and Jack if these issues cannot be resolved immediately.” (Emphasis in original).

75. On April 9, 2008, Complainant emailed Wolfe a list of eleven “topics/thoughts I would like addressed in tomorrow’s meeting.” It included: every time he feels like they have “moved on,” another unfair, retaliatory incident occurs and his trust in Haynes is lost again; the retaliation must stop; he had used up all of his sick leave to be home with his new son or due to illness passed on by his son and he would like to be able to work late or at home in order to avoid using unpaid leave; he would like to have monthly email exchanges “in order make sure Mark is ‘behaving’”; he does not want to feel Haynes is “ready to

pounce on me for any mistake I may happen to make. I want to feel 'safe', knowing that he will use any errors as a lesson to teach me; he wants Haynes to be held accountable for his behavior just as Complainant is responsible for his own behavior; Haynes should be required to take management and communications training and Complainant would be happy to take any training Wolfe deems appropriate; written weekly status reports are not necessary; he requested higher hazard dams to work on to prepare him for the next open PE II position.

76. At 9:13 p.m., Wolfe thanked Complainant and said he would review the list that night.

77. The three met on April 10, 2008. Wolfe tried to encourage Complainant and Haynes to open up, drop their guard, and express their concerns about their working relationship. His goal was to build a dialogue and help them develop a better working relationship. The meeting had short-term benefits.

78. In April 2008, Wolfe worked hard with Haynes to mentor him through the conflicts with Complainant. He directed Haynes not to make any negative statements to others about Complainant. He offered Haynes advice on how to better manage himself as a supervisor in dealing with the conflict. He informed Haynes that he needed to communicate with Complainant in person rather than by email. Wolfe offered Haynes another position at DWR at this time, which Haynes rejected.

79. On April 15, 2008, Complainant sent an email to Wolfe stating, "I had a good work meeting with Mark yesterday." Wolfe responded, "Great news. Thanks."

2007/2008 Annual Evaluation

80. On May 8, 2008, Haynes gave Complainant his annual evaluation with an overall rating of Satisfactory, scoring 100 points on a 61 – 180 point scale.

81. To receive a Satisfactory rating on IPO 1, Dam Safety Inspections and Reports, it was necessary to complete the dam safety report within ten working days of the dam inspection 90% of the time and within fifteen working days 100% of the time. Haynes stated, "John does acceptable and satisfactory work in this area and performed over 35 dam safety inspections this year. However, he was unable to complete all of these tasks in a reasonable time period."

82. Complainant submitted over 15 of the 35 engineering reports more than two months after the initial safety inspections. In addition, he sent out

storage restriction letters for the Skeel and Green Valley Retention Dams three and seven months after the initial inspections.

83. The issuance of a storage restriction letter is a time-sensitive event because it concludes that public safety necessitates a limit on the storage level of a dam and mandates immediate compliance by the dam owner.

84. Haynes concluded, "This is considered to be unsatisfactory performance. Nevertheless, taking into account the amount of work effort, a few other tasks assigned with higher priority, and uncontrolled circumstances, John was given a satisfactory rating for this work task. John needs to improve in the budgeting of his time to complete assignments in a timely and efficient manner and in determining work assignment priorities. John also needs to keep me informed of problems in the execution and completing of assigned tasks and projects."

85. Regarding IPO 2, Design Review and Construction Inspection, Haynes noted that Complainant had been given minimal activities in this area and that he needed to develop his technical skills in dam design and construction through additional outside and on-the-job training.

86. Haynes gave Complainant a Satisfactory rating in IPO 3, Engineering Analysis. He noted that when Complainant was given a ten-day deadline to complete a risk-based profile evaluation of ten high and significant hazard dams, he was able to complete it on time.

87. Complainant was assigned one new hydrology report in 2008, which he completed in just under two months. This was considered unsatisfactory work performance. In addition, Haynes had assigned Complainant the hydrology report for Parker Bar CCC Dam in 2007. By the end of the April 2008, he had not yet completed this assignment. Haynes noted his failure to complete both hydrology reports on his evaluation.

88. Complainant checked the box indicating he disagreed with this evaluation. He wrote a lengthy response, noting that on IPO 3, Haynes had told him to work on the Parker CCC dam hydrology report "at my leisure when other assignments were completed. In times when I have asked for additional work, this assignment was never mentioned." With regard to IPO 1, he stated that his reports were timely, and requested to "go through each report, one-by-one, and to review my schedule/workload during each respective period," to review emails exchanged regarding delays, and to review past weather reports in order to demonstrate how inclement weather had affected scheduled inspections.

89. Haynes did not agree to these requests, but attached Complainant's statement to the evaluation, to be placed in his personnel file.

Complainant's Requests Regarding 2008/2009 Performance Plan

90. On May 13, 2008, Complainant emailed Haynes five "questions/comments" regarding the IPO's for the following performance year. Complainant requested that under IPO 1, dam safety inspections and reports, there be language relaxing deadlines "in cases where circumstances (new assignments, etc.) occur that would delay completion of the reports or orders." He also asked for clarification of several phrases defining Satisfactory and Outstanding work, and pointed out that it appeared some of the criteria might be more appropriate for a PE II rather than a PE I.

91. On June 18, 2008, Complainant emailed Wolfe, stating that Haynes "never shares any responsibility or information with me. It's like I'm not even there. Mark never takes me along on inspections or meetings . . . he only includes Paul. He never stops by my office to socialize . . . he only chats with Paul." He said that he preferred this treatment to the hostile treatment he previously received from Haynes, that the dams he worked on were boring, but that he really enjoyed the work he was doing and could put up with the cold environment.

Haynes Coaching on Timeliness of Reports

92. Haynes noticed that Complainant continued to have difficulty submitting dam inspection reports within ten days of the inspections of the dams. He discussed the issue with Complainant, who explained that for travel efficiency, and in order to complete as many inspections as possible during good weather, his practice was to schedule several inspections on every road trip. This caused him to complete several inspections before he ever started writing his reports. Haynes suggested that while these were legitimate scheduling concerns, it would be easier for Redding to complete his reports on time if he wrote the reports for two or three completed inspections, prior to scheduling additional inspections.

93. During the next performance cycle, Complainant was assigned to conduct independent reviews of hydrology reports and hazard classifications of other engineers.

July 1, 2008 Requests of Wolfe

94. On July 1, 2008, Complainant emailed Wolfe regarding, "stuff." He stated that Haynes had stopped in his office to go over "some of the things that I have been working on! Maybe there's hope. . ." Referring to his unanswered May 2008 questions about the current year's performance plan, he stated, "Can you please look into these issues for me?"

95. Complainant also noted that DSB coworkers were asking whether they needed to save emails he sent them, pursuant to a directive by the Attorney General's office. He stated, "I need to know whether or not this practice is still in effect. If not, can you please contact these individuals to tell them that they are no longer required to do so?"

July 6, 2008 Wolfe Memo to Burgess Regarding Redding and Haynes

96. Haynes turned to Wolfe for assistance in supervising Complainant. Wolfe always involved HR Director Burgess in management issues. On July 6, 2008, in preparation for an upcoming mediation session, Wolfe sent a lengthy email to Burgess and Jody Grantham, another human resources staffer, in preparation for mediation. He stated that after giving a lot of thought to the situation with Redding and Haynes (and Byers), as much as "we would like to escape this problem, I am of the belief that the best way to escape from a problem is to solve it. Kim has voiced this position for a long time but it has been difficult to achieve due to the circumstances. . . I have an obligation to lead this agency with integrity built on character. Character is doing the right thing. What comes along with this are trust, professionalism, consistency and respect . . . I believe employees should earn respect and ultimate position within DWR not by threats or favoritism but by earning it. Therefore, we should not promote bad behavior or underperformance with rewards. Unless we deal with the issue between John and Mark head on we would only empower one or both of them for not acting professionally."

97. Wolfe stated he felt he was in "a lose-lose situation. If I don't move John from Dam Safety I run the risk of Mark leaving. If I move John, I run the risk of him filing yet another complaint or suit. If I give him some new position as he has requested, I just empower John to get 'promoted' by illegitimate reasons. Therefore, I am proposing that we talk to Mark about developing a[n] Employee Improvement Plan (I am not sure if this is the same thing as a Corrective Action Plan but Kim used this title when I talked to her last week) for John. Of course John will expect something in return from Mark since he feels he has also been in need of improvement. This is where I need your help if you so choose. I would like the plan to be short, say 90 days, with clear expectations so that we can determine in short order if there is any progress being made. If not, we should have some identified consequences. I think the consequences need to be swift and decisive so that this matter does not drag on any further."

98. Wolfe concluded by asking for their advice on this idea and planning a meeting, noting that Burgess was already working on Redding's performance plan.

99. Grantham responded that he was available and inquired as to what consequences Haynes would face. Wolfe responded, "I think John would be the only one with an Improvement Plan with possible consequences. Mark contends

that he is not performing to expectations but he has been unwilling to take any action for fear of further claims of retribution from John.” Wolfe clarified that he did not anticipate an improvement plan for Haynes, “but there are some areas that he could improve somewhat as a supervisor and he recognizes that.”

Burgess Review of and Suggestions Regarding Complainant’s Performance

100. In June or July 2008, Wolfe and Haynes asked Burgess to review Complainant’s past performance evaluations, work product, emails between Haynes and Redding, and daily activity logs and work progress reports, so that she could help Haynes manage Complainant more effectively.

101. In addition, Haynes, Wolfe, and Burgess worked on revising Complainant’s Performance Plan during the spring of 2008, in order to address Complainant’s questions and concerns, and in order to improve Complainant’s performance.

102. On July 10, 2008, Burgess emailed Haynes and Wolfe indicating she had completed her “review of information related to John Redding’s job performance to develop ideas to address ongoing concerns.” She stated there were two primary issues: his lack of accountability for work completion and his demonstration of counterproductive interpersonal behaviors.

103. Burgess noted that when Complainant was accepted to transfer into the DSB, it was understood that he lacked knowledge to function as a PE I upon entry. However, because he had received extensive training for two years and had been closely supervised by Haynes, it was reasonable to expect him to function at a fully operational level.

104. She also noted that Complainant’s problems in accountability, interpersonal relations, job knowledge, time management, and problem analysis/decision making appeared in past evaluations by another supervisor.

105. Burgess outlined her comments and suggestions for moving forward:

- Because some of Complainant’s performance issues had been explicitly mentioned in his evaluations, while others had not, no significant action could be taken at that time;
- Complainant should be provided with a memo articulating the nature of a PE I position, clarifying it as a fully operational one, and listing the elements of the Core Competencies of Accountability and Interpersonal Skills on which he needed to focus;
- Clarify the number of construction inspections that are “adequate;”
- Specify the training to be offered that year;

- Consider placing a goal or limit on the number of outreach sessions with the public;
- If Accountability and Interpersonal issues arise again, document the specific action and behavior and provide clear feedback to Complainant immediately.

106. Burgess closed by asking if the allegation regarding unethical behavior regarding gifts had been addressed. She stated, "if not, it should be as he is using this issue as a basis to allege that he faces 'retribution' as a whistleblower. Until that allegation has been resolved, I suspect it will continue to come up." Wolfe thanked Burgess and planned a follow-up meeting.

July 13, 2008 Email Exchange Between Wolfe and Redding Regarding Slander and Gifts

107. In mid-July, Wolfe held another meeting with Haynes and Complainant at a restaurant, in another attempt to mend the relationship. They discussed the subject of talking behind others' backs. Wolfe commented that everyone has said negative things about other people at work at one time or the other, or words to that effect. Complainant asked Haynes if he had been saying negative things about him to the other dam safety engineers. Haynes said yes.

108. On July 13, 2008, a lengthy email exchange occurred between Wolfe and Complainant. The email string commenced in June 2008, when Wolfe offered Complainant the opportunity to transfer back to his previous position. Complainant declined the offer. In the course of their exchange, Wolfe asked for specific information on Complainant's allegations about Haynes accepting gifts, stating he took the issue seriously, and hoped to resolve it. Wolfe stated, "This issue needs to be cleared up now so that we can move forward without the threat that it will be used as a basis for future claims of retaliation."

109. Complainant responded that he could not state whether Haynes' acceptance of gifts was still an issue, because it depended upon "the way Mark treats me in the future. Perhaps the prudent thing to do is to have Mark list every gift he has ever received from every consultant he has done business with as a State employee, and also to contact consultants to ask what gifts they have ever given to Mark. Next, construction drawings, memos, etc. could be reviewed from independent dam safety engineers to see if anything unethical was done. Just a suggestion."

110. Wolfe responded that it was a serious matter that could not be based on how Haynes treated him. "Either he has done something or he has not. As an appointed official by the Governor, I have a fiduciary responsibility to let him know if there has been any unethical conduct by any of my employees. I need to know if there has been any unethical conduct based on first-hand

knowledge by you, not as a result of a proposed investigation.” Wolfe stated if he had this type of information he needed it immediately.

111. Complainant indicated in this exchange that Haynes was supposed to be training him to become a PE II, which was the intention of his PE I position, and that Haynes was “failing” him by: not including him in meetings with consultants; not taking him on inspections; discussing important Branch issues only with PE II’s and not himself; assigning Complainant only low hazard dams after two years in his position; and not responding to communications regarding his performance review and plan. Wolfe responded that Haynes’ new supervisor would be working with Haynes on his performance expectations and that Haynes was working on his performance plan.

112. Complainant then sent another email to Wolfe, stating that Haynes had repeatedly slandered his name with the dam safety engineers with whom he had to work “(as he admitted to you during our recent chat at Panera’s). Is that something that the State will look into, or are these charges that I would have to bring up on my own?”

113. Wolfe responded the next day, that he took the claims of slander and unethical conduct by accepting gifts very seriously, requesting “specific statements to support your claims,” after which Wolfe would determine the appropriate next steps.

114. Complainant responded that Wolfe had heard Haynes admit that he had spoken negatively about him to the other dam safety engineers, “so you know the allegation to be true. Since slander, by definition, is oral defamation, I will need to schedule deposition[s] to yield the evidence you requested. I suggest the first wave of those to be deposed include Paul Perri, Jack Byers, Bill McCormick, Mike Graber, Dennis Miller and Marta Ahrens. The remaining dam safety engineers can be deposed after this stage. Can I count upon our AG’s office to handle the depositions?”

115. On July 15, 2008, at 10:39 p.m. Wolfe responded that his request was not for Complainant to conduct an investigation. It was “for factual statements of the remarks made by Mark that you have heard and believe are slanderous. Based on that information I will determine whether or not an investigation is necessary. The mere statement by Mark that he may have spoken to others about you does not constitute slander.”

116. Complainant responded that at their recent meeting, he had asked Haynes if he had been saying negative things about him to the other dam safety engineers. Haynes had said, “Yes.” Complainant had responded, “You can’t do that! You’re my supervisor and you can’t say those kinds of things to the people I have to work with! They’ve been treating me negatively ever since you and Jack started saying disparaging things about me!”

117. Wolfe responded at 11:44 p.m. on July 16, stating that was not what he recalled from the conversation and, "Even if Mark had said that he made negative statements about you, how does this constitute slander? . . . For example, if Mark had said to someone, 'John beats his wife and would kill her if he could get away with it', I could see this as being a slanderous statement. I am not trying to be argumentative here but I need more specific statements to go on and not just a statement that negative things were said. . . . I am really trying to get to the bottom of this so it can be resolved once and for all so we can move forward. I have to admit that I have never been involved in this type of situation before in all my years as a supervisor or manager. But, there is a first for everything. Thanks."

118. On July 17, 2008, Complainant responded, "I cannot describe to you the depth of disappointment I have in your response." He said he had a witness whose identity Complainant had promised to keep secret.

Complainant's July 16, 2008 Email to Wolfe Regarding Haynes Gifts

119. On July 16, 2008, Redding also sent an email to Wolfe entitled, "Mark's gifts". He stated that the only gifts from consultants he had actually seen were a jacket Haynes received for his work on Reuter Hess dam, and a large gift basket. He also stated that Haynes had told him he had received tickets to sporting events and had had greens fees paid by consultants. Complainant stated that he had never witnessed any inappropriate favoritism by Haynes in exchange for the gifts, and that his concerns were as follows: state employees should not accept gifts from the public; employees in positions of authority should be especially cognizant that accepting gifts from consultants could give the perception that their professional ethics may be selectively relaxed; employees receiving gifts may not even be aware that subconsciously they are reviewing items with a biased eye. He stated the citizens of Colorado should at least be informed of these incidents of conflicts of interest, and can then "determine whether an independent investigation into a potential risk to their safety is warranted."

120. Wolfe responded the next day by thanking Redding for the information, and stating that he would be conducting an investigation into the matter and would update Redding when he had more information.

Additional Emails Regarding Slander

121. On July 17, 2008, Redding emailed DNR's HR Director Burgess, regarding "slander", copying Wolfe. He stated, "Hi Kim, Can you please tell me the consequences of filing a slander lawsuit against my supervisor? Thanks, John."

122. Burgess responded by stating she was not sure what he was asking. He responded that he wanted to know if his position would be vulnerable when he files the lawsuit. She responded, "I don't see any relationship between your position and a lawsuit you might file."

123. Wolfe then responded, "John, What do you hope to achieve by filing a lawsuit? There are other preferred ways to address this matter and I hope you avail yourself to them." Redding responded, "Justice."

124. In another July 17, email, Wolfe stated that making an allegation of slander is a very serious matter that is not the same as confirming the negative things were said about him. "There is a complaint process that can be followed to address this. If you are asking me to tell Mark to quit saying negative things about you, I can do that." Complainant responded by thanking Wolfe for the offer and noting it "should have been done a long time ago." He then cited the Colorado Anti-Discrimination Act and indicated its hostile work environment clause includes receiving the silent treatment, being excluded from meetings and site visits, unreasonable expectations, and overly criticizing one's work.

125. On July 21, Complainant provided a lengthier response to Wolfe's question about what he wanted to achieve by filing a lawsuit. He stated he hoped to: stop Haynes from viewing his work negatively; be recognized as a hard working, valuable employee; regain faith in the system; stop having to save every email for use in a future lawsuit; stop having to worry that what he says will be used against him; get his career back on track; have rumors stopped immediately when reported; require Haynes to take training in employment law, ethics and supervising skills; have Haynes publicly retract the negative and slanderous things he has said to the other PE II's.

126. On July 21, 2008, Complainant emailed Wolfe, "my counsel has recommended that I stop sending emails like we've been exchanging because they could have a tendency to escalate when emotions start getting involved. So, please enjoy the rest of your vacation and forget about this for awhile. . . ." Wolfe responded that was fine and to ask his attorney how they should correspond in the future to resolve the matter. Complainant responded without an alternative and noted that his attorney "just knows how worked up I can get about things that I've experienced, and she wants to make sure I don't say something without really thinking it through."

Email to Wolfe Regarding Federal Court

127. On July 25, 2008, Redding emailed Wolfe regarding his recent meeting with his attorney. He indicated that things were about to "ramp up" and provided a list of offenses by Haynes and Jack Byers, and concluded, "Since we have had no success with other methods, I really feel that the Federal Court is the best venue for an unbiased review of this case." The offenses he listed

included: “slandering/poisoning me against my fellow dam safety engineers . . . not responding to my responses to volunteer on projects; excluding me from meetings and construction inspections; trying to sabotage educational opportunities; accusing me of not showing up at a meeting when permission had already been given not to attend; not acknowledging my good work . . .; falsely accusing me of not coming to work; . . . not responding to e-mails I’ve sent about my performance review, my performance plan, and miscellaneous work questions; giving me the silent treatment (going months or longer without hearing a word from my supervisor).” He also noted having to leave a volunteer project because of rumors being spread about him.

2008/2009 Performance Plan

128. On July 29, 2008, Haynes emailed Complainant a completed copy of his revised Performance Plan. He indicated that he had taken Complainant’s comments under consideration, revised the plan, and attached a copy of Complainant’s Class Series Description for the PE I position, noting that the PE I position is considered to be fully operational, capable of functioning with limited supervision.

129. Haynes also provided Complainant with a copy of the entire detailed list of elements that define the Core Competencies in the areas of Communication, Interpersonal Relations, and Accountability. These elements included:

- Maintains sensitivity to the feelings and efforts of others;
- Listens effectively to the ideas, problems, and suggestions of others;
- Seeks feedback on the effectiveness of written and oral communication;
- Does not initiate conflict and actually takes measures to ensure that conflict does not occur;
- Is tactful and diplomatic when resolving conflicts, addressing concerns directly with the individuals involved;
- Approaches to conflict are exceptional, creating enhanced teamwork, without creating hard feelings;
- Contributes to a positive work environment through interactions with others;
- Behaves in ways designed to keep problems impersonal whenever possible;
- Maintains positive work relationships;
- Treats others with courtesy and respect;
- Is cooperative and responsive;
- Builds trust and works with integrity;
- Accepts criticism, is open to new ideas, and handles conflict constructively and diplomatically;
- Works through conflict for positive solutions/results;
- Promotes cooperation and teamwork;

- Learns from conflict and makes appropriate changes;
- Adheres to established work schedules;
- Meets assigned deadlines without additional prompting by supervisor or others;
- Follows approved leave practices and policies;
- Actions and speech reflect a commitment to the agency;
- Always finishes assignments on time;
- Avoids gossip and negative rumors; and
- Demonstrates initiative consistent with job expectations to improve performance.

130. Haynes asked Complainant to review the attached documents, and said they would meet to discuss them as soon as Complainant was available.

131. On July 29, 2008, Complainant sent Wolfe an email stating that as far as he could recall he had never received any comments on his weekly status reports from Haynes; therefore, he assumed there was no problem with his work.

Wolfe Motivational Email to Complainant

132. On August 3, 2008, at 10:43 p.m., Wolfe sent Complainant a long email stating he had been thinking it over a lot in the past couple weeks and wanted to provide Complainant some ideas on how to improve his situation. He referenced Complainant's promise, made when Wolfe became State Engineer, "to help mend the broken relationships that I am involved with." Wolfe focused on Complainant's role as "the one who holds the ultimate outcome of your destiny," and related a quote stating, "The person who seeks all their applause from outside has their happiness in another's keeping." He quoted Dale Carnegie as saying, instead of worrying about what people say about you, why not spend time trying to accomplish something they will admire.

133. Wolfe stated that he realized Complainant had experienced a lot of pain in recent years. He said that he believed the path Complainant had chosen to end the pain would not provide the happiness he was seeking. Wolfe recommended a Tony Robbins video that discusses personal power from within. He stated, "I am hoping that we can turn the corner and begin to focus on the positive and less on the negative. It is very draining to be in a state of negative emotions for all of us. As I have stated before, I cannot change the past. But we can predict the future by creating it." He said he preferred a successful future to one broiled in turmoil and angst, that he hoped Complainant was intent on mending broken relationships, and that he was happy to discuss further. He also mentioned that by permitting a third party to make the final decision on any matter, Complainant would be giving up any control over the outcome.

134. Complainant responded on August 4, 2008 with a longer email, thanking Wolfe for his thoughtful email and acknowledging his awkward position

trying to keep the peace. Complainant noted that he had turned the other cheek repeatedly out of respect for Wolfe and his position. However, when Wolfe had denied hearing Haynes admit saying negative things about him, on July 16, "I didn't believe you. And with this new information, I suddenly realized that I was all alone in this matter." He said he never expected favoritism from Wolfe because of their friendship, but only to be treated fairly; he was not being fairly now "because of your strong desire not to alienate Mark." Noting that the retaliation and hostile work environment continue, he was well along on the path he was on and could say with a clear conscience that he had tried, to no avail, to mend broken relationships.

135. On August 4, 2008, at 11:41 p.m., Wolfe responded that he had not refuted Complainant's statements about the meeting with Haynes; his memory was simply different. He indicated that it hurt to think that Complainant felt alone and treated unfairly after Wolfe had spent countless hours writing and talking to him.

136. On August 8, 2008, Wolfe forwarded Complainant's July 16 email regarding gifts to Haynes, requesting that he provide details on gifts cited by Complainant and any others "you deem necessary to bring to my attention." Wolfe requested dates and description of gifts, from whom, and why he received them. He also said that Haynes could respond to Complainant's statements regarding conflict of interest and violation of ethical codes.

137. On August 8, 2008, Complainant requested a mid-year performance review in the near future in an email to Haynes. Haynes did not respond.

Haynes Response Regarding Gifts

138. On Sunday, August 17, 2008, at 11:52 p.m., Haynes sent his response to Wolfe. It is a long and detailed account of all gifts received in his 18-year career with DWR. The first is the Reuter-Hess Dam project jacket, purchased for the company's staff in the fall of 2004 after the design was approved for construction. He valued the jacket at less than \$50.00 and stated it was an extra one. He denied having shown inappropriate favoritism to the company and provided names and telephone numbers of the president of the company and one other individual.

139. Haynes also detailed holiday gift baskets containing food, sent to himself, Byers, and Perri, the office had received during the last two years. He indicated that the baskets were opened and shared with employees of DWR in the reception area on the 8th floor. He gave the names of three individuals to contact regarding the gift baskets. He said he gives the empty baskets to his sister-in-law, who re-uses them. He also stated he receives small fruit, candy or nut boxes at holiday time and treats them similarly.

140. Haynes stated he had also received five or six tickets to sporting events, participated in consultant sponsored golf tournaments and an occasional lunch after meetings, received plastic coffee travel mugs and baseball caps.

141. Haynes then discussed the Executive Order signed by Governor Bill Owens in 1999 concerning the Code of Ethics for State Employees, citing the rules verbatim, and concluding that he had not violated the rules. Haynes noted that he takes his job and responsibilities very seriously in assuring the safety of the public from the potential of a dam failure, making life and death decisions on a daily basis. He stated that he would not risk his job, livelihood, professional engineers license and the safety of the general public over the acceptance of meaningless gifts.

142. Haynes stated that he was getting tired of Complainant's "continual unabated attacking of my ethics and integrity." He also indicated that he questioned whether soliciting donations from consultants to offset the costs of the CWOA conference and for door prizes was a violation of the code of ethics. He noted that Complainant had done this for the upcoming CWOA conference and was operating under a double standard.

143. Wolfe forwarded Haynes' response to Burgess and the Office of the Attorney General for review. Both conducted reviews and concluded there had been no code of ethics violation by Haynes.

144. On August 25, 2008, Wolfe emailed Redding and stated that Haynes had responded to the claims of accepting gifts. Wolfe stated that he had provided Haynes' responses to Burgess and the Office of the Attorney General for their review, and, "They have concluded that Mark has not violated any Executive Orders on Codes of Ethics for accepting gifts. Consequently, I consider this matter closed. I appreciate you bringing these important issues to my attention."

August 2008 Email Exchanges between Wolfe and Complainant Regarding Questions for Investigation of Haynes

145. During the first week of August 2008, Wolfe had lunch with Complainant to discuss his concerns. During the meeting, Wolfe invited Complainant to submit a list of questions he felt were unanswered, which might assist Complainant in resolving his conflict with Haynes.

146. Complainant responded with a six-page, single-spaced email on Tuesday, August 12, 2008. He started with questions for Haynes: had Haynes had made statements to other DSE's about Complainant, were they work related or more personal; did he make the statements to those on the PE II interview panels or someone likely to talk to the panelists; was it appropriate to have

individuals with a bias that Haynes created against Complainant participate in the interview process; had Haynes ever heard Byers say negative things about Complainant (work-related or personal, to panel members); did Haynes ever tell Byers he should not be saying negative things about Complainant; did Haynes report Byers' negative statements about Complainant to anyone in DWR or HR; why didn't Haynes respond to his email regarding a 2008 conference; why did he aggressively accuse Complainant of not coming into work when he obviously didn't know that he had; why was Complainant suddenly no longer invited to meetings or site visits; etc.

147. Complainant also made a detailed list of similar questions for nine other PE II's and Byers regarding Haynes or Byers saying negative things about him. And, he made a list of questions for Burgess: was it appropriate for a supervisor to say negative things about a supervisee to co-workers; were Haynes and Byers ever told to cease saying negative things about him and was their behavior monitored; why were more than three people interviewed for the PE II positions; is it acceptable for a supervisor to go months without saying a word to a supervisee.

148. On August 14, 2008, Complainant emailed Wolfe to ask if he had a timeframe for answering the questions.

149. On Sunday, August 17, 2008, at 11:12 p.m., Wolfe responded that he had been out of town and working early and late, apologized for his late response, and thanked him for his patience. Wolfe stated that he wanted to focus on positive steps to take in the future, that he knew Complainant wanted closure on the past, and that he (Wolfe) sought to resolve the issues "outside the context of any potential litigation." When Complainant responded that it could turn into litigation, Wolfe clarified that just as in settlements of water litigation suits, they could discuss settlement possibilities without discussing wrongdoing and facts.

150. Complainant responded by saying he would appreciate it if Wolfe "could take this at least one more round and respond to" his questions. Wolfe did so on August 18, 2008. He stated that he wanted to understand what relief Complainant sought, since he had already stated he did not want to be placed in the Greeley or Durango PE II positions already filled in 2007. Complainant responded he sought a promotion to PE II in his current position, a 10% pay raise, and reimbursement of legal fees. Wolfe responded that HR would have to approve an upgrade of his existing position, that he was performing PE I level work, and that there was not enough PE II work to justify the upgrade.

151. Complainant also suggested a transfer to a Water Resources PE II position, 10% pay increase and attorney fees. Wolfe rejected this idea, stated that settlements always involve each party paying their own fees, and that Complainant could apply for the upcoming vacancies within the next 6 – 9

months. "This could potentially provide you with the quickest path to a potential promotion. However, that path could become clouded if you file a lawsuit as you indicate by August 25."

152. Complainant requested that if he continued to work with Haynes, he expected him to include him in meetings and inspections, have regular communication with him, cease creating a hostile work environment, stop "slandering/speaking negatively about me to my coworkers;" and "publicly retract statements made about me to the other" PE II's. Wolfe responded that he already expected both Haynes and Complainant to comply with all of these demands, but that it would be punitive to require a public retraction from Haynes when Haynes had made no public statements about Complainant; moreover, he did not know what "statements" Complainant was referring to.

153. Wolfe also stated that as State Engineer, he had gone three to four months without talking to some of the people he supervises, and that each situation was different. Complainant responded that Haynes was supposed to be playing a major role in developing his career. "Before I complained about the hostile work environment, his receiving gifts from consultants, etc., he included me in meetings, site inspections, one-on-one training, etc." Wolfe responded that he needed to tell Haynes he felt ignored. Complainant responded that he had done so in mediation.

August 25, 2008 Haynes Email regarding Weekly Progress Report

154. Throughout Complainant's tenure under Haynes, he was required to submit weekly progress reports detailing the work he performed and the length of time required.

155. On August 25, 2008, Haynes emailed Complainant to inquire about some entries on his August 11 and 18 reports. He asked about the August 11 entry for compiling a "list of questions per Dick's request." Complainant responded that he had spent "maybe half a day" on the list after a meeting with Wolfe. Haynes inquired about an entry during the week of August 18, "exchanged emails with Dick." Complainant responded, "The emails that were exchanged were an unsuccessful attempt to avoid a lawsuit" and that he had spent "maybe half a day."

156. Haynes also asked for clarification regarding two other work-related entries concerning computer work and responding to a water rights question.

157. On September 4, 2008, Haynes emailed Wolfe to request a copy of the Attorney General's Office response on the gifts issue. Wolfe responded that nothing had been provided in writing. He also stated, "if John actually files something on this then we can have the AG's Office respond in writing. I doubt

John will actually file anything specifically on this but will rather argue that you were retaliating against him for even raising the issue. I hope this helps.”

October 2008 Haynes Request to Meet in Person Instead of Using Email

158. On October 22, 2008, Haynes wrote an email to Complainant indicating that in a one-hour period following a meeting on a dam, Complainant had sent him three email messages while Haynes was in his office. After receiving the third email, Haynes walked into Complainant’s office and they had discussed all three issues.

159. Haynes asked in the email, “In the future, John, I would prefer that if you have questions for me to walk into my office, pull up a chair and discuss them with me. With all of the email messages I get each day, I would prefer you come and talk to me instead of sending an email. As you know, I have always had an open door policy.”

160. Complainant responded, “I usually send you an email when you have been out of your office for a while and I don’t want to forget communicating something important to you. I will try to accumulate issues that need to be communicated and talk to you in person in the future (though I think I have already been doing so). And I know your office door is usually *physically* open, but metaphorically, it hasn’t always *felt* open, such as when you, Paul and Jack would laugh at my expense.” (Emphasis in original).

161. Haynes responded that he could not recall a time in the last six months when Complainant had initiated a face-to-face conversation with him, and that he often received emails from him while he was in his office. He also said he didn’t know what he meant by the statement regarding laughing at his expense, and noted that Byers had been gone from the DSB for the last six months.

162. Complainant responded that it was “rather unsettling” that Haynes didn’t recall three recent instances when he had stopped by his office. He stated, “We may be talking more about the ‘open-ness’ of your office in another venue” Haynes responded with a long email on Tuesday, October 28, at 8:57 p.m. The email exchanges continued.

February 2009 Dispute Regarding Make-up Time

163. On February 2, 2009, Complainant left work thirty minutes early, in order to buy his wife a birthday gift. On February 3, 2009, Complainant arrived at work one hour and fifteen minutes early and emailed Haynes, indicating he was making up time for leaving early the day before. He stated, “Thanks for letting me make up the time.”

164. Haynes responded, "Sorry, - The time needs to [be] made up when I am in the office." Complainant responded, "You didn't mention that yesterday when you gave me permission to make up the time today."

165. Both parties misunderstood the intentions of the other party in this dispute.

February 12, 2009 Whistleblower Complaint

166. On February 12, 2009, Complainant filed a petition for hearing with the State Personnel Board (Board), asserting that Haynes had retaliated against him for raising the issue of accepting gifts from consultants. He challenged Haynes' requirement to make up time when Haynes was in the office, and accused Haynes of saying negative things about him to his peers at work and accusing him of inexcusably not showing up at the April 2008 DSB meeting in front of his peers.

167. When Wolfe learned of this filing, he contacted Burgess to request that she hire a third party investigator to perform a second investigation of Complainant's allegations about Haynes' receipt of gifts from consultants. Burgess contacted the Department of Personnel and Administration, who provided the name of a retired Deputy Attorney General, Tim Arnold, to conduct the investigation. Arnold was retained by DNR to conduct the investigation. He interviewed at least twelve employees, including Complainant, reviewed all pertinent legal authorities and documents, and issued a detailed report in May 2009 finding no violation of any ethics laws by Haynes.

168. In June 2009, the Board granted Complainant's petition for hearing.

Cuthbertson Mediation of Make-up Time Dispute

169. When the dispute arose between Redding and Haynes regarding Haynes' denial of Complainant's February 2009 make-up time, Wolfe decided to have the new Assistant State Engineer for Public Safety, Scott Cuthbertson, mediate the situation. Cuthbertson replaced Byers and was Haynes' new supervisor. Cuthbertson reported to Mike Sullivan, Deputy State Engineer and Deputy Director of DNR. Sullivan reported to Wolfe.

170. Soon after Cuthbertson assumed his position in December 2008, Haynes informed Cuthbertson he needed assistance with Redding's interim performance appraisal. Cuthbertson stated that he could not help him because he had just assumed his position.

171. Cuthbertson scheduled a meeting with Haynes and Redding on February 23, 2009. At the meeting, each party presented his side to Cuthbertson. Haynes informed Cuthbertson that Redding had violated his

longstanding requirement that all variations in Complainant's flextime schedule be pre-approved by Haynes in writing. Complainant stated that he had obtained oral pre-approval and was the only engineer in the DSB upon whom Haynes had imposed this requirement.

172. Cuthbertson saw a pattern of Complainant not following Haynes' clear directive to obtain pre-approval for changes to his normally scheduled hours. Cuthbertson concluded that it was appropriate to impose a consequence on Complainant for not following his supervisor's directions.

173. At the end of the meeting, Cuthbertson stated that it was incumbent on Redding to obtain Haynes' pre-approval for working outside normally scheduled work times, and that because he had not done so, he would not receive credit for the make-up time worked in the early morning.

174. Redding stated that while he disagreed with Cuthbertson's decision, he would abide by it.

175. After the meeting, Redding walked with Cuthbertson and stated to him that he did not yet know the whole picture and that he intended to file a federal lawsuit against Haynes the following week due to his ongoing mistreatment.

176. Cuthbertson was taken aback by this statement because it seemed out of place. He felt it was a very aggressive response to the meeting.

177. After the meeting, Complainant asked for an appointment with Wolfe to override Cuthbertson's decision, and did not inform Cuthbertson. When Cuthbertson learned of this, he came to Complainant's office and expressed his concern about Complainant having said he would abide by the decision, but having done something else. Complainant apologized for having gone behind Cuthbertson's back.

2009 Interim Evaluation

178. In January 2009 Haynes verbally gave Complainant a mid-year review, praising his work over the past two months.

179. On February 24, 2009, Complainant sent an email to Haynes requesting that he put in writing what Haynes had orally informed him in January regarding his job performance. On March 8, 2009 Haynes responded, stating that since November 2008, Haynes had noted an improvement in Complainant's job performance in the areas of scheduling dam safety inspections and other work assignments, and the completion of inspection reports in a timely manner "as compared to the same activities during the months prior to November (April through October)." Haynes also stated that he had thanked Complainant during

the DSB meeting for volunteering to participate on the hazard classification committee. Complainant replied, asking Haynes to confirm that he had said he was happy with the “work product” Complainant had submitted. Haynes did not respond.

Cuthbertson Investigation of Complainant’s Allegations Against Haynes

180. Complainant met with Wolfe on February 26, 2009 to discuss his ongoing concerns about being mistreated by Haynes.

181. On March 2, 2009, Complainant wrote Wolfe a long email following up on the February 26, 2009 meeting. He thanked Wolfe for offering to get answers to several questions Complainant had regarding Haynes’ and Byers’ mistreatment of him. Complainant outlined the questions he wanted answered and provided the names of coworkers to interview. Complainant asked that six specific PE II’s be asked if Haynes or Byers had ever said anything negative about him to them or others within hearing distance and whether the negative statements influenced their opinion of Complainant or how they interacted with him.

182. Complainant also provided another long list of questions for Haynes: ask Haynes if he has ever asked Paul Perri, the other PE II in the Denver office, or anyone else, to spy on Complainant; confirm with Haynes that he had gone months without saying a word to Complainant and had excluded him from meetings and discussions; confirm with Haynes that Haynes had told the other engineers at the annual DSB meeting that Complainant was supposed to be present but had apparently abandoned his co-presenter; confirm that Haynes changed the rules on Complainant regarding the make-up time in February by not allowing the time to count.

183. Wolfe responded to this email on March 2 by thanking Complainant and stating that he had chosen Cuthbertson to conduct the investigation “since he has not been involved or influenced by the past events leading up to this investigation,” and he believed Cuthbertson could provide objective and unbiased findings.

184. Complainant responded on March 6 that he was “surprised and disappointed” that he had changed the terms of his offer to address his concerns personally, stating, “you said that you were extremely busy, but you would commit to make the time to investigate my questions/statements if I would consider dropping the lawsuit, based upon your findings.” Complainant said that although he respected Cuthbertson, he questioned his ability to perform the investigation “based upon the extremely biased manner” in which he had handled the make-up time issue. He indicated that if the original offer of a personal investigation by Wolfe was completed by March 27, he would “proceed with your original offer.”

185. Wolfe responded that he was not intending to change the conditions of his offer but was trying to get the investigation done in a timely manner, that his schedule, viewable online, was too full to do it himself, and that it was “highly probable” that the deadline would not be met. He stated it was Complainant’s call as to how he would proceed.

186. Cuthbertson interviewed three PE II’s, Paul Perri (Denver office), Garrett Jackson (Grand Junction office), and Bill McCormick (Colorado Springs office). In an effort to avoid bias in the conversations, he asked general questions regarding whether there a leadership problem in the unit, were they aware of any existing conflict between Redding and Haynes, and if so, how did they become aware of it. Each of the engineers was aware of the conflict between Redding and Haynes by having observed it personally; however, they each felt that Haynes was doing a fine job as a supervisor.

187. Cuthbertson did not investigate the question of whether Haynes treated Complainant differently than his other supervisees.

188. On March 5, 2009, Complainant emailed Haynes and asked if he could leave work forty-five minutes early for his child’s doctor’s appointment on March 10, and make up the time “by coming in early and/or staying late sometime during 3/9 – 11?” Haynes approved the request if he stayed late and asked when he would make up the time. Complainant responded that he had to leave work to pick up his son at daycare after work and asked him to reconsider, allowing him to make up the time before normal work hours. Haynes declined.

189. On March 18, 2009, Complainant sent an email to Haynes, copying Wolfe and Cuthbertson, stating, “Dick directed me to ask you why you took the following actions against me:” and then posing nine questions. The questions included:

- Why did you accuse me of not coming into work, when you weren’t even in the office when you said you were?
- Why did you give me such an extremely unfair performance appraisal last year, and why didn’t you bother to meet with me when I had pointed out all the incorrect statements and omissions you made in the appraisal?
- Why did you take EPAT responsibilities away from me with no explanation or warning?
- Why did you discontinue inviting me to meetings and including me on site visits?
- Why do you not respond to some of my e-mails, including the one sent in August which requested a mid-year review? . . .

- Why did you not allow my made-up time to count towards time missed the previous day, even though I had worked the time (and more) exactly as requested?

190. On March 18, 2009, Cuthbertson responded to Complainant's email by stating he was not aware of any such directive from Wolfe and asked Complainant to "immediately cease and desist making representations on behalf of either Dick or myself. You may ask me whatever question you like and I will do the directing after consulting, if necessary, with Dick." He also asked Complainant to stop "restating concerns already stated and being investigated" by Cuthbertson, and encouraged him to direct his energy to his work.

191. On March 19, 2009, Complainant responded by email to Cuthbertson, "Scott, Please talk to Dick so that you may become aware of this directive from him. Also, please inform Mark that the Director of Water Resources has told me to ask him to explain his actions directly. If possible, I would like Mark's responses to these questions by March 25. I would also like to know if he answers them independently or if he has assistance in responding to them. Thank you."

192. Cuthbertson responded by stating that he and Wolfe were fully engaged regarding his concerns, "which I understand and am investigating. Please focus on performing the tasks assigned by your supervisor."

193. Complainant responded via email, "So are you saying that Mark won't be responding to the questions which I asked him, per Dick's instruction . . . ?" Cuthbertson responded that after he completed his investigation he would direct actions necessary after consulting with his supervisor.

194. Complainant responded that since Cuthbertson was apparently "not allowing it, I will schedule a meeting with you and Dick (per our agreement) to see if he is withdrawing his direction for me to do so."

195. Wolfe, who had been copied on the above email chain, emailed Complainant, "John, I did not instruct you to ask Mark these questions. I was merely responding to your question of what Mark's motive was for his actions. I said that you would have to talk to him. It is your choice to talk to him but I am not instructing you to talk to him." Complainant then responded to Wolfe by quoting Wolfe's March 19 email, which stated, "Only Mark can explain his actions so you need to ask him directly."

196. During this exchange, Complainant also emailed Wolfe stating, "I am beginning to understand the full ramifications of your warning that by filing the lawsuit, it would negatively affect my career with DWR." Wolfe responded, "John, I did not make this statement to you." (Emphasis in original.)

197. Also on March 19, 2009, Cuthbertson came to see Complainant in his office. He stated to Complainant that the investigation of his concerns was occurring, that Wolfe was aware of the progress, and that as soon as he had the results he would report them to Complainant. He told Complainant to stop sending inane emails and just get back to work.

198. By the time Cuthbertson returned to his desk, an email from Complainant to Burgess and copied to Cuthbertson and Wolfe awaited him entitled, "Confrontation." Complainant stated, "Kim, Scott Cuthbertson just came down to my office and yelled at me (with my office door open) because he was apparently not pleased with e-mails that had been exchanged this morning. Is this kind of intimidating treatment allowed? Should we all get together to discuss this matter? Thank you."

199. Burgess responded that while she had not witnessed the interaction, she would be happy to meet. Complainant and Cuthbertson both responded they would meet.

200. Cuthbertson had by this time developed a serious concern about Complainant's core competencies in the areas of interpersonal relationships, communication, and accountability. He saw that Complainant had exhibited an inability or refusal to conduct himself within appropriate norms of behavior.

201. Complainant, Cuthbertson, Burgess, and Wolfe exchanged dozens of emails concerning the scheduling of a meeting to address Complainant's complaint, his requests to change the meeting date in order to have a representative present, and whether to handle the matter as a grievance.

March 26, 2009 Meeting Regarding Cuthbertson Investigation of Haynes

202. On March 26, 2009, Cuthbertson, Wolfe and Complainant met for Cuthbertson to communicate the results of his investigation of Complainant's assertions against Haynes. Cuthbertson informed Complainant that his interviews resulted in no evidence of Haynes trying to influence other PE II's to think negatively of Complainant. He stated that the PE II's had been very complimentary of Haynes' performance as a supervisor.

203. Cuthbertson directed Complainant to stop making the allegations against Haynes because they were not true.

204. At this meeting, Cuthbertson also expressed concern about Complainant having gone behind his back to Wolfe regarding the February make-up time decision, after stating directly to Cuthbertson he would abide by the decision. Complainant denied having ever stated to Cuthbertson that he had agreed to abide by his decision. Cuthbertson was troubled by what he perceived as a willful attempt by Complainant to fabricate his own previous conduct.

205. Complainant confirmed at the meeting that he would soon file a “whistleblower” complaint to challenge Cuthbertson’s February 23, 2009 resolution of the make-up time issue.

206. On March 26, 2009, Complainant sent an email to Wolfe and Cuthbertson, stating that in view of his history with Haynes, he would like to be considered for a Water Resources Risk/Safety Engineer position or as a database assistant to another DNR employee, Doug, last name unknown.

Complainant’s Performance on Assignments During the 2008/2009 Cycle

207. During the period May 2008 through February 2009, Complainant was assigned several projects he did not complete in a timely or satisfactory manner. He did not complete the Parker Bar CCC Dam hydrology report and hazard classification verification, assigned initially in March 2007.

208. During this period, Haynes directed Complainant to perform an independent analysis of the hydrology report and hazard classification of Erie Prince Number 2 Dam which had been conducted by an independent consultant. The purpose of the assignment was for Complainant to independently review and verify the accuracy of a private dam consultant’s work.

209. The purpose of a hydrology study is to define the spillway capacity of a dam, so as to assure no public hazard downstream to life or property. The purpose of a hazard classification is to determine the level of hazard posed to life and property in the event of a breach of the dam; this classification determines the frequency of inspections of the dam by the DSB.

210. Complainant’s work on Erie Prince was to be performed independent of any other influence. Complainant contacted the consultant and requested the model he had used to run the HEC-RAS computer model. Complainant then used the consultant’s model to perform his hazard analysis. In addition, Complainant ran the HEC-RAS model in two areas that were not appropriate for determining the hazard classification. When Complainant erroneously determined that the consultant had made an error in his work, instead of discussing his concern with Haynes, Complainant contacted the consultant directly.

211. Complainant’s conduct on the Erie Prince Dam project demonstrated a failure to follow directions, to work independently, to understand the basics of hydrographic modeling and risk assessment, and to exercise sound professional judgment. Haynes was also concerned that Complainant had damaged his own and the DSB’s credibility with the consultant.

212. During this performance cycle, Complainant was also assigned to perform a dam safety inspection of the Family Enrichment Camp Lake Dam. He did not review the construction drawing of the dam prior to inspecting it. Therefore, he was unable to locate the service spillway which controls the water surface level, critical to an accurate inspection report. Complainant showed initiative and hard work by returning to the dam a second time and canoeing through it in order to find the spillway. However, his failure to review the construction drawing demonstrated a lack of professional judgment and led to an enormous amount of wasted time.

213. In the course of performing a dam safety inspection of the Trojanovich Dam, Complainant asked the owner at the dam site for directions to the dam. The owner pointed over the hill. There were two dams located over the hill, and Complainant imposed deficiencies on the dam he inspected, a very serious action. However, he named it incorrectly, confusing it with the adjacent dam. The owner called to correct the error and Complainant immediately worked hard to identify the owner of the restricted dam, who was then deceased. Complainant had not yet corrected this error by March 2009, several months after learning of the error.

March 19, 2009 Work Assignments

214. On March 9, 2009, Complainant had emailed Haynes to ask if he had a list of inspections for him to perform that spring. Haynes responded that he was working on a list of work activities for him and would discuss them with him in the very near future.

215. On March 19, 2009, Complainant emailed the DSB engineers asking if there were any projects he could help with, with Haynes' permission. Complainant did not copy Haynes on this email.

216. When Haynes learned about the email, he sent a follow-up to the same group, asking them to ignore Complainant's request because it was sent without discussing it with or obtaining Haynes' permission. He also stated that Paul Perri and Haynes were responsible for Complainant's work assignments and there was plenty to do in the Denver office.

217. On March 19, 2009, at 7:04 p.m., Haynes sent an email to Complainant, listing his next project assignments as follows:

- Complete the Restriction letter for Frederickson Lake Dam – letter and report returned to you today.
- Complete the investigation of which dam was wrongly identified as Trojanovich Dam and was restricted last year, and please correct this oversight.

- Perform a hydrology study for Parker Bar CCC Dam . . . and verify the hazard classification of the dam. (Originally assigned in March of 2007)
- Perform a hydrology study for Arapahoe Lake Dam and verify the hazard classification of the dam.

218. Haynes stated he anticipated Complainant “should be substantially done with this work by April 3rd. I will meet with you on March 31st to discuss your progress. All questions about this assignment and the execution of it, including guidance in the performance of these tasks should be directed solely to me.”

219. Complainant responded with at least three emails to Haynes. The first stated, “As you know, you have previously told me to put the hydrology study for Parker Bar CCC ‘on the back burner’ since you have been giving me higher priority assignments to work on.” The others clarified that he could not talk to any of the other DSB engineers if he had a question about one of the hydrology studies, asked if it was some kind of test and if he could ask Paul Perri questions, and reminded Haynes that he would be out of the office the next week. Haynes confirmed that he would be gone but available to answer questions by email, that Perri could answer questions regarding GIS, and that all remaining questions were exclusively for Haynes. He stated he wanted a “totally independent evaluation” and copied Cuthbertson on his last response.

220. Complainant objected to these assignments, indicating he felt the strict working conditions were unfair. Cuthbertson responded that it was not an unusual request and he was fully aware and supportive of Haynes in providing this direction so Complainant could demonstrate his skill set. Complainant responded by asking Cuthbertson for examples of other DWR employees who had been given similar requests. Cuthbertson declined to discuss other employees. Complainant then forwarded the email chain to Wolfe.

221. Complainant continued to send emails objecting to the assignments. On April 6, 2009, he sent an email to Haynes, copying Wolfe and Cuthbertson, listing the tasks he had to complete in the next two days, most of which involved Parker Bar CCC Dam and Arapahoe Lake Dam. He stated it was obvious he was being “set up to fail” because it was impossible to complete the tasks and to prepare for the branch meeting within two days, and invited Wolfe and Cuthbertson “to intercede in this assignment and corresponding schedule.”

222. Later in the day on April 6, 2009, Complainant sent a second email to Haynes asking if he wanted Complainant to prepare for the branch meeting or complete the assigned tasks. Haynes responded he should do both because he was already prepared for the meeting. Complainant then forwarded the above email chain to Wolfe and Cuthbertson, not copying Haynes.

223. Cuthbertson responded later on April 6, 2009, asking Complainant not to leave his supervisor out of the communication loop, and stating that he was not being set up to fail and that he resented the assertion. He also objected to Complainant's "attempt to skew the written record by asserting that you've been given only two days to complete the tasks. The tasks were assigned some time ago and the annual meeting has been on the calendar for over a month."

224. In his April 6 email, Cuthbertson stated that in order to assuage his fears of potential retaliation from Haynes, he had asked Haynes to assure a third party was present during all reviews of his work product to protect against any bias. Haynes had agreed to assure that Paul Perri was present for those meetings. If Perri wasn't available, Cuthbertson would be.

April 7, 2009 Complaint to Wolfe Regarding Cuthbertson

225. On April 7, 2009, Complainant emailed Wolfe asking for a one-on-one meeting to discuss the treatment he had been receiving from Cuthbertson. He indicated he had tried to build a good relationship with him but Cuthbertson was not interested in doing the same. He stated that Cuthbertson had yelled at him to get to work, twisted facts or failed to get information in order to put Complainant in the "worst possible light," had incorrectly sided with Haynes on the overtime issue, and had groundlessly taken exception to or resented factual statements Complainant makes in an attempt to defend himself.

226. Wolfe responded that he was on the road and not back in the office until the following week, asked him to discuss it with Sullivan first "since he is Scott's immediate supervisor," and that he assumed they were meeting soon.

227. On April 14, 2009, Haynes met with Complainant to discuss the assignments in detail and provide direction. On April 15, 2009, Complainant emailed Haynes to state that he did not know if he had sufficient background in using two computer models to give him an accurate timeframe on when he could complete the projects.

228. On April 15, 2009, at 11:45 p.m., Haynes responded with a detailed email with specific directions on completing the projects. He stated that Complainant did not need to use one of the two models, and made suggestions on how to perform the work. Complainant responded.

229. Complainant did not complete the Arapahoe Lake Dam assignment prior to the deadline.

2008/2009 Annual Evaluation and Corrective Action Plan

230. On April 30, 2009, Complainant was given a seven-page letter containing his Needs Improvement 2008/2009 performance evaluation and a

Corrective Action Plan he was required to implement. Haynes, Cuthbertson and Burgess drafted the document. Wolfe reviewed and approved it prior to its issuance.

231. In IPO 1, Complainant had completed 19%, or 8 out of 43, inspection reports within the required ten-day period; the remainder took over 20 days; some reports took over 40 days. After the computer hard drive crashed in April 2008 and photos of three dams were lost, Complainant waited eight months to revisit the sites and took another 20 – 40 days to complete and submit the reports for review.

232. Complainant received an Unsatisfactory rating in IPO 1.

233. Complainant was also given an Unsatisfactory rating in IPO 2, in part on the basis of his problems with the Erie Prince Dam. The IPO 2 discussion also addressed Complainant's similar failure to perform an independent hydrology review on the Old Dillon Dam. Complainant had obtained information and models from others, and had failed to correctly input the unit hydrograph for rainfall on a reservoir into his HEC-HMS model, resulting in an erroneous hydrograph. The evaluation noted that when errors in his model were pointed out to him, he blamed others for the mistake, demonstrating a lack of an "adequate understanding of the fundamental concepts of hydrology even after attending various, in depth training sessions."

234. Regarding IPO 3, Engineering Analysis, Complainant was rated at Unsatisfactory. Complainant was faulted for poor performance on the recent Arapahoe Lake Dam hazard classification and hydrology study assignment, which he failed to complete. The evaluation noted that Complainant had failed to delineate the drainage basins, "a very basic and simple task," and neglected to complete the hydrology study prior to the hazard classification.

235. The evaluation also critiqued Complainant for failing to complete the Parker Bar CCC hydrology study, which had been assigned in March 2007 and noted in his 2008 annual performance review. It noted that Complainant's time reports showed he had worked on it off and on but never completed the assignment, and that he had "requested additional assignments during the interim but never went back to complete this assignment even though you were asked several times about its status."

236. Complainant was rated Satisfactory in IPO's 4 and 6, Response to Public/Records Management and Office Support.

237. Complainant was rated Unsatisfactory in IPO 5, Emergency Response, for his response to a dam incident involving the collapse and sloughing of the downstream slope of Green Valley Retention Dam. This dam had nearly failed under the same conditions in 2008. When Complainant

received a call regarding the continued failing of the dam, he had not independently assessed the situation by immediately going to the site. Instead, he had called up the chain of command, ultimately to Wolfe, to inform them of the situation. Haynes ultimately accompanied Complainant to the site to assess the situation.

238. In the area of Core Competencies, Complainant was given an Unsatisfactory rating. The evaluation contained two single-spaced pages discussing Complainant's serious problems in communication, interpersonal relations, and accountability. It noted that while Complainant is clearly intelligent and articulate, he communicates in a way that manipulates, intimidates, and attempts to avoid responsibility instead of facilitating his development and promoting the effectiveness of the team. The evaluation provided examples of Complainant attempting to influence others to get what he wants by omitting relevant information.

239. The evaluation also faulted Complainant for informing Cuthbertson in February 2008 he would abide by his decision on make-up time, then going behind Cuthbertson's back to Wolfe for relief, and later denying to Wolfe and Cuthbertson ever having stated he would abide by Cuthbertson's decision.

240. It stated that when critiqued on his performance, Complainant was quick to defend his actions or deflect responsibility to someone else instead of trying to understand what is being communicated, learn from it, and then improve his own competency. The review concluded, "you seem to believe that your failure to perform is somehow always someone else's fault."

241. With regard to interpersonal relations, the evaluation stated, "While you attempt to compensate with wit and a somewhat animated personality, you have alienated your peers and supervisor and significantly disrupted the productivity of the team. Your professional conduct is often irresponsible and, at times, appears intentionally deceitful." It noted that while he had repeatedly accused Haynes of undermining his reputation, it was Complainant who had been observed by others attempting to influence others' opinions of Haynes via emails to Cuthbertson and Wolfe, via "numerous complaints alleging mistreatment, which have been totally refuted by the facts," and by making "groundless statements" impugning Haynes' technical ability.

242. The evaluation stated that Complainant seemed to thrive on conflict.

243. The Corrective Action Plan imposed the following requirements on Complainant:

- Complete projects in a timely manner by meeting the standards established by his supervisor;

- Take responsibility for the completion of projects by independently identifying all necessary tasks, making the necessary decisions, identifying customers, if any, and performing all technical analyses correctly;
- Communicate without deception; communicate with his supervisor and coworkers in a professional, non-argumentative manner; receive constructive criticism in a professional manner and demonstrate through subsequent performance a willingness to comply with the direction provided;
- Strictly adhere to a communication protocol utilizing the chain of command by raising all concerns first with his supervisor, then Cuthbertson, then Mike Sullivan, the Deputy State Engineer, “then, and only then, are you to have any work related contact with the State Engineer”;
- Work to rebuild your relationship with your supervisor by demonstrating a willing compliance with directions and constructive criticism;
- Work to remove conflict from the work place by treating other dam safety team members, including your supervisor, with courtesy and respect;
- Demonstrate accountability for your work by taking responsibility for your own accomplishments and failures instead of trying to blame others;
- Take responsibility for completing the assignments given during the corrective action period.

244. The Evaluation Narrative and Corrective Action was signed by Cuthbertson and Haynes, and provided appeal rights.

245. Complainant appealed the Corrective Action to the State Personnel Board, alleging retaliation under the whistleblower act. He also initiated the performance management dispute process internal to DNR, and filed a grievance.

Complainant’s Response to the Evaluation

246. On April 29, 2009, Complainant provided a lengthy written response to his evaluation. He indicated that because Haynes was biased against him because of his retaliatory behavior towards him, Haynes should not be permitted to conduct the evaluation. He also asserted, even if DNR believed that Haynes had not retaliated against him, due to the pendency of his whistleblower case before the State Personnel Board, it was unreasonable to expect him to be objective.

247. Complainant also made the following points: Haynes should have informed Complainant during the performance period that he was doing

unsatisfactory work; and, in March 2009 he was given an assignment that was unachievable in areas he had never “done from scratch before.”

248. Complainant stated regarding IPO 1 that he had completed all inspection reports within ten working days of the inspections “except during times when I told my supervisor that other work assignments would not allow this requirement to be met.” He highlighted projects he had performed on time and on which he had been complimented by Haynes.

249. Complainant asserted that he deserved a Satisfactory rating in most areas, and an Outstanding rating in Response to Public, Office Response, and Emergency Response.

250. On April 29, 2009, Cuthbertson reviewed Complainant’s response to his evaluation, and wrote a memo to Complainant containing his comments. His points included the following: Haynes had not acted in a way that was improper, biased or retaliatory; Paul Perri and Cuthbertson had participated in the evaluation process in order to assure an objective and fair process; a mid-year review was conducted and there is no attempt to determine a formal rating at mid-year review; the appropriateness of both content and time provided to complete the March work assignments were reviewed by Perri and himself; and, he disagreed with Complainant’s self-evaluation of his work performed.

Performance Management Review Panel

251. Wolfe determined that due to Complainant’s allegations of retaliation, an independent three-member panel should decide Complainant’s appeal of his Needs Improvement evaluation. He permitted both Haynes and Complainant to choose a panel member, both of whom would then choose the third panel member. Complainant chose Pat McDermott, a PE II; Haynes chose Bill McCormick, PE II. Those two chose Steve Kastner, a PE II from Pueblo.

252. Complainant and Respondent submitted documents to the panelists to review. The panelists reviewed all documents, had two conference calls to discuss the materials, and then participated in an all-day work session. The panel also requested additional written input from Complainant, which he timely supplied.

253. On June 12, 2009, Complainant tendered his 2009 Hydrology Report on Terrace Dam to the Panel, stating, “I believe it will also disprove the statement that I don’t have even the most basic of engineering skills.” McCormick read it closely and noted that Complainant had utilized an assumption for a computer model that the dam basin was 100% impervious, meaning that all of the rainwater would run off. This assumption rendered the entire analysis invalid and McCormick viewed it as evidence supporting the poor evaluation.

254. On June 12, 2009, the panel issued its unanimous decision finding “no cause for dispute of the ratings determined by the supervisor.” The Panel first addressed Complainant’s assertion Respondent had violated the Performance Management Plan’s (PMP) requirement of “sufficient coaching and feedback to the employee in order to prevent ‘surprises’ to the employee at the time of an annual rating.” It found that “performance issues with the employee had been identified by the supervisor beginning in at least 2007. Certain directives were issued by the supervisor to the employee since that time, including into March 2009.” It noted that while some performance improvement had been made by Complainant during the year, the interim rating did not indicate at what level he had been performing during the entire year.

255. The Panel found that Haynes had made efforts to provide coaching and feedback to Complainant, but that the “work relationship . . . had deteriorated which resulted in a lack of communication and a compromise in the ability to achieve effective coaching and feedback.” It concluded based on the material provided that “there should not have been a relative surprise to the employee of the rating determined by the supervisor.”

256. The Panel further concluded that Complainant’s compliance with the Corrective Action was “necessary” to improve communication, thereby facilitating effective coaching and feedback between Complainant and Haynes. In addition, it underscored the importance of weekly performance review meetings in order to progress towards effective communication between employee and supervisor.

257. On June 26, 2009, Wolfe affirmed the Panel’s decision.

Grievance Decision Regarding Corrective Action

258. Complainant filed an internal grievance of the corrective action, making the following assertions: Haynes was unreliable and retaliatory; Cuthbertson’s opinion was questionable since he had no dam safety experience and little interaction with Complainant during the performance cycle; he should have received a Performance Improvement Plan instead of a corrective action; he had no notice of poor performance during the year; and Haynes provided insufficient coaching and feedback to avoid surprises.

259. Mike Sullivan, Haynes and Cuthbertson met with Complainant on June 3, 2009, to informally discuss his grievance. Sullivan determined that the evaluation and plan should remain in effect, finding that the detailed evaluation language regarding late reports, substandard work product, and communication issues was not refuted by Complainant’s input or rebuttal. He also found that the mid-year performance review was not late because the plan had been modified in August 2008, and that there had been no surprise.

260. Complainant then requested to meet with Wolfe regarding Sullivan's decision. Wolfe agreed and invited Complainant to have an objective third party such as the state Ombuds participate as a witness. Complainant accepted June 24, 2009 as the date to meet, but did not appear on that date.

261. On July 1, 2009, Wolfe issued his decision on Complainant's grievance. He first noted that Complainant had requested three remedies in his grievance: to rescind the corrective action; to require Haynes and Cuthbertson to take training in performance management; and to have an "unbiased 'watchdog' " such as the state Ombuds "monitor the behavior of Mark and Scott, to make sure they are acting morally, ethically and professionally."

262. Wolfe denied Complainant's grievance, making the following points: Haynes and Cuthbertson are professional engineers fully qualified to render an objective evaluation of his performance based on personal observations, review of project assignments, discussion with other staff, and professional judgment; Wolfe found their evaluation and corrective action to be fundamentally sound and rational; a Performance Improvement Plan was considered; however, given the gravity of the performance deficiencies and the feedback already provided, a corrective action was determined appropriate; Complainant should not have been surprised by this evaluation in view of his performance history; no staff violated the performance management process; therefore, no training was warranted; and, there was no basis to warrant a "watchdog" to monitor Haynes or Cuthbertson.

Performance During the Corrective Action Period

263. Complainant was provided six separate assignments, one per week, during the corrective action period commencing May 3, 2009. On June 29, 2009, Cuthbertson issued a memo with attachments to Complainant summarizing his performance. The attachments consisted of evaluations of Complainant's performance during the corrective action period by various reviewers. These documents are referenced below.

264. Assignment 1. The first assignment was to perform a hydrology study and hazard classification of Arapahoe Lake Dam, in order to corroborate the current "Significant" classification or deem it appropriate for re-classification. The assignment was one previously assigned to Complainant, on which he had already worked sporadically for several weeks.

265. Complainant had previously received several trainings in hydrology, had reviewed PE II's hydrology studies, had conducted the hydrology component of larger projects, and had performed at least three hydrology studies in his PE I position. He had also received training in hazard classification studies, had run a computer model for a hazard classification, had reviewed the hazard

classification studies of other PE II's, and had participated in them with DSB PE II's. Complainant had not previously completed his own hazard classification study from start to finish.

266. On May 4, 2009, Complainant emailed Haynes asking him to review the attached document describing his work on the first portion of the assignment, review the cross-section locations he intended to obtain with the HEC-RAS model, and confirm "these are sufficient sections to take measurements, prior to my trip to the dam tomorrow morning?"

267. Haynes responded at nearly 1:00 a.m. on May 5, "John - The report appears to be a start. As far as the cross sections go, you have to make that determination in the field. The number and location of the cross sections need to be selected to adequately model the downstream hazard zone and to defend your recommended hazard classification." Complainant responded by requesting more specific feedback if his report lacked something and noting that Perri had refused to provide input the day before. Complainant then forwarded Haynes' response email to Wolfe, asking if it was reasonable to expect a response from Haynes to "the urgent email that was sent to him yesterday?"

268. Complainant submitted his work product to Cuthbertson on May 11, 2009 for review, concluding that the dam should possibly be reclassified to a High Hazard Dam; however, due to the complex nature of the dam, additional research and further analysis should be performed.

269. At the meeting, Complainant informed Cuthbertson that he had asked Paul Perri for help during the week and had received none. Cuthbertson promised to follow up on this issue and talked to Perri. Perri stated that he had discussed "the determination of the dam breach width" with Complainant, that his help had probably gone beyond coaching, and that he had "more or less provided [Complainant] with the solution." When Perri asked Complainant why he had so misrepresented his actions, Complainant tried to make up for the misrepresentation by apologizing to Perri.

270. On May 14, 2009, Cuthbertson submitted his evaluation of Complainant's first week of performance to Complainant. He found that Complainant's Conclusion constituted an incomplete performance of the assignment, as the "additional research and further analysis" should have been conducted by Complainant. Cuthbertson also discussed problems in his Core Competencies, "My assessment is that you have misrepresented the interaction with Paul in an attempt to either denigrate him, excuse your own failure to perform or both. Such conduct continues to demonstrate unacceptable core communication, interpersonal and accountability competencies."

271. Haynes' preliminary review of the report had been satisfactory. However, upon closer review, he pointed out the following problems: it contained

no map or photos of the dam and downstream hazard zone; several different models were used in his analysis without an explanation of how each model was either eliminated or used; Hydrograph Method calculations were provided with no description of that method in the report; and, there was no description of the two houses downstream and their first floor elevation as they relate to the critical section.

272. Complainant's work during the first week of the Corrective Action was deemed Unsuccessful.

273. On May 14, 2009, upon receipt of the review from Cuthbertson, Complainant responded by requesting to discuss it, "sentence-by-sentence," with Mike Sullivan because here were many misrepresentations he sought to address. He indicated he would be playing a tape recording of their meeting on Monday, wherein Cuthbertson had promised to get back to him later that day [but hadn't] and wherein Haynes had stated that "this was a very unusual, complex dam. We can play that part of the recording for Mike, too." Cuthbertson stated that they should wait until their meeting with Haynes.

274. Complainant responded that he preferred to include Sullivan for several reasons: Cuthbertson had asked Haynes to re-review his work after initial approval; a person "with no experience in dam safety" should not be critiquing his work; and, Cuthbertson had engaged in blatant, shameless retaliation. Complainant requested to have several PE II's review his report. Additional emails ensued. No tape recording was produced.

275. Assignment 2. The second assignment was to conduct a hazard classification and dam breach analysis of Cantrill Dam and Quick Dam, which were adjacent to each other and therefore used the same model to evaluate downstream inundation. Paul Perri and Bill McCormick both independently reviewed Complainant's work on this project, finding it to be unsatisfactory. Perri found two fundamental problems with Complainant's conclusions on both dams: first, his conclusions and recommendations were taken from a July 1984 order; second, Complainant failed to comply with the Rules and Regulations for Dam Safety and Dam Construction by failing to recommend a rehabilitation of the outlet and construction of an emergency spillway. In addition, Perri found that Complainant had failed to commence the project with a typical dam inspection in order to provide an explanation and supporting photos of the overall condition of the dam.

276. McCormick also found fundamental errors in Complainant's work, concluding that "the recommended actions for repair of these dams are also insufficient to reduce the hazard to the owner. Neither list (Quick or Cantrill) includes a recommendation to install a low level outlet or an emergency spillway. These improvements would allow the owner control of stored water and reduction in the volume of stored water, both ways to reduce the hazard to him [the owner].

The work performed by John Redding on these two dams is not logical or technically conclusive. A recommended plan for work toward eliminating the potential hazard of these structures to the owners was not provided. In my opinion the work product provided by John does not satisfy the goals of the assignment.”

277. McCormick noted that the purpose of the assignment was to confirm the file information regarding the dam with field work; however, Complainant had instead copied existing file information from the database concerning the date of construction, dam height, crest width, storage levels, and dam length. Because a 3-foot deep “spillway” had been cut through Quick Dam, the normal storage level was now different and that was not reflected in Complainant’s report. McCormick also found that Complainant’s data on Cantrill Dam showed two different water depths, of 24 and 34 feet, which should have been a red flag that something was wrong with his model. His HEC-RAS analysis was flawed and inaccurate; therefore, his analysis would not be considered a solid basis to draw conclusions.

278. Assignment 3. Complainant completed the third assignment, three routine dam safety inspections and reports, in a satisfactory manner. Haynes noted in his memo that “the three inspections and reports were completed in a five day period of time (one week). This is a much improved work effort as compared to the production of dam safety inspection reports during the 2008-2009 performance period where a total of 26 inspections and reports were completed from April through September.”

279. Assignment 4. During Week 4, on May 27, 2009, Complainant requested “to meet with someone on a daily basis to make sure that the work that I am doing each week conforms with your expectations,” and cited the PMP provision stating that marginal performance requires more substantial monitoring and supervision. Cuthbertson responded that there was no need to formalize the process and that Haynes, Perri or both had been available through the process and would continue to be so.

280. Assignment 4 was to perform a hazard classification analysis of McIntyre Dam. Complainant injured his foot; therefore, his assignment was modified to the first step only, to develop and submit a work plan.

281. Upon receipt of the work plan, on May 28, 2009, Cuthbertson provided Complainant with his review of the work plan for McIntyre Dam. Among his feedback was the following: during his visit to the dam, what other data should he “be obtaining, such as the geometry of the dam, storage potential, photos, etc?” his work plan should state what he is going to do to accomplish the assignment, not simply restate the objective; in addition to determining the jurisdictional status of the dam, it should have also included a cursory hazard analysis. Complainant responded by answering his questions, asking several

follow-up and clarification questions, and requesting an additional day to complete the assignment.

282. On May 29, 2009, Complainant discussed the definition of a cursory hazard analysis with Paul Perri. Perri provided him with general guidance on things to consider in the field. Complainant gave Perri a plan to evaluate the hazard, and Perri commented on the plan and informed him to critically think about making defensible assumptions on storage volume. Complainant asked if he could modify the plan and give it to Perri for his blessing. Perri declined this request. Complainant asked whether he needed to perform a combined breach analysis and Perri responded that he needed to determine the answer through his field observations.

283. In response to Cuthbertson's direction to state what he was going to do to accomplish the assignment, Complainant asked, "So, I should describe how I'm going to take measurements of the dam features . . . or how I'm going to take photos. . . or what spreadsheet I will be using to determine peak flows? I'm still unclear on this." Cuthbertson responded, "There's no reason to be a smartass. I gave you the answer to your question in my original response. " In another of his responses, Cuthbertson also stated, "What do you think? (I'm not being a smartass; I want to know what you think!)" Cuthbertson closed by stating, "Lastly, please resist the urge to reply to this email again and instead focus on doing the assignment. Thanks."

284. Complainant forwarded Cuthbertson's May 28 email, with the word, "smartass" in an enormous font size, to his attorney, Wolfe, Sullivan, Burgess, an ombudsman, and two other individuals, stating he had "extreme resentment" for being called a 'smartass' by the Assistant State Engineer and not receiving responses to legitimate questions regarding his weekly assignments. He stated he was being set up to fail and requested a meeting. He did not copy Cuthbertson.

285. On June 1, 2009, Sullivan wrote a long email response after reviewing the email chain. He stated he had admonished Cuthbertson to "be more circumspect in his terminology." And, he noted that Complainant's response, "So, I should describe how I'm going to . . ." was "extremely sarcastic" and not appropriate for a professional engineer. He directed Complainant to be more respectful in his interactions with his supervisors. He also noted that Cuthbertson had used leading questions in an attempt to help lead Complainant to appropriate actions to create an acceptable work plan.

286. Sullivan closed by expressing his concern about the amount of email generated by Complainant, his opinion it was not a productive use of his time, and reminding Complainant that during the corrective action period he needed to focus on performing his work tasks.

287. Complainant responded that he was not trying to be sarcastic.

288. Complainant was not trying to be sarcastic in his May 28 email. Cuthbertson misunderstood the tone of his response, due to the tone of other emails sent by Complainant during his tenure in the DSB.

289. Cuthbertson's June 29, 2009 summary of Complainant's performance during week four of the corrective action period noted that Complainant's response to his coaching memo had been explosive and in violation of the communication protocol.

290. Assignment Five. Complainant performed a hydrology study of Terrace Dam for week five, reviewed by Paul Perri. Perri concluded that Complainant's study was unsatisfactory for several reasons. Complainant had failed to provide a basis for the values utilized in the study, despite Perri having "often" given Complainant direction on how to do so. Complainant's assumption that the dam basin was 100 percent impervious was unrealistic and resulted in unrealistic inflow values. Complainant had performed an unnecessary calculation that was based on a "fundamentally incorrect" approach. Perri concluded that Complainant "continues to struggle with the understanding of the core concepts required to accurately perform dam safety related analyses."

291. Cuthbertson also noted in his review of week five that instead of interacting with Haynes on an as needed face-to-face basis, Complainant had sent several computer-generated calendar appointments to Haynes with no subject and no known purpose. When Haynes declined the appointments, Complainant asserted that Haynes was refusing to coach him. When Complainant did approach him in person, Haynes had provided assistance.

292. Assignment 6. The last assignment was to complete two projects on which Complainant had previously worked: perform a hydrology study and verify the hazard classification of the Parker Bar CCC Dam and Arapahoe Lake Dam. McCormick was the reviewer of this work.

293. McCormick found that Complainant's work on the Parker Bar CCC dam was inadequate. Complainant failed to provide any history of the dam and its operation, the physical setting of the dam, the existing spillway capacity, and any changes that may have occurred downstream since 1984 that might affect the hazard classification. This baseline information was critical and the spillway information forms the basis for both the hazard classification and hydrology study. The report omitted several fundamental components of a hazard classification and dam breach analysis, utilized erroneous assumptions (e.g., the dam level was full, when Complainant had reported in 2006 the water surface at 9 feet below the dam crest), and Complainant did not make a conclusion regarding the hazard classification.

294. Cuthbertson delivered his review of Complainant's performance during the corrective action period to Complainant on June 29, 2009. It concluded that he would be referring Complainant to Wolfe for consideration of disciplinary action.

Pre-disciplinary Meeting

295. Wolfe received and reviewed all of the documentation regarding Complainant's performance during the corrective action. On July 8, 2009, Wolfe sent a notice of a pre-disciplinary meeting to Complainant.

296. Complainant emailed the DNR Executive Director, Harris Sherman, and the Department of Personnel and Administration Executive Director, Rich Gonzales, to request that Wolfe be removed as appointing authority due to his bias against him. His requests were denied.

297. The predisciplinary meeting was held on July 24, 2009. Complainant was present with his attorney. Wolfe attended with Burgess. Complainant asserted that his performance met the standards of a PE I position, that the Corrective Action tasks were inappropriate for him, and reviewed his poor treatment by Haynes.

298. Wolfe gave Complainant the weekend and one working day to provide additional information to consider. Complainant did so.

299. Wolfe reviewed Complainant's personnel file, the information submitted by Complainant, and considered as mitigation the length of Complainant's employment at DNR. In addition, he reviewed all of the statements Complainant had made in his filings with the State Personnel Board, at Complainant's request.

300. Wolfe was very concerned about the trends he saw in Complainant's performance: the decline in numerical ratings on his performance evaluations, and Complainant's declining ability to meet the core competencies of his position. Wolfe had wanted Complainant to demonstrate during the corrective action period that he could do his job; however, Wolfe concluded that Complainant's poor performance on the assignments confirmed his lack of sound professional judgment as an engineer.

301. Wolfe determined that termination of employment was the only appropriate course of action because of the public safety mission of the DSB unit.

Termination Letter

302. On July 28, 2009, Wolfe issued a nine-page, single-spaced termination letter. Highlights of the letter include the following:

- The PE I position was a fully-operational position;
- Demonstration of Core Competencies is required for all state employees;
- Complainant's employment history at DNR started at a Commendable level and steadily declined;
- On each of Complainant's annual ratings as a PE I, Complainant had been informed that he failed to complete tasks within the timeframes specifically established on the performance plan, and he needed to improve the timeliness of project completion and budgeting and prioritizing his time;
- Throughout the 07-08 performance year, behaviors demonstrating poor communication and interpersonal skills increased. These behaviors were often associated with an ongoing failure to accept accountability for his work. Complainant did not engage in a productive dialogue, but instead focused on the actions or behaviors of your supervisor, thereby deflecting responsibility from himself to your supervisor. To facilitate better communication, his supervisor requested that he simply speak with one another rather than sending emails. Complainant refused to comply with this request and instead consistently demanded that his supervisor and others put direction/communication in writing;
- The DNR Performance Management Program Dispute Resolution process determined there was no cause for dispute of Complainant's Needs Improvement rating and that the Corrective Action Plan was necessary;
- The overall assessment of his performance during the Corrective Action period was unsatisfactory. He failed to complete those assignments independently, with adequate analysis and technical accuracy. At various points during the Corrective Action period he alleged his performance was hampered by the actions of others and you were therefore not accountable for the results. For example, he alleged Paul Perri refused to assist him, but later it was determined that Paul did in fact assist him;
- In the R 6-10 meeting and afterward in the additional documentation provided, Complainant asserted that he met or exceeded the standards for quality of someone in a training position, with little or no exposure to requirements of the subject matter of the Corrective Action assignments. In fact, the assignments made during the Corrective Action period required

the application of the same theories, concepts and standards as assignments previously made and completed during the past three years in the Dam Safety Branch;

- Throughout the Corrective Action period, interactions with his supervisor, manager and peers were unsatisfactory relative to both communication and interpersonal relations. Statements made during the Corrective Action period were similar to those provided as examples in the initial Corrective Action and were further illustrations of steps to deceptively generalize the behavior of others. These statements are negative, provocative and lead to conflict;
- During the meeting he repeatedly stated that he failed to receive training and coaching, however he also stated that at the same time, he believed his work would be viewed as outstanding as compared to other Professional Engineers in the Dam Safety Branch;
- Wolfe concluded that several troubling trends had become clear. "First, there is a recurring pattern of failure to exercise professional judgment. The lack of adequate judgment evidences itself in your failure to meet established timelines for work products and failure to meet standards for quality. As a Professional Engineer, you are required to exercise professional judgment in the application of the theories, concepts, standards and techniques of your profession. Professional level positions in any discipline require the incumbent to exercise judgment to adapt to new contextual characteristics, to analyze problems, define alternatives and arrive at conclusions. This judgment is necessary to address technical matters as well as issues such as determining how to prioritize work assignments and how to allocate time dedicated to each task. You have failed repeatedly to adequately exercise professional judgment";
- "A second and related trend is a failure to take responsibility for your work. You have repeatedly indicted your supervisor for his failure to provide coaching, mentoring and training, when in fact you have received ongoing coaching, mentoring and training (both formal and informal) appropriate for your position. . . You have accepted responsibility only for minor errors in your work products and have, even then, attributed those to having received inadequate training or just being human.";
- "Due to the critical nature of the work performed by the Dam Safety Branch, these performance deficiencies are significant. The work performed in the unit must be timely and must represent solid, professional analysis followed by decisive conclusions. Failure to exercise judgment and accept responsibility for that failure detracts significantly from the Branch's ability to fulfill its charge;"

- “The lack of competence in the core areas of communication and interpersonal relations represents impacts that are perhaps the most troublesome. In any work unit, effective communication and interpersonal relations provide the underpinnings of success for the individuals and the group. When communication fails or is damaged, interpersonal relations often follow in their deterioration. The trends in your communication, both in terms of substance and style, lead to confusion, anxiety, mistrust, and conflict. Based in part on your own characterization of the interactions between you and your supervisor, I believe irreparable damage has occurred.”

303. Perri and McCormick gave objective, credible testimony regarding Complainant’s abilities as a professional engineer.

304. Complainant timely appealed his termination to the Board, asserting a violation of the whistleblower act.

DISCUSSION

I. GENERAL

Certified state employees have a property interest in their positions and may only be disciplined for just cause. Colo. Const. art. 12, §§ 13-15; §§ 24-50-101, *et seq.*, C.R.S.; *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). Such cause is outlined in State Personnel Board Rule 6-12, 4 CCR 801, and generally includes:

- (1) failure to comply with standards of efficient service or competence;
- (2) willful misconduct including either a violation of the State Personnel Board’s rules or of the rules of the agency of employment;
- (3) false statements of fact during the application process for a state position;
- (4) willful failure or inability to perform duties assigned; and
- (5) final conviction of a felony or any other offense involving moral turpitude.

In this *de novo* disciplinary proceeding, the agency has the burden to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The Board may reverse Respondent’s decision if the action is found to be arbitrary, capricious or contrary to rule or law. Section 24-50-103(6), C.R.S.

II. HEARING ISSUES

A. Complainant committed the acts upon which the termination was based.

Respondent has proven by preponderant evidence that Complainant committed the acts upon which discipline was based. For a series of years, commencing in 2006, Complainant received unsatisfactory ratings relating to the timeliness of his work. In 2006, Complainant's supervisor used strong words to address the lack of timeliness issue, indicating that he spent "an inordinate amount of time on" customer service work, "which severely detracts from his ability to complete other tasks." The supervisor coached Complainant by informing him in this evaluation he needed to prioritize his workload, spending more time on the important but not urgent tasks.

Complainant's problems with timeliness and prioritization continued in his DSB PE I position. His Performance Plan contains numerical definitions for achieving a Satisfactory rating on his engineering IPO's. Complainant never achieved success in these IPO's; despite this fact, for the first two years, Haynes gave Complainant satisfactory ratings in these areas, demonstrating leniency as Complainant learned the position.

On his January 2007 interim evaluation of Complainant, Haynes wrote, "John apparently is not concerned with datelines and needs to improve on budgeting his time on projects. He seems to concentrate on the easier assignments first." However, by April 2007, Haynes gave Complainant a Commendable overall rating, while noting that he "still needs to improve on the timeliness of the completion of his assignments." Complainant checked "agree" on this evaluation.

During the 2007/2008 performance cycle, Complainant completed 15 out of the 35 dam inspection reports more than two months after the inspections. To achieve a Satisfactory rating, the IPO required completed reports within ten working days of the inspection 90% of the time, and within fifteen working days 100% of the time. In addition to failing to meet those numbers, Complainant issued two time-sensitive storage restriction letters three and seven months after the inspections. Despite Complainant's failure to meet these objective requirements governing his work performance as a professional engineer, Haynes generously gave Complainant an overall Satisfactory rating on IPO 1. Haynes noted that while the record "is considered to be unsatisfactory performance," the mitigating factors Complainant had faced that year led him to give a Satisfactory rating.

In the 2008 evaluation, Haynes appropriately counseled Complainant again that he needed to improve in the budgeting and prioritizing of his time to complete assignments in a timely and efficient manner. Haynes also informed

Complainant he needed to keep him informed of problems in getting his assignments done.

By the time of the 2009 annual evaluation, Complainant's control over his workload had diminished further. Only 19% of his inspection reports were generated in a timely manner. Eight out of 43 were completed within the required ten-day period; the remainder took over 20 days and some took over 40 days.

Complainant's failure over a four-year period to improve in meeting deadlines indicates he was unable or unwilling to timely complete his work assignments. After Haynes noted the Parker Bar dam on his 2008 evaluation, Complainant's response was that he had been told to work on it "at my leisure when other assignments were completed. In times when I have asked for additional work, this assignment was never mentioned." Complainant behaved as though he was not responsible for performing an assignment as directed by Haynes, unless Haynes repeatedly drew attention to it. As a professional employee, it was Complainant's responsibility to track his assignments by date given, date due, progress made, and to adjust his work to meet his deadlines.

Complainant argued at hearing that the last assignments given to him in the 2009 performance cycle, on March 19, 2009, were too difficult to perform in the time provided, and that he had not been adequately trained or prepared to perform this work. Therefore, he asserts, it was unfair to base the termination decision in part on his performance of these tasks.

The evidence does not support this argument. There were four tasks assigned. One was to make revisions on a report returned to him by Haynes on March 19, a minor task. The second was to simply correct the identification of a dam from a project the previous year prior, another minor task. The third was to complete the hydrology study for Parker Bar CCC Dam. Complainant had at this time completed at least two or three prior hydrology studies during his tenure. The 2008 evaluation noted it took him two months to perform one hydrology study, and that although he had been assigned the Parker Bar CCC dam hydrology study in 2007, he had not completed it yet. Complainant alone is responsible for his lack of more experience performing hydrology studies. It would have made no sense for Haynes to assign him another one when he had not yet completed the pending assignment.

The fourth assignment given on March 19, 2009, was to perform a hydrology study for Arapahoe Lake Dam and verify the hazard classification. This dam was similar to Parker Bar dam; therefore, it was reasonable to assign him this as the last task. In addition, Complainant had been well trained in performing the computer programs for hazard classifications, had performed portions of them with other PE II's, and had assisted with and reviewed several of them. If Complainant had commenced work immediately on the projects instead

of sending dozens of emails attacking the assignments, he would have provided himself the opportunity to succeed. His failure to do so was an error in professional judgment and a misuse of valuable work time.

Respondent also proved by preponderant evidence that Complainant lacked the fundamental engineering analysis skills to independently perform the PE I position after three years in the position. When ordered to independently verify the hazard classification of a dam, Complainant failed to perform any independent work on the project, instead re-using the work performed by the private contractor. This serious error in judgment undermined the public safety mission of the DSB. An objective panel of professional engineers reviewed and verified the appropriateness of the Needs Improvement evaluation. And, both Perri and McCormick, unbiased dam engineers, closely reviewed Complainant's work during the corrective action period and concluded that he lacked the requisite professional engineering judgment.

Turning to core competencies, Complainant's Performance Plan required him to be tactful and diplomatic when resolving conflicts and addressing concerns with others; to take measures to ensure that conflict does not occur; to approach conflict in a manner that avoids creating hard feelings; to keep problems impersonal whenever possible; to maintain positive work relationships; to treat others with courtesy and respect; to accept criticism and handle conflict constructively; and to be cooperative and build trust.

Complainant was unable or unwilling to comply with these core competencies. He often personalized the critical feedback he received of his work and was personal in his criticism of Haynes as a supervisor. He was seldom able to be tactful and diplomatic when resolving conflicts and addressing concerns with others, even though the evidence suggests that he often believed he was being diplomatic. Complainant was somehow unaware of the effect that his words had on others. While this is unfortunate, it does not negate the fact that his inappropriate and unprofessional behavior alienated Haynes, Cuthbertson, and, ultimately, Wolfe.

Instead of taking measures to ensure that conflict did not occur, Complainant often escalated situations which, if left alone, would have resolved themselves over time. One example of this is during the first month of employment, when Complainant was still completing work from his prior position. Haynes came to the office after work hours and left a note on his desk expressing concern about whether Complainant was performing dam safety work. Instead of letting it go or discussing it with Haynes in person to smooth over the issue, Complainant responded with an email that would have been shocking for any new supervisor to receive. Complainant stated he was getting "really resentful" about getting "this kind of crap" and "that's not a good way to start a new position." The tone of this email is tactless and undiplomatic; the message it conveys is one of disrespect for Haynes' authority over him as his

new supervisor.

In October 2008, Haynes requested that Complainant stop by his office and pull up a chair on a daily basis in order to discuss issues that arose in the course of his PE I work. This email was a reasonable and necessary request, and a clear attempt to break the ice and re-engage in a smooth working relationship with Complainant. Instead of responding in a professional manner, Complainant created a new conflict. He failed to accept the invitation, and again personalized his work relationship with Haynes by attacking him for laughing with others in his office at Complainant's expense in the past. Complainant's response email contained so much raw hostility that any reasonable supervisor would have concluded Complainant was unwilling to make an effort to re-build the working relationship. Moreover, Complainant did not modify his email habits, even after repeated requests from supervisors to use other means of working out his differences.

It is also significant that Complainant stated in an email to Wolfe that his own attorney had directed him to stop communicating by email. Complainant was simply unable to control his impulses to email and continued to do so.

Another example of Complainant's inability to build trust with supervisors is his behavior towards Byers' replacement, Cuthbertson. After informing Cuthbertson that he would abide by his decision on make-up time in February 2009, he then went behind his back to appeal to Wolfe. When confronted about this behavior, he denied ever having agreed to abide by the decision. After this experience, it would have difficult for Cuthbertson to trust Complainant again. The following month, in March 2009, after Wolfe informed Complainant that Cuthbertson would be investigating his claims against Haynes, Complainant sent a list of questions directly to Haynes, while the investigation was pending. When challenged on this behavior by Cuthbertson, he falsely represented to Cuthbertson that Wolfe wanted some specific questions asked. Once Wolfe corrected the record, Complainant continued to respond in a defiant manner, even towards Wolfe.

Complainant was unable to meet the core competencies required of his position. He created conflicts, engendered mistrust in others, personalized work issues, and failed to maintain positive work relationships with others. Complainant's behavior was detrimental to the productivity of his workplace.

B. The termination decision was not arbitrary or capricious.

In determining whether an agency's decision is arbitrary or capricious, a court must determine whether the agency has 1) neglected or refused 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; 2) failed to give candid and honest consideration of the evidence before it on which it is authorized to act in

exercising its discretion; or 3) exercised 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. *Lawley v. Department of Higher Education*, 36 P.3d 1239, 1252 (Colo. 2001).

Respondent's termination decision in this case was not arbitrary or capricious. Wolfe used the utmost diligence and care to obtain all relevant evidence prior to making his decision. Wolfe's lengthy and detailed disciplinary action letter evidences the thorough and professional manner in which he made his decision. In addition, it addresses every argument raised by Complainant.

C. Respondent did not violate the Colorado State Employee Protection Act.

Complainant has filed three separate appeals under the Colorado State Employee Protection Act (whistleblower act or Act). Complainant asserts that Haynes' hostile treatment of him, the 2009 Needs Improvement evaluation and corrective action, and his termination were each imposed in violation of the Act. Each of these claims will be analyzed separately below.

i. Introduction

The whistleblower act protects state employees from retaliation by their appointing authorities or 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 of the Act appears in the Legislative Declaration,

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.

ii. Disclosures

In assessing a claim under the whistleblower act, the threshold determination is whether an employee's disclosures fall 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. To be protected under the Act, a disclosure of information must touch on a matter of public concern. *Ferrel v. Colorado Dept. of Corrections*, 179 P.3d 178, 186 (Colo.App. 2007). The disclosure may be provided in writing or orally. *Ward v. Industrial Commission*, 699 P.2d 960, 967 (Colo. 1985).

Complainant's oral discussions with Haynes and Wolfe, and his emails to Wolfe in April and July of 2008, regarding Haynes' acceptance of gifts from private dam consultants, constitute protected disclosures under the whistleblower act. They addressed a matter of public concern because public safety could be compromised if the chief of dam safety for the state were giving favorable treatment to private dam contractors in exchange for gifts. This practice could also constitute an abuse of authority or mismanagement of a state agency.

iii. Adverse Actions

The whistleblower act defines adverse action as "any direct or indirect form of discipline or penalty, including, but not limited to, dismissal, demotion, transfer, reassignment, suspension, corrective action, reprimand, admonishment, unsatisfactory or below standard performance evaluation, reduction in force, or withholding of work, or the threat of any such discipline or penalty." Section 24-50.5-102(1), C.R.S.

Complainant filed three separate whistleblower complaints. In February 2009, he claimed that Haynes gave him the cold shoulder, imposed requirements governing make-up time, made negative statements about him to peers, excluded him from meetings, refused to take him on construction visits, and withheld work in March 2009, in retaliation for raising the gifts issue.

The preponderance of evidence demonstrates that Haynes did give Complainant the silent treatment for periods of time in 2007 and 2008. Haynes also admitted to Complainant that he had made negative statements about him. However, the preponderance of evidence demonstrates that these statements were not made to Complainant's peers. The statements were most likely made to Byers, Haynes' direct supervisor. Complainant also proved by preponderant evidence that Haynes required only Complainant to make up time with pre-approval by Haynes, and took him on fewer construction visits in 2008.

Complainant did not meet his burden of proving that Haynes excluded him from meetings or withheld work from him in March 2009. No evidence was presented concerning any meetings from which Complainant was excluded. In addition, in March 2009, Complainant still had the Parker Bar CCC dam hydrology report assignment pending. Therefore, Complainant has established some, but not all, of the adverse actions alleged in connection with his February 2009 whistleblower complaint.

Complainant also challenges his 2009 annual performance evaluation of Needs Improvement and Corrective Action Plan and his termination of employment as violations of the whistleblower act. These are clearly actions considered adverse under the whistleblower act.

iv. Substantial or Motivating Factor

Once it is established that protected disclosures occurred, the employee must demonstrate that the protected disclosures were "a substantial or motivating factor" in the agency's adverse actions taken against the employee. *Ward*, 699 P.2d at 968. Section 24-50-103(1), C.R.S. The timing of actions is the most relevant and compelling indicator of retaliation. Cases implementing the antiretaliation clause of Title VII of the Anti-Discrimination Act of 1964 can provide useful guidance in analyzing causation. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 386 (10th Cir. 1984); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999).

The causal connection between a protected disclosure and the adverse action may be shown indirectly by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Burrus v. United Tel. Co. of Kan., Inc.*, 683 F.2d 339, 343 (10th Cir. 1982). The inference of retaliation generally requires a close temporal proximity between the protected activity and the subsequent adverse action. Unless the adverse action is "very closely connected in time to the protected activity, the plaintiff must rely on additional evidence beyond temporal proximity to establish causation." *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999)(emphasis in original). The temporal proximity standard may be relaxed where a pattern of retaliatory conduct begins soon after protected activity and later culminates in actual discharge. *Marx v Schnuck Markets, Inc.*, 76 F.3d 324, 329 (10th Cir. 1996).

a. February 2009 Complaint

The chronology of events in this case reveals that Complainant and Haynes' relationship became strained well before Complainant mentioned the issue of Haynes' receipt of gifts from consultants in June 2007. Complainant's behavior towards Haynes was inappropriate from the outset of his employment in the DSB in March 2006. In his first month on the job, Complainant challenged

Haynes' authority by sending him a tactless and confrontational email. This email set the tone for their relationship.

In later 2006, after his wife had a miscarriage, Complainant asked Byers and Haynes to refrain from discussing fertility at work. After this request, Complainant perceived that Haynes and Byers were giving him the cold shoulder and were retaliating against him. This alleged "retaliation" had no relation to Complainant raising concerns about gifts from consultants.

In January 2007, when Haynes gave Complainant his interim performance evaluation and flextime memo, both Haynes and Complainant perceived the other to be confrontational during the meeting. Haynes viewed Complainant as defensive and felt he was trying to "deflect the blame" on him. Haynes was sufficiently critical of his own supervisory skills that he emailed Byers indicating he was "not too proud of the way" he had handled the meeting.

The evidence indicates by the spring of 2007, Haynes and Complainant were not on speaking terms with each other. On June 7, 2007, Haynes sent an email to Complainant entitled, "Timesheet Discrepancies." He noted that Complainant had taken more leave than Haynes had pre-approved. Complainant requested that they discuss it in person when Haynes returned to the office. Haynes responded with a rude email, "Sorry, but I thought your preferred method of communication was by email messages based on the amount of emails I get from you." Complainant then responded that it occasionally "makes sense for one of us to walk the 10 feet into the other's office." This is a relationship already broken, not one that would be damaged in the future by Complainant's protected disclosures.

The manner and timing in which Complainant first raised the gifts issue in writing with Haynes is also instructive as to his motives in discussing the issue. Following the above exchange, on June 7, 2007, Complainant sent Haynes an email entitled, "jacket, etc.", asking where he had gotten the Reuter Hess jacket and the gift basket at Christmas time. Before receiving a response, the next morning, Complainant sent two additional emails to Haynes, confronting him about the gifts issue. The first is entitled, "Speaking of morals . . ." asking if it was allowable for a state employee to accept sports tickets, etc., because of the potential for "compromising our integrity to do our job without bias." Complainant asked Haynes to respond to his question before leaving on his trip, and when he received no response, stated he would "get answers to these questions elsewhere while you're gone. Have a good trip!"

The preponderance of evidence demonstrates that Complainant first used the gifts issue against Haynes as a means of counter-attacking Haynes for holding him accountable for timesheet discrepancies. Moreover, Complainant's June 2007 promise to get answers while Haynes was out of the office was

threatening and antagonistic, a sign that he had no respect for his authority over him.

While Haynes responded to Complainant's conduct with the silent treatment and by making negative statements about him to Byers, it was not because he was retaliating against Complainant for the content of Complainant's statements. It was the fact that Complainant openly challenged Haynes' authority from the very beginning of the working relationship and created constant conflict. Haynes found it difficult to have any productive communication with Complainant.

Complainant asserts that Haynes imposed different working conditions on him because of his protected disclosures. The evidence contradicts this contention and demonstrates that Complainant's own conduct necessitated that Haynes impose restrictions on Complainant's work schedule and leave time. In January 2007, Haynes gave Complainant a memo indicating that due to "recent timecard inconsistencies, task performance, and inconsistent work and attendance schedule as we discussed today in your interim performance evaluation meeting," he was requiring Complainant to select a standard work schedule, stick to it, and obtain written pre-approval for deviations from that schedule. Complainant presented no evidence that other employees supervised by Haynes had similar timecard inconsistencies and inconsistent work and attendance issues. Complainant had run out of sick leave by mid-2008; therefore, it became important for Haynes to closely track Complainant's work hours. In addition, Complainant repeatedly violated Haynes' clear directive to obtain pre-approval for schedule deviations; this pattern necessitated that Haynes respond with tighter control.

Complainant has failed to prove that his protected disclosures were a substantial or motivating factor in Haynes' hostile or disparate treatment of him.

b. 2009 Evaluation and Termination

The preponderance of evidence demonstrates that Complainant's protected disclosures were not a substantial or motivating factor in Respondent's imposition of the 2009 evaluation and corrective action, or the termination of Complainant's employment. Complainant's performance after three years in the PE I position was substandard in several areas. This reason alone led to his Needs Improvement evaluation, the corrective action, and his termination.

Wolfe charged an objective panel of three engineers, one of whom was chosen by Complainant, with reviewing Complainant's performance in 2009. This panel unanimously determined that Complainant's Needs Improvement rating and the corrective action were fully justified. Moreover, both McCormick and Perri testified credibly at hearing that Complainant's performance during the corrective action period was below the minimum level required of a professional

engineer in his position. They both testified persuasively that Complainant's work product was deficient and that his decisions and professional judgments made on the projects showed he lacked a fundamental understanding of dam engineering. After receiving these two separate, objective, and thorough reviews of Complainant's work performance, Wolfe was obligated to take decisive action.

The vast paper trail of email correspondence, and the number of meetings held between Wolfe and Complainant, reveal that Wolfe was a loyal friend and mentor to Complainant, who spent several hours of his personal time, often late into the night, trying to help Complainant get along with Haynes and re-direct his focus to his work. Wolfe made every effort to make Complainant a productive employee.

Several emails stand out. On July 6, 2008, Wolfe sent a memo to Burgess and another mediator, which was confidential at time it was written, discussing his thoughts on how to break the impasse between Haynes and Complainant. This email reveals Wolfe's true feelings and beliefs about both Haynes and Complainant. At this point, it was clear to Wolfe that Haynes wanted Complainant gone. In addition, Wolfe believed that the reason Haynes had not imposed greater consequences against Complainant for his many performance deficiencies was that Haynes feared being accused of retaliation by Complainant. With regard to Complainant, Wolfe knew that his friend had demonstrated a long history of serious performance problems in terms of meeting deadlines, following his supervisor's directions, and in core competencies. In addition, Wolfe believed that Complainant was using his allegations of retaliation and threats of a lawsuit as a means of obtaining the promotion he sought.

Wolfe decided to give neither Haynes nor Complainant what he wanted. He overruled the desires of Haynes and ordered him to impose a performance plan on Redding, with the guidance and assistance of Burgess. In addition, Wolfe decided that he had to enforce standards of performance on Complainant that were appropriate, and not to cave in to Complainant's demands under the threat of future litigation and claims of retaliation. Wolfe followed through on both of these decisions to the very end of Complainant's tenure. He continued to provide support and mentoring to both Complainant and Haynes, but also insisted that they do their respective jobs: Haynes needed to engage Complainant, provide supervision, and impose consequences for poor performance; Complainant needed to comport himself appropriately and perform his work competently.

Wolfe was not motivated to take any adverse action against Complainant because of the protected disclosures made by Complainant. In fact, Wolfe took the allegations seriously and had them investigated by his HR Director and the Office of the Attorney General once he received sufficiently detailed allegations. Wolfe oversaw a process of progressive discipline in dealing with Complainant,

which culminated in termination not because of, but in spite of, his protected disclosures and claims of retaliation.

Complainant asserts that Wolfe made statements to him that demonstrate his clear motive to retaliate against him for filing whistleblower claims. He points specifically to Wolfe's statement in August 2008. Wolfe indicated that Complainant could apply for the upcoming vacancies within the next 6 – 9 months. He added, "This could potentially provide you with the quickest path to a potential promotion. However, that path could become clouded if you file a lawsuit as you indicate by August 25."

This statement was made in the context of Complainant's threats to file a lawsuit for slander in district court, which Wolfe correctly believed to be baseless. Wolfe considered Complainant's threat of a lawsuit to be frivolous and a means of extracting a promotion. In addition, Wolfe believed that to place one's future in the hands of a third party, in the context of litigation, was to give up power over one's own future. Therefore, Wolfe's statement was an inartful but honest expression of his belief that Complainant would accomplish nothing by filing a slander lawsuit, and would probably burn more bridges. The statement was not a threat and it probably never occurred to Wolfe that it could be construed as such.

Complainant argues that the secret and conspiratorial nature of the discussions concerning Complainant's alleged performance problems is evidence of retaliatory motive. Specifically, he avers that because Wolfe and Haynes anticipated Complainant would be filing retaliation claims, they sought to pre-empt the filing of those claims by taking disciplinary action against him. The evidence suggests instead that Wolfe assiduously worked to help Complainant improve his performance, and, Wolfe appropriately viewed Complainant's threats as a means of obtaining a promotion. Wolfe was motivated by a desire to assure Complainant did his job, not by a desire to retaliate.

Wolfe's close involvement in mentoring Haynes and Complainant through their conflict, evaluating Complainant's performance in 2009, imposing the corrective action, and deciding ultimately on termination, demonstrates that he worked hard to help Complainant succeed. First, Wolfe directed Haynes to communicate with Complainant in person and to refrain from making negative statements about Complainant. Second, he set up at least two informal meetings with Haynes and Complainant outside of the office, in an effort to smooth over the ruffled feathers and establish a collegial path forward. By April 2009, it had become clear to Wolfe that either a corrective action or a performance plan must be imposed on Complainant.

Wolfe asked Burgess and Cuthbertson to participate in drafting the 2009 evaluation and corrective action, in order to assure that it was appropriate, accurate, and thorough. Then, Wolfe personally reviewed it prior to its

finalization. Wolfe was not motivated in this process by a desire to retaliate against Complainant. As his statements in the July 6, 2008 memo to Burgess attest, he believed that all DWR employees, including Complainant, "should earn respect and ultimate position not by threats or favoritism but by earning it."

Complainant also contends that he was never informed of his performance problems until the 2009 needs improvement evaluation. The documentary evidence in his annual evaluations rebuts this assertion, as discussed above. In addition, the February 2009 email Haynes sent to Complainant, summarizing his interim evaluation, notes that while his performance had improved in November and December 2008, that contrasted with the period April through October. Complainant was put on notice that his performance had not been satisfactory during the period April through October 2008.

Complainant also argues that the difficulty of the tasks contained in the corrective action evidences Respondent's retaliatory motive to set him up for termination. He asserts he had never performed a hydrology study prior to the corrective action; however, the evidence revealed that he had performed two or three, and that he had been so uncomfortable with the Parker Bar CCC project assigned in 2007 that he never completed it. The corrective action was, in part, a means of calling attention to the fact that Complainant had, after three years on the job, resisted tackling the tougher assignments. It presented Complainant with the opportunity to prove he could do those jobs. He did not meet that challenge.

Lastly, Wolfe's heavy reliance on objective third parties to assess Complainant's performance in 2009 also attests to his lack of an ulterior motive. The evidence establishes that Complainant's protected disclosures were not a substantial or motivating factor in any of the three adverse actions taken by Respondent against Complainant. Therefore, Complainant's whistleblower claim fails.

D. Respondent did not violate State Personnel Board Rule 6-4.

Complainant correctly contends that it is fundamentally unfair for an employee to be disciplined or terminated for reasons that come as a surprise to the employee. In addition, he points out that classified employees are entitled to receive coaching and feedback, and to be given the opportunity to improve performance, prior to the imposition of disciplinary action. Complainant states that none of these rights was provided to him.

Complainant cites State Personnel Board Rule 6-4, 4 CCR 801, and Section 24-50-104(1)(c)(I) and (IV), C.R.S. in support of his position. These authorities establish the performance management system for the state classified system, and define the required elements of such systems. Complainant has not

pointed to any provision violated by Respondent in this case.

Complainant should not have been surprised by the 2009 evaluation and corrective action. Every annual evaluation noted his failure to meet deadlines. Complainant was also aware of the fact that he had violated several of Haynes' written directives: to stop using email and talk to him in person every day; to obtain prior written approval for all leave; to submit his inspection reports within ten or fifteen working days of inspections; and to complete the hydrology study for Parker Bar CCC dam.

Complainant was given the opportunity to improve his performance and demonstrate his technical competence during the corrective action. Unfortunately, his performance deteriorated and he demonstrated he was unable to exercise professional judgment independently, render solid engineering conclusions, and demonstrate appropriate interpersonal skills.

E. The termination was within the range of reasonable alternatives.

The credible evidence demonstrates that the appointing authority pursued his termination decision thoughtfully and with due regard for the circumstances of the situation as well as Complainant's individual circumstances. Board Rule 6-9, 4 CCR 801. Termination was well within the range of reasonable alternatives available to Respondent.

F. Attorney fees are not warranted in this action.

Complainant requested an award of attorney fees and costs. The Board's enabling act mandates an award of attorney fees and costs upon certain findings. Section 24-50-125.5, C.R.S. It states in part,

Upon final resolution of any proceeding related to the provisions of this article, if it is found that the personnel action from which the proceeding arose or the appeal of such action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless, the employee . . . or the department, agency, board or commission taking such personnel action shall be liable for any attorney fees and other costs incurred by the employee or agency against whom such appeal or personnel action was taken, including the cost of any transcript together with interest at the legal rate. . . (Emphasis added.)

Neither party engaged in conduct warranting an award of attorney fees and costs. Complainant's request is denied.

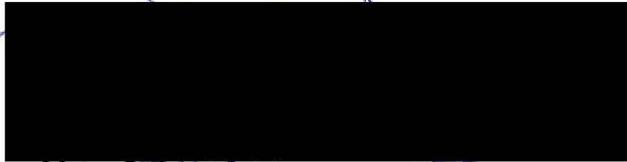
CONCLUSIONS OF LAW

1. Complainant committed the acts upon which the termination was based;
2. Respondent's termination decision was not arbitrary, capricious or contrary to rule or law;
3. Respondent did not violate the Colorado State Employee Protection Act;
4. Respondent's termination decision was within the range of reasonable alternatives;
5. Complainant is not entitled to an award of attorney fees and costs.

ORDER

Respondent's actions are **affirmed**. Complainant's appeal is dismissed with prejudice.

Dated this 27th this day of April 2010



Mary S. McClatchey
Administrative Law Judge
633 - 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

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. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or 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.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is **\$50.00**. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee 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. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. 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 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

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 appellant may file a reply brief within five days. Board Rule 8-72, 4 CCR 801. An original and 9 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 1/2 inch by 11 inch paper only. Board Rule 8-73, 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. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must 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 ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 27th day of April, 2010, I electronically served true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE** and **NOTICE OF APPEAL RIGHTS**, addressed as follows:

Patricia S. Bangert

[REDACTED]

Vincent E. Morscher, First Assistant Attorney General
Monica Aldridge, Assistant Attorney General
Employment Law Section

[REDACTED]

[REDACTED]
Andrea C. Woods