STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2024B091

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

CARIANN RYAN,
Complainant,

v.

DEPARTMENT OF PERSONNEL & ADMINISTRATION,
Respondent.

This matter came before the Colorado State Personnel Board for an evidentiary hearing on December 2-3 and 18, 2024. Complainant appeared by video conference with counsel, Christopher M.A. Lujan, Esq. Respondent appeared, by and through counsel, Senior Assistant Attorney General Jacob Paul, Esq. and Assistant Attorney General Monica Manning, Esq. Respondent's advisory witness, Robert Jaros, State Controller, was also present. The record closed on December 18, 2024. A list of the exhibits admitted into evidence and the witnesses who testified at hearing is attached as an appendix.

As a preliminary issue, this Administrative Law Judge preformed an *in camera* review of the witnesses' performance evaluations and found no information that is relevant to this matter or would significantly affect the witnesses' credibility. Complainant's pending Motion to Compel Expedited Release of Personnel Evaluations is therefore denied.

MATTER APPEALED

Complainant contends that Respondent's decision to abolish her position was retaliation in violation of the Colorado State Employee Protection Act (Whistleblower Act). As relief, she requests reinstatement, back pay, and attorney's fees and costs.

Respondent contends that the Department of Personnel and Administration (DPA) did not retaliate against Complainant, and requests that the Board deny all relief sought by Complainant, and dismiss Complainant's appeal with prejudice.

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

ISSUE TO BE DETERMINED

Does Respondent's decision to abolish Complainant's position constitute retaliation in violation of the Whistleblower Act?

FINDINGS OF FACT

Time and Leave Management

1. Time and leave systems ("Time and Leave") track the hours state Colorado employees work, as well as the different types of paid leave and unpaid leave available and used.

2. Time and Leave is decentralized. Different state agencies use different Time and Leave programs. Some state agencies do not have a Time and Leave program and are still using manual spreadsheets.

3. The majority of the state agencies use a Time and Leave program developed and sold by a vendor called United Kronos Group, commonly known as UKG or Kronos.

4. The older version of UKG's program is called Workforce Central, which is scheduled to be discontinued on December 31, 2025. UKG has a newer program called Dimensions, which is already in use by some state agencies.[1]

5. Both Workforce Central and Dimensions were implemented on a state agency by agency basis at different times. There is no consistency between state agencies regarding program configuration. Time and Leave information is entered into the UKG programs in different ways by different state agencies.

6. The Office of Information and Technology (OIT) owns the long-term contract with UKG for both Workforce Central and Dimensions. OIT has traditionally managed all aspects of Time and Leave, including the technical aspects ("Product Ownership"), as well as managing implementation, standards, and insuring compliance with state and federal law ("Business Ownership").

7. DPA is responsible for payroll for all state employees. Its Central Payroll Unit uses the Time and Leave data provided by state agencies to pay employees appropriately and on time. As described by one witness, Time and Leave is the input, and payroll is the output.

[1] The terms UKG, Kronos, Workforce Central and Dimensions are often used interchangeably. For purposes of this Order, the vendor will be referred to as UKG, the older program will be referred to as Workforce Central, and the newer program will be referred to as Dimensions. The two programs collectively will be called the UKG programs.

8. In the past, DPA was responsible for reviewing contracts with vendors and setting standards for compliance, but DPA had no responsibility for actual management of Time and Leave. In 2023, an executive steering committee gave DPA statewide management/Business Ownership of Time and Leave with the long-term goal of standardization across state agencies. OIT remained the Product Owner for both Workforce Central and Dimensions.

Complainant's Position

9. After obtaining Business Ownership of Time and Leave, DPA created the new position of Statewide Time & Leave Manager ("Position").

10. The Position's job duties included obtaining information from state agencies regarding their current Time and Leave practices and coordinating with the agencies to develop a path towards standardization. The Position would also, "be the lead for the time, attendance and leave for the payroll modernization project to ensure rules, guidelines [and] statutes . . . are met for the agencies statewide."

11. The Position also supervised three employees, including GM[2], who was the Time and Leave Subject Matter Expert for DPA. GM handled the day to day issues with DPA's Time and Leave, while the Position was intended to develop the information and strategy to move towards the goal of statewide consistency as state agencies implemented Dimensions.

12. Complainant was the Business Owner of the UKG programs and frequently referred to herself as such. She was not the Product Owner.

13. Robert Jaros was the appointing authority, and Tammy Terrell was initially the supervisor for the Position.

14. The Position was "term limited." It was originally funded through and expected to end on June 30, 2026.

15. Complainant was an employee with the Office of the State Auditor (OSA). She applied for and, after completing the comparative analysis process, was offered the Position.

16. As a condition of employment, Complainant signed a "Waiver of Retention and Other Rights."

17. The waiver stated in relevant part that: "this position is term-limited and may be abolished . . . if the appointing authority has determined, in his/her sole judgment

[2] Non-parties are being identified by their initials to protect their privacy.

and discretion, that the job duties of the position are completed or no longer required."

18. Complainant understood the Position was term limited but believed there was a strong possibility that it would be extended or made permanent.

19. Complainant started the Position on December 4, 2023.

Time and Leave Accessibility Issues

20. Workforce Central is an old and outdated program. DPA and OIT has known for almost a decade that it was completely incompatible with screen readers for the visually impaired.

21. UKG refused to address Workforce Central's accessibility issues because the program was scheduled to be discontinued. DPA and OIT leadership were very frustrated by UKG's lack of responsiveness regarding this and other issues. The leadership team felt that UKG was not meeting the State's needs.

22. DPA and OIT leadership, including Jaros and Terrell, were aware of Workforce Central's accessibility issues. It was a "hot topic."

23. In 2021, the National Federation of the Blind issued a resolution condemning the State's use of "Kronos." At the time of this resolution, Dimensions was not yet in use, so the term Kronos referred to Workforce Central.

24. On June 30, 2021, Governor Polis signed HB 21-110 requiring OIT to develop accessibility standards to provide all individuals with a disability access to electronic information by ensuring compatibility with adaptive technology systems. All state agencies were required to comply with OIT's accessibility standards by July 1, 2024.[3] Any state agency failing to comply could face civil action with a potential fine of $3,500 payable to each plaintiff per violation.

25. OIT has a Technology Accessibility Program (TAP) Team. The TAP Team drafted the accessibility standards and began the rule making process. The TAP Team also drafted a memorandum regarding HB 21-110's requirements, which it posted on its website.

26. The TAP team provides training, product vetting and consulting to state agencies. It is aided by an advisory council consisting of members of government and the public. The TAP Team also works with the procurement team and with the individual state agencies' accessibility personnel. The TAP Team publishes an

[3] This deadline was later extended to July 1, 2025, as long as a state agency was making a good faith effort to comply with the law.

accessibility checklist for vendors on its website and has open office hours regarding accessibility for leadership and employees. It also publishes an accessibility newsletter.

27. All software needs to be constantly evaluated for accessibility compliance given there are frequent updates and changes. No program is 100% compliant.

28. Since OIT was the product owner of the UKG programs, it took the lead regarding compliance with accessibility standards.

29. On October 4, 2023, UKG issued an accessibility report regarding Dimensions. This document was also made publicly available on UKG's website. In contrast with Workforce Central, Dimensions is "light years" ahead in terms of accessibility. Although it is not completely compliant with all accessibility standards, the remaining issues are mostly minor, especially compared to Workforce Central.

30. Karen Pellegrin, Senior Program Manager and head of the TAP Team, reviewed UKG's 2023 Accessibility Report and made comments regarding her assessment of the critical issues and priorities. An annotated copy of the report with Pellegrin's comments was provided to UKG and to state agencies.

31. Beginning in 2024, UKG reengaged with the TAP Team. They provided demos of Dimensions to the TAP team to elicit feedback from screen reader users and drafted a roadmap to fix the outstanding problems. They also established their own accessibility team.

32. The Tap Team now receives regular updates form UKG regarding their progress. Some of the accessibility issues identified in UKG's 2023 Accessibility Report have already been fixed. Dimensions is now as good if not better than the other Time and Leave programs available on the market.

33. Based on these improvements and UKG's renewed commitment to addressing accessibility issues, the TAP Team made the determination that the utilization of Dimensions for Time and Leave had a low risk of liability pursuant to HB 21-110. The TAP Team recommended that state agencies move forward with Dimensions because of this low risk of liability, as well as the time constraints for state agencies to replace Workforce Central before it was discontinued. The TAP Team's recommendation was also based on other considerations such as the State's budgetary and security requirements.

Complainant's Disclosures

34. From the start of her employment in December of 2023, Complainant was passionate about the accessibility issue. It was "dear to her heart."

35. Complainant raised concerns regarding accessibility to DPA and OIT regarding the UKG Time and Leave programs on multiple occasions. While she did not always differentiate between Workforce Central and Dimensions, she did specifically address UKG's 2023 accessibility report regarding Dimensions, and her perception that Dimensions remained substantially non-compliant with accessibility standards.

36. When she told Terrell, then her immediate supervisor about UKG's accessibility issues, Terrell replied, "[y]eah, we know. OIT is working on it."

37. Complainant was directed to research alternatives to UKG. However, OIT and DPA thought it would be difficult to complete the procurement and implementation process to have a new vendor in place before the deadlines created by the accessibility standards and the discontinuation of Workforce Central.

38. On January 25, 2024, Complainant had what was billed as a "meet and greet" meeting with payroll teams from multiple state agencies. The purpose of the meeting was for Complainant "to introduce herself to you as the new Statewide Time and Leave Standards Manager and . . . to talk about where your experience to date (sic) with UKG Dimensions and any challenges you are facing."

39. During this meeting, Complainant brought up accessibility standards and the state agencies' potential liability pursuant to HB 21-110. This put the payroll teams "in a panic." The perception after the meeting was that DPA was leaving the state agencies to fend for themselves regarding the accessibility standards, and that DPA was not going to provide any solutions. Two state agency controllers sent Jaros emails stating they felt that DPA should have addressed the issue with state agency leadership before presenting it to the payroll teams.

40. To address the state agencies' concerns, Jaros and representatives from OIT met with state agency controllers on February 1, 2024 and February 15, 2024 regarding the UKG programs. These meetings were primarily focused on two issues – first, the implementation and ongoing costs of Dimensions; and second, the accessibility issues and potential liability regarding both Workforce Central and Dimensions. OIT acknowledged that Workforce Central was not compliant with accessibility standards, and that its continued use could result in lawsuits. Ultimately, the ten state agencies still using Workforce Central agreed to migrate to Dimensions.

41. Following her January 25, 2024 presentation, Complainant was informally coached regarding awareness of her audience and working with state agencies' chain of command. She was not given a corrective action or disciplined.

42. Complainant was not satisfied regarding DPA and OIT's response to her concerns regarding the UKG programs' accessibility. She felt that there was no progress

being made towards accessibility, and that OIT was being dismissive of her complaints. She also felt that OIT and DPA did not sufficiently review alternative software made by other companies. She thought that OIT was not being transparent with state agencies regarding the potential liability using the UKG programs.

43. In February of 2024, Complainant had a discussion with Audra Payne, then her peer, about filing an ethics complaint with OSA's fraud hotline. Payne was already aware of the accessibility issues prior to this discussion but told Complainant to do whatever Complainant thought was right. Payne did not know whether Complainant followed through with filing an ethics complaint.

44. Terrell moved to the Payroll Modernization Project, and Payne took over as Complainant's supervisor on April 1, 2024.

45. At some point after Payne became Complainant's supervisor, Complainant contacted Payne by chat about an email from the Colorado School for the Deaf and Blind inquiring about UKG's accessibility issues. Payne told Complainant that the Colorado School for the Deaf and Blind needed to address its inquiries to its IT Director and OIT.

46. On April 25, 2024, Complainant contacted a former colleague at the Office of State Auditor's fraud hotline about filing an ethics complaint, alleging "corruption" and "kickbacks" within OIT and DPA regarding the UKG contract. Complainant asked her colleague to file an anonymous ethics complaint on her behalf, but this did not occur.

Decision to Abolish Complainant's Position

47. In March of 2024, the executives of DPA and OIT decided that management of Time and Leave would return immediately to OIT and the state agencies. The reason for this decision was that OIT was close to implementing the upgrade to Dimensions and believed it should manage statewide Time and Leave until this major project was completed. While DPA would continue provide guidance regarding compliance with state and federal law, OIT would retain the UKG contract ownership, and the state agencies would have the Product and Business Ownership. Because of this decision, almost all of Complainant's job duties were transferred back to the Department of Human Resources, OIT and/or the state agencies.

48. Jaros was not personally happy with the decision to change management of Time and Leave back to OIT, but he understood the reasoning and eventually agreed that it was in the best interests of the State.

49. Initially, Jaros thought that Complainant could continue to work with the seven state agencies that used manual spreadsheets or programs other than UKG. However, all of these agencies subsequently decided to implement Dimensions.

50. Jaros also thought that DPA could utilize Complainant's experience as an auditor to audit the state agencies' compliance with statues and rules. However, it was later determined that each state agency would be responsible for self-auditing.

51. After management for Time and Leave was transferred back to OIT, Payne reviewed Complainant's position to determine how much work Complainant had left. Payne provided this information to Jaros but had no other role in the decision-making process regarding Complainant's position.

52. Jaros reviewed the information provided by Payne. On May 29, 2024, he sent an email to Human Resources stating that Complainant's Position was not needed. Jaros inquired about the process of informing Complainant that her position would not be made permanent. In a follow up email, he indicated that the funding for her position was changing from the Payroll Modernization Project to the state controller's budget as of August 31, 2024.

53. On June 18, 2024, Jaros met with Complainant and informed her that he was abolishing her position as of August 31, 2024 because "[d]ue to the change in direction on time and leave, the job duties for your position are no longer required."

54. Jaros, alone, made the decision to abolish Complainant's position. Payne nor did not have a part in the decision other than providing information to Jaros regarding Complainant's workload. Terrell was focused on the Payroll Modernization Project and did not have any part in the decision to abolish Complainant's position.

55. At the time he made the decision to abolish Complainant's position, Jaros knew that Complainant had expressed her concerns regarding the UKG programs' accessibility issues to him, Terrell, Payne, Pellegrin, and the employees of multiple state agencies. He was not aware that she had contacted her former colleague at the OSA Fraud Hotline in an attempt to submit an anonymous ethics complaint.

56. Complainant contacted Human Resources on June 20, 2024, alleging that the abolishment of her position was retaliation for bringing up the UKG programs' accessibility issues

57. Complainant timely filed this appeal on June 27, 2024.

58. After filing the appeal, Complainant was uncomfortable being supervised by Jaros or Payne. As a result, Tobin Follenweider, Deputy Executive Director of Operations, became her direct supervisor on July 1, 2024.

59. During this period, GM retired and was replaced by CA. CA has an accounting background and most of her job duties involve acting as a backup for the various positions in the Central Payroll Unit. Complainant helped train CA regarding Time and Leave.

60. On July 8, 2024, Complainant followed up with her colleague at the OSA fraud hotline. It is unclear whether the ethics complaint was ever officially filed. It was Complainant's understanding that OSA was not investigating because her accessibility concerns were not considered to be occupational fraud.

61. Follenweider completed Complainant's final performance evaluation. He rated Complainant effective or highly effective in all categories with an overall rating of effective. In the evaluation, he twice referred to Complainant as a "Product Owner." Complainant disagreed with the evaluation because she felt she was never a Product Owner.

ANALYSIS

A. Complainant's Whistleblower Claim

The Colorado State Personnel Board has jurisdiction over appeals alleging violations of the Whistleblower Act. C.R.S. § 24-50.5-104 and Board Rule 8-24.[4]

The Whistleblower Act protects state employees from retaliation when an employee discloses actions by state agencies that are not in the public interest. C.R.S. § 24-50.5-101(1) and § 24-50.5-103. In order to establish a *prima facie* case of whistleblower retaliation, an employee must establish: 1) that she disclosed information pertaining to a matter of public interest; 2) that she was disciplined as defined by the Whistleblower Act; and 3) that the disciplinary action occurred on account of the disclosure of information. C.R.S. § 24-50.5-103(1), *Ward v. Indus. Comm'n*, 699 P.2d 960, 966-68 (Colo. 1985). If the employee makes such a showing, the burden shifts to the Respondent to prove that it would have reached the same decision even in the absence of the employee's protected conduct. *Id.*

First Element of a *Prima Facie* Case of Whistleblower Retaliation:

To establish the first element of a *prima facie* case of whistleblower retaliation, an employee must show that she made a "disclosure of information," defined as "the written provision of evidence to any person, or the testimony before any committee of the general assembly, regarding any action, policy, regulation, practice, or procedure, including, but not limited to, the waste of public funds, abuse of authority, or mismanagement of any state agency." C.R.S. § 24-50.5-102(2).

[4] While Respondent initially challenged the Board's jurisdiction based on the "Waiver of Retention and Other Rights" signed by Complainant, this challenge was withdrawn.

To warrant protection under the Whistleblower Act, the disclosure must involve a matter of public concern. *Ferrel v. Colorado Dep't of Corrections*, 179 P.3d 178, 186 (Colo. App. 2007). While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns vital public interests. *Gardetto v. Mason*, 100 F.3d 803, 812 (10th Cir. 1996) "Whether a disclosure falls within the whistleblower statute is a question of fact." *Ferrel,* 179 P.3d 185.

The Whistleblower Act does not apply to an employee who discloses information that she knows to be false or who discloses information with disregard for the truth or falsity of the information. C.R.S. § 24-114-102(1)(a). The Act requires both a good faith belief in the accuracy of the information disclosed and a reasonable foundation of fact for such belief. *Lanes v. O'Brien*, 746 P.2d. 1366, 1373 (Colo. App. 1987).

In this case, Complainant made two different disclosures. First, she disclosed to her supervisors, OIT, OSA, and state agency employees that the UKG programs were not compliant with accessibility standards, and that the state was subject to liability for utilizing these programs to manage Time and Leave. While her disclosures may not have been completely accurate, Complainant had a good faith belief in their veracity, and her belief had a reasonable foundation in fact, as the accessibility issues for both programs were acknowledged. In addition, Complainant's disclosures involved potential mismanagement and waste of public funds through needless litigation. As a result, Complainant's disclosures regarding the UKG programs' accessibility and the potential liability for their use are protected under the Whistleblower Act.

Second, Complainant disclosed to her colleague at the OSA that the reason for OIT's advocacy for the UKG programs was due to "corruption" and "kickbacks." Complainant did not present any evidence to support these allegations either at the time of her ethics complaint or during this hearing. At best, they are based on nothing more than rumor and speculation. At worst, Complainant fabricated these allegations to support her otherwise legitimate complaints regarding the UKG programs. In either case, Complainant's allegations of corruption and kickbacks do not have sufficient foundation in fact to warrant protection under the Whistleblower Act.

Because the Whistleblower Act protects some of her disclosures, Complainant has established the first element of a *prima facie* case of whistleblower retaliation.

Second Element of a *Prima Facie* Case of Whistleblower Retaliation:

To establish the second element of a *prima facie* case of whistleblower retaliation, an employee must show that she was disciplined. The Whistleblower Act defines "disciplinary 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." C.R.S. § 24-50.5-102 (1). Here, Complainant's position was abolished. Although this action was not disciplinary, if it was taken in retaliation for her disclosures of information, it was a penalty. Complainant has therefore established the second element of a *prima facie* case of whistleblower retaliation.

Third Element of a *Prima Facie* Case of Whistleblower Retaliation:

To establish the third element of a *prima facie* case of whistleblower retaliation, an employee must establish that the protected disclosure was a substantial or motivating factor for the adverse action. *Ward v. Industrial Com'n*, 699 P.2d 960 (Colo. 1985).

Here, Complainant cannot show that her disclosures were a motivating factor in the decision to abolish her position. Complainant testified that she was the only one raising complaints regarding the accessibility of the UKG programs. This is clearly incorrect, as this Administrative Law Judge credits the testimony of Jaros, Terrell, Payne and Pellegrin that they all knew about this issue long before Complainant raised it, and that it was a "hot topic" for both DPA and OIT. Terrell's contemporaneous response to Complainant's disclosures sums it up: "yeah, we know. OIT is working on it."

The accessibility issue was not a state secret. The resolution issued by the National Federation of the Blind was publicly available, as was HB 21-110, including the penalties for violations. OIT's memorandum regarding HB 21-110 was posted on its website, along with its vendor compliance checklist. UKG's compliance report regarding Dimensions was posted on its website. All of the information disclosed by Complainant was already known and publicly available.

Complainant argues that she is the only one who put "two and two" together regarding the accessibility issue creating legal liability for the state agencies' continued use of the UKG programs. However, this was based in part on a misunderstanding of the difference between Workforce Central and Dimensions. Complainant often conflates the two programs in her arguments regarding the Federation of the Blind's readiness to sue the state for its use of UKG, and OIT's admissions of non-compliance during the meeting with the state controllers. However, as Pellegrin testified, Dimensions is a complete "rebuild" of the program and a vast improvement over Workforce Central, facts that Complainant does not appear to acknowledge.

Complainant's disclosures specifically regarding Dimensions seem to be based on her misunderstanding of UKG's compliance report. Complainant apparently thought that every "partially compliant" rating represented a major issue, whereas Pellegrin testified that most of Dimension's remaining accessibility issues were relatively minor. Pellegrin further testified that UKG had improved its relationship with OIT and had developed a roadmap to fix the remaining accessibility issues. As a result, the TAP Team had determined that the liability risk for the use of Dimensions was low. According to Pellegrin's testimony, Complainant had a much more negative view of Dimensions than

Pellegrin did. Of the two opinions, Pellegrin's is more credible because she and the Tap Team, including the Advisory Council have more expertise in this area than Complainant. It is also more credible because it is based on feedback from actual screen readers.

Complainant's theory of the case is that she had a message to DPA that UKG was not accessibility compliant and that DPA chose to shoot the messenger. However, DPA had no motivation to shoot a messenger whose message was already widely known and was already being addressed by an entire team of accessibility professionals.

Complainant argues that the abolishment of her position was in retaliation for the January 25, 2024 meeting with the state agency payroll employees during which she disclosed UKG's accessibility and liability issues, creating a panic. However, Jaros credibly testified that the problem with the meeting was not disclosures, but Complainant's failure to respect the state agencies' chain of command, which upset several state agency controllers. The other problem with the meeting was that the state agencies were left with the impression that there was no plan to resolve the accessibility issue when, in fact, the TAP Team was working with UKG on Dimensions. After meetings with Jaros and OIT, the state agencies using Workforce Central agreed to migrate to Dimensions. While it is true that Complainant's lack of diplomacy created a problem for Jaros and OIT, the end result was to move the Dimensions implementation forward. Payne credibility testified that Complainant was informally coached regarding knowing her audience and respecting the chain of command but in no way corrected or disciplined. These facts show DPA did not retaliate against Complainant for the January 25, 2024 meeting.

Complainant also argues that the abolishment of her position was in retaliation for filing an ethics complaint with the OSA Fraud Hotline. However, it is not clear that this complaint was actually filed, and even if it was, Jaros did not know of it when he decided to abolish Complainant's position.

Complainant further argues that Respondent should have rescinded its decision to abolish Complainant's position after she filed this whistleblower complaint because Jaros should not have moved forward with abolishing her position knowing of the allegations. However, the analysis of a whistleblower claim necessarily involves a determination of Respondent's motivation or intent. Because motivation is an issue, the relevant time frame is when the decision was actually made, not when it culminated on Complainant's last day, almost ten weeks later. The case cited by Complainant, *Martin Marietta Corp. v. Lorenz*, 823 P.3d 100 (Colo. 1992), involves the statute of limitations for a tort claim of wrongful termination and is not relevant as to the third element of a *prima facie* case of whistleblower retaliation.

Based on the above analysis, Complainant has not established the third element of a *prima facie* case of whistleblower retaliation, and her claim must therefore fail.

Respondent would have Reached the Same Decision to Abolish Complainant's Position Even in the Absence of Complainant's Disclosures:

Even if Complainant established a *prima facie* case of whistleblower retaliation, Respondent has proven that it would have reached the same decision even in the absence of the employee's protected conduct. In 2023, an executive steering committee gave DPA the responsibility for managing statewide Time and Leave. DPA then created Complainant's position for the purpose of developing and implementing a centralized Time and Leave system. Once the committee's decision was reversed and the responsibility for managing Time and Leave reverted to OIT in March of 2024, there was no longer enough work to support Complainant's position. This ALJ credits Jaros' testimony that the decision to abolish Complainant's position was due solely to workload, or lack thereof.

Complainant argues that DPA's stated reason of lack of work was pretext for retaliation because Complainant trained her replacement, CA. However, this Administrative Law Judge credits Payne's testimony that CA replaced GM, who had retired, not Complainant. This Administrative Law Judge also credits Payne's testimony that CA has an accounting background and that her primary duties involve backing up the various positions in the Central Payroll Unit.

Complainant also argues that there was other work available for her to do, including managing the state agencies who were still using spreadsheets for Time and Leave, as well as auditing state agencies for compliance with Time and Leave laws, rules, and policies. However, this Administrative Law Judge credits Jaros' testimony that while he initially proposed these job duties for Complainant, the state agencies using spreadsheets agreed to implement Dimensions, and that it was determined that all state agencies would self-audit for compliance. The fact that Jaros tried to find other work for Complainant shows his good faith, even though his efforts were not ultimately successful.

Complainant also argues that Follweider's characterization of her job as the Product Owner of the UKG programs in her final job evaluation was an attempt to justify the abolishment of her position, when she was, in fact, never the Product Owner. However, from the testimony, the terms Product Owner and Business Owner were not used consistently by the witnesses in this case. To the extent that Complainant was the Business Owner and not the Product Owner of the UKG programs, it is more likely than not that that this was a confusion regarding terminology. This is particularly true since Follenweider had only recently assumed the role of Complainant's supervisor and may not have had a full understanding of Complainant's role.

Complainant finally argues that she was assured when she was hired that her position would be extended or made permanent. However, this is directly contradicted by the waiver she signed, which clearly states that her position could be abolished at any time either for lack of funding or for lack of work in the sole discretion of the appointing authority. This ALJ credits Jaros' testimony that DPA had every intention of implementing

and managing a standardized and statewide Time and Leave system, but there was a subsequent decision on the executive level to take this role away from DPA. Far from having malicious intent, Jaros was not happy about this executive decision or the resulting need to abolish Complainant's position, but the circumstances were beyond his control. Complainant's position was abolished as a consequence of a business decision at the executive level. While unfortunate, Complainant knowingly accepted this risk by transferring to a term-limited position.[5]

B. Complainant's Request for Attorney's Fees and Costs

C.R.S. § 24-50-125.5(1) provides for the award of attorney's fees and costs if Respondent's personnel action was "instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless . . . ." A frivolous personnel action is an action for which "no rational argument based on the evidence or law was presented." Board Rule 8-51(B)(1). Personnel actions that are "in bad faith, malicious, or as a means of harassment" are actions "pursued to annoy or harass, made to be abusive, stubbornly litigious, or disrespectful of the truth." Board Rule 8-51(B)(2). A groundless personnel action "means that despite having a valid legal theory, a party fails to offer or produce any competent evidence to support the theory." Board Rule 8-51(B)(3).

In this case, Respondent's decision to abolish Complainant's position was not frivolous, in bad faith or harassment. Respondent's arguments during the hearing were rational and based on law and fact. The award of attorney's fees is therefore not warranted.

CONCLUSIONS OF LAW

Based on the above analysis, Respondent's decision to abolish Complainant's position was not retaliation in violation of the Whistleblower Act. Complainant is not entitled to attorney's fees and costs.

ORDER

IT IS THEREFORE ORDERED: Respondent's decision to abolish Complainant's position is affirmed. Complainant's Consolidated Appeal and Dispute is dismissed with prejudice.

Dated January 30, 2025 by:

/s/ [redacted]
Charlotte A. Veaux
Administrative Law Judge
State Personnel Board
1525 Sherman Street, 4th Floor
Denver, CO 80203

[5] Complainant withdrew her claim that the abolishment of her position was arbitrary, capricious or contrary to rule or law.

CERTIFICATE OF SERVICE

This is to certify that on the 30th day of January, 2025, I electronically served a true and correct copy of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** as follows:

Christopher M.A. Lujan, Esq.
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[redacted]

APPENDIX

Complainant's Witness:

Robert Jaros
Tammy Terrell
Audra Payne
Jeffrey Groissaint
Sarah Clark
Stefanie Winzler
Cariann Ryan

Complainant's Admitted Exhibits:

A-B, D-G, I-S, U-DD, FF, HH-OO

Respondent's Witnesses:

Tobin Follenweider
Karen Pellegrin
Audra Payne
Robert Jaros

Respondent's Admitted Exhibits:

1-6, 8-14, 16-24, 26 (page 15 only), 27-31

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS:

To abide by the decision of the Administrative Law Judge ("ALJ").

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 served to the parties. § 24-4-105(15), C.R.S. and Board Rule 8-53(A)(2).

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 served to the parties. §§ 24-4-105(14)(a)(II) and 24-50-125.4(4), C.R.S. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. 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 referred to above. *Vendetti v. Univ. of S. Colo*., 793 P.2d 657 (Colo. App. 1990) and § 24-4-105(14) and (15), C.R.S.

RECORD ON APPEAL

The cost to prepare the electronic record on appeal in this case is $5.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. Board Rule 8-53(C). 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. 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. See Board Rule 8-53(A)(5) – (7). For additional information contact the State Personnel Board office at (303) 866-3300 or email at: dpa_state.personnelboard@state.co.us.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is served to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-54.

ORAL ARGUMENT ON APPEAL TO THE BOARD

In general, no oral argument is permitted. Board Rule 8-55(C).

MOTION FOR RECONSIDERATION

Motions for reconsideration are discouraged. See Board Rule 8-47(K).