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WHISTLEBLOWER COMPLAINT

PCC 3.14

RCW 42.21

IMPROPER GOVERNMENTAL ACTION

BY

MARK LINDQUIST, PIERCE COUNTY PROSECUTOR

DATED MAY 21, 2015

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INTRODUCTION

This whistleblower complaint is filed under PCC 3.14 and RCW 42.21. It alleges improper government actions by Mark Lindquist, the Prosecuting Attorney of Pierce County. The information below is true and correct to the best of the complainant's knowledge. Most of the information is based on firsthand knowledge while other is from sources the complainant believes are reliable. The complainant believes a full investigation will support a finding of the improper government actions alleged and may uncover further improper actions unknown to complainant. Further, given the nature of the complaints and the office affected, the complainant believes a full investigation is necessary for the safety and well-being of the public.

I. VIOLATION OF STATE OR FEDERAL LAWS OR COUNTY ORDINANCES

A. Violation of State and Federal Labor Relations Acts

1. Interference with Union Elections

Most of the Deputy Prosecuting Attorneys (DPAs) in the Pierce County Prosecutor's Office are represented by the Pierce County Prosecuting Attorneys' Association (PCPAA). Lindquist and other management DPAs (division chiefs) are excluded from the PCPAA. In 2014, the PCPAA held an election for its officers. DPA James Schacht filed to run for a vice presidential position. Initially, no one else filed against Schacht. Lindquist feels Schacht has been unduly critical of Lindquist.

DPA Erika Nohavec then filed against Schacht for the union officer position. Nohavec is a friend of Lindquist's and the two are often seen together socializing. Lindquist then directed non-guild member management DPAs to tell guild member DPAs they should vote for Nohavec over Schacht in the PCPAA election. At least some management DPAs followed Lindquist's directive, including Misdemeanor Division Chief Timothy Lewis. Lewis encouraged the office's newest DPAs to vote for Nohavec over Schacht. One DPA, Annie Gutierrez, felt the pressure by Lewis was inappropriate and reported the interference to guild officer DPA Lisa Wagner.

2. Elimination of Union Position without Notice

In 2013 former DPA Grant Blinn decided to seek the Lakewood Municipal Court Judge position. Blinn was then the Chief of the Misdemeanor Division. In order to support Blinn's candidacy, Lindquist moved Blinn from Misdemeanor Division Chief to leader of the homicide trial team—one of several trial teams in the felony division. Lindquist believed the title of "homicide chief" would help Blinn's application.

However, division leaders are not guild members and are paid a higher salary than trial team leaders. The move would have cost Blinn several thousands of dollars in annual salary, so Lindquist reclassified the homicide trial team into a "division" in order to keep Blinn's salary the same. This "division" had and still has only one DPA, the division chief himself. Lindquist made this change unilaterally and without notice to the PCPAA, despite the fact that the action eliminated a voting PCPAA DPA position.

3. Proposed Retribution against DPAs for Statements at PCPAA Meeting

On May 1, 2015, DPA Brian Leech spoke out at a PCPAA meeting against approving an amicus brief to be filed by the PCPAA in support of Lindquist in litigation pending before the

Washington Supreme Court. On Monday, May 4, 2015, Lindquist proposed reassigning Leech from the felony property crimes trial team to the juvenile division in retaliation for the comments.

Potential Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Jared Ausserer, Gregory Greer, Timothy Lewis, Annie Gutierrez, Lisa Wagner, James Schacht, Brian Leech, Grant Blinn

B. Violation of State and Federal Family Leave Acts

In 2013, Lindquist directed then-Chief Criminal Deputy Phil Sorensen to contact DPA Jared Ausserer, then team leader of the special assault trial team, while Ausserer was at home on family leave with the birth of his child, and to instruct Ausserer to come into the office while still on family leave in order to refile charges in the *State v. Lynn Dalsing* case (see Section II, Abuse of Authority, below).

Witnesses: Jared Ausserer, Phil Sorensen

C. Violation of State and Federal Equal Employment Acts

Lindquist prefers to hire and surround himself with physically attractive people. Accordingly, jobs are offered to, and preferred assignment are given to, attractive people over potentially more qualified candidates. Lindquist has jokingly used the phrase “the person meets our hiring criteria” as a euphemism for being physically attractive.

Example: Every year, the Appeals Division hires two new law students for two-year internships. In 2013, Lindquist passed over the top choice of the head of the Appeals Division and selected two lesser-ranked choices because the top candidate was overweight. One of these two choices then decided at the last minute not to start the position, leaving the Appeals Division one intern short for the next two full years.

Example: In 2013, Lindquist decided to create a ‘public information officer’ and selected a brand new legal assistant with no experience in media relations to fill the position. The basis for the decision appeared to be that she was young and physically attractive. Lindquist gave her an office right next to his. The woman, who had been hired to be a legal assistant, ended up quitting after having to write press releases about some of the county’s most horrific crimes.

Example: In 2013, one of the legal assistants in the homicide unit left the office for other employment and a replacement needed to be reassigned there. The homicide legal assistants sit in an area that Lindquist walks by every time he goes to his office. When candidates were discussed, Lindquist made the final decision, stating that his decision was based in part on the fact that he would have to walk past the person every day.

Example: In 2014, three full-time DPA positions became available in the Misdemeanor Division. Misdemeanor Chief Timothy Lewis ranked the candidates, all of whom had already been

working in the division as interns or volunteers. One such intern/volunteer was Crystal Gunder. Lewis ranked her seventh out of seven with serious concerns about her competence. Lindquist chose Gunder and instructed Lewis to make her “passable.” Again, the only apparent basis for the decision was that Lindquist found her attractive. Since then, Gunder has lost 12 of 13 trials and does not appear able to do her job competently, despite the efforts of supervisors and mentors.

Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Timothy Lewis, Kit Proctor, Lisa Hilligoss

D. Evasion of Public Records Act

Lindquist directs employees to avoid email, especially for sensitive subjects, and admonishes employees who fail to follow the directive.

Lindquist schedules meetings on his calendar without indicating what the meeting is about, rather it just says “Meeting” to avoid disclosing meeting agendas through potential public records requests.

In early 2015, Lindquist called Penner, private phone to private phone, about a work matter, to wit: the Washington Supreme Court’s reversal of the conviction in *State v. Darcus Allen*. Lindquist told Penner to read a newspaper article about it, then call him back. Penner called back using his work phone and Lindquist admonished him for putting Lindquist’s private cell number in his PRA-available work phone call logs. Lindquist required Penner to call him back with his private phone. The next day, Lindquist again admonished Penner for not being a team player.

Witnesses: Stephen Penner, Kelly Kelstrup, Dawn Farina, John Sheeran, Jared Ausserer, Kit Proctor, Doug Vanscoy, Denise Greer

E. Violation of Due Process and Equal Protection Clauses (Rights of Criminal Defendants)

In 2014, over 30 local attorneys filed affidavits in pending litigation (*Ames v. Pierce County*) accusing Lindquist of withholding evidence and defamation and/or urging the trial court not to impose CR 11 sanctions against the attorney who had brought the suit. Lindquist dubbed these attorneys the “confederacy of dunces,” a reference to the quote by author Jonathan Swift: “When a true genius appears, you can know him by this sign: that all the dunces are in a confederacy against him.” Presumably, Lindquist considers himself the “true genius.”

Lindquist directed team leaders to instruct DPAs not to give good deals to these attorneys, especially attorney Gary Clower, whom Lindquist believed was the leader of the group, based on his role in the *State v. Lynn Dalsing* case [see Section III. Abuse of Authority, below].

Lindquist keeps a list of high-profile media cases and instructs that good deals should not be given on those cases because the public will notice. One such case was a defendant who had embezzled money from a school district, and his attorney was Gary Clower. When the case was initiated, Penner instructed property trial team negotiator Frank Krall to treat the case like any other case. Accordingly, after the defendant paid 75% of the restitution, down to the \$5000 guideline for the office diversion program, Krall agreed to dismiss the case to the diversion program. Lindquist became upset because he did not want the media reporting the case had been dismissed, and further because

Clower was the attorney. Penner and Krall were admonished for dismissing a media case, especially one where the defendant was represented by Clower.

Thereafter, Lindquist accused Penner of not having passion for the office. When Penner replied he had a passion for justice, Lindquist replied, "Justice is a platitude." Lindquist instructed Penner to direct trial team negotiator DPAs not to give good deals to defendants represented by anyone in his 'confederacy of dunces.' When Penner declined to do so for ethical reasons, Lindquist instructed Felony Division Chief John Sheeran to deliver the directive, which he did. DPAs were also told not to be seen being friendly to these attorneys, lest their careers be adversely affected.

Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Timothy Lewis, Michelle Hyer, Frank Krall, Heather Songer, Raymond Odell, Gary Clower, Bryan Hershman

F. Violation of Whistleblower Act

On May 13, 2015, DPA Steven Merrival filed a whistleblower complaint against Lindquist. Merrival made the complaint public and provided copies to the media. Merrival gave a quote to the Tacoma News Tribune and appeared on camera for television news. In response, Lindquist directed Farina to appear on camera and Denise Greer to provide a quote to the newspaper. Both did and both accused Merrival of being disgruntled because he had been passed over for leadership positions. Merrival was the drug trial team negotiator, enjoyed his position, and never sought a leadership position from Lindquist—all of which Lindquist knew.

Lindquist then called at least two meetings of office leaders (trial team and division leaders) as well as smaller meetings of top leadership DPAs. In these meetings Lindquist said Merrival had a "meltdown" and was not acting "adult and mature." After the meetings, Penner recommended Lindquist stop criticizing Merrival publicly. Penner also suggested the comments already made, including the news comments, could be the basis for a whistleblower retaliation lawsuit; Denise Greer agreed.

Penner was then admonished for not "being present" and not showing leadership regarding the Merrival whistleblower issue. Farina also admonished Penner in front of other top leaders because Penner's fiancée, attorney Elizabeth Mount, had posted a comment on the News Tribune article in support of Merrival's character. Lindquist then spoke with Penner and questioned his ability to remain Chief Criminal Deputy.

Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Jared Ausserer, Timothy Lewis, Maureen Goodman, Sven Nelson, Heather DeMaine, Michelle Hyer, Frank Krall

II. GROSS WASTE OF PUBLIC FUNDS

A. Requiring In-House Attorneys to Draft Pleadings for Outside Law Firms' Signature after Obtaining Special Funds to Pay Outside Law Firms

Although there are routinely civil claims filed against the county, there have been three recent lawsuits filed against the county alleging personal misconduct by Lindquist: *Dalsing v. Pierce County* (alleging false arrest and malicious prosecution by the prosecutor's office), *Nissen v. Pierce County* (a public records lawsuit alleging Lindquist used his personal phone to conduct private business and

thereby avoid the public records act), and *Ames v. Pierce County* (alleging Lindquist used the Potential Impeachment Policy to label a detective as dishonest because he was going to testify on behalf of Dalsing in that case). Lindquist sought and obtained extra money from the County Council to hire outside law firms to represent the County and himself on these cases. These attorneys were Stewart Estes and Phil Talmadge.

However, the majority of the briefing was conducted in-house, by senior DPAs during work hours, only to have some such briefs superficially reviewed and signed by the outside attorneys. Senior DPAs required to participate in such briefing sessions included Chief of Staff Dawn Farina, Chief Civil Deputy Douglas Vanscoy, Chief Criminal Deputy Stephen Penner, Felony Division Chief John Sheeran, Appellate Division Chief Kit Proctor, Homicide Division Chief Jared Ausserer, Civil Litigation Team Leader Dan Hamilton, and Mike Sommerfeld, advisor to the Pierce County Sheriff's Department. Lindquist also participated personally. The briefing sessions would often last several full days at a time, including office-paid lunches, with as many as eight DPAs participating at the same time to conduct line-by-line editing of lengthy appellate briefs.

Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Jared Ausserer, Douglas Vanscoy, Dan Hamilton, Mike Sommerfeld, Kit Proctor, Stewart Estes, Phil Talmadge

B. Providing Unpaid Legal Services to Non-Governmental Agencies and Their Attorneys; and
C. Paying Outside Law Firms to Provide Legal Services for Non-Government Agencies

One of the briefs mentioned above was an amicus brief to the Washington Supreme Court in *Nissen v. Pierce County*. This brief was not being filed by any government agency, but rather by outside parties such as the Washington Education Association, the Washington State chapters of AFSCME and IAFF, and the Pierce County DPA's union (PCPAA). The brief was written by in-house DPAs Dan Hamilton, Stephen Penner, Dawn Farina, Mike Sommerfeld, among others. It was drafted to compliment the arguments presented by the county, as named defendant, and Lindquist, as a personal intervenor. The briefing was coordinated with outside counsel, who also reviewed the draft and gave advice.

Penner questioned whether a brief for the PCPAA should be written by management, but was told that it was okay because Hamilton and Sommerfeld were PCPAA members. Sheeran expressed concern to Penner that drafting briefs for outside agencies might be a gift of public funds. Penner asked Farina about this, but Farina had no concerns. Penner asked Denise Greer, Assistant Chief of the Civil Division, who stated that paying the outside attorney (Talmadge) to review it was probably more problematic because it was direct payment, but since the in-house DPAs were salaried, it could be claimed they were working on the brief during their "break times," despite the fact that well over a hundred employee-hours were devoted to that brief alone, all during standard work time of 8:30 a.m. to 4:30 p.m..

Witnesses: Dawn Farina, Stephen Penner, John Sheeran, Jared Ausserer, Douglas Vanscoy, Dan Hamilton, Mike Sommerfeld, Kit Proctor, Scott Peters, Phil Talmadge

D. Reclassifying DPA Positions to Increase Pay for Loyal DPAs

In 2013, Lindquist reclassified the homicide team into the "homicide division" so that DPA Grant Blinn could transfer to that position from Misdemeanor Division Chief without suffering a cut in his annual salary. However, there is no supervisory aspect to the position, as the homicide "division" has only ever consisted of one DPA, the division chief himself.

Witnesses: Grant Blinn, Jared Ausserer, Lisa Hilligoss

III. ABUSE OF AUTHORITY

A. Vindictive Prosecution

In 2015, Pierce County Superior Court Edmund Murphy dismissed the criminal case of *State v. Lynn Dalsing*, finding that Lindquist's office had refiled the charges in response to Dalsing filing a civil lawsuit against the County after her original charges were dismissed for insufficient evidence. In addition to the findings of the judge, additional factors which weigh on the question of vindictiveness are the facts that DPA Ausserer was called in early from family leave to file the charges at a particular time, and DPAs from the civil division were involved in the decision to refile criminal charges.

After the case was dismissed for vindictive prosecution, civil DPAs were initially involved in discussions regarding reconsideration and appeal, until Penner raised concerns with Civil Chief DPA Vanscoy's initial proposal to "appeal and seek settlement of the civil suit." When Appeals Division Chief Kit Proctor voiced an opinion against appealing Murphy's ruling, Lindquist replied, "Vanscoy thinks we should appeal."

Witnesses: Jared Ausserer, Kit Proctor, Dan Hamilton, Phil Sorensen, John Sheeran, Stephen Penner, Doug Vanscoy, John Sheeran, Dawn Farina

B. Attempted Misuse of Potential Impeachment Evidence Policy

In 2013, potential impeachment evidence became available regarding PCSD Det. Mike Ames. Specifically, DPA James Richmond filed an affidavit in the *Dalsing v. Pierce County* lawsuit alleging that Ames had lied in an affidavit he had filed in the same suit. Thus, a DPA was saying that Ames had lied, information which could be relevant in any criminal case where Ames might be expected to testify.

This evidence was provided to attorney Barbara Corey, defense counsel in the murder case of *State v. D'Marcus George*, however the State planned to move to exclude the evidence from trial. Lindquist directed that Penner was to argue all motions to exclude potential impeachment evidence. Regarding Ames, Lindquist told Penner not to argue too hard against admissibility.

Due to miscommunication between Penner and the trial DPA, Kit Proctor, Proctor argued the motion to exclude potential impeachment evidence. Proctor was successful in getting the information excluded from the trial.

Nevertheless, Lindquist admonished Penner for failing to argue the motion himself. When Penner said something to the effect that "At least we got the ruling we wanted" in excluding the potential impeachment evidence, Lindquist replied, "That wasn't the ruling we wanted."

Admission of the potential impeachment evidence would have damaged the State's case in a retrial of a murder case

C. Retaliatory Job Assignments

Lindquist has reassigned or threatened to reassign DPAs from more preferred assignments to less preferred assignments when he feels a DPA has criticized him too loudly or too publicly. This is part of the "culture of fear" DPA Steven Merrival mentioned in his whistleblower complaint.

Example: Diane Clarkson was moved from the felony violent crime team to the juvenile division after speaking out at a public County Council meeting against plan to remove Minority Bar from judicial qualifications committee. Lindquist had proposed the change in law to help support the application of DPA Kevin McCann for a vacancy on the District Court Bench.

Example: James Schacht was moved from the felony violent crime team to the appeals division after speaking out against Lindquist. Lindquist and/or Farina reportedly later admitted this move was retaliatory.

Example: Steven Merrival was threatened with reassignment after his wife posted critical Facebook comments and Merrival expressed criticisms of how Lindquist ran the office, including encouraging bullying by DPAs. This move was blocked when Merrival filed his whistleblower complaint.

Example: Lindquist proposed moving Brian Leech from the felony property crime team to the juvenile division after Leech spoke out at a PCPAA Guild meeting against the proposed amicus brief in *Nissen v. Pierce County*.

Example: Lindquist suggested to Penner that he might not keep his position as Chief Criminal Deputy because he wasn't showing enough support for Lindquist after Merrival filed his whistleblower complaint.

Witnesses: Diane Clarkson, James Schacht, Steven Merrival, Stephen Penner, Brian Leech, Dawn Farina, Lisa Hilligoss

D. Intimidation of Employees for Non-Work Activities

Lindquist monitors the non-work activities of employees for anything that might be critical of Lindquist.

Example: Lindquist advised DPA Steven Merrival that Merrival's wife ought not to post things on her Facebook that were derogatory of Lindquist or the office.

Example: Michelle Walker, Justice Services/Victim Advocate Supervisor, was admonished for 'liking' a photograph of a sunset posted on Facebook by former Chief Criminal DPA Mary Robnett, whom Lindquist now dislikes and considers to be a member of his 'confederacy of dunces.'

Example: Penner was admonished when his fiancée posted an online comment in support of Merrival's character after Merrival's whistleblower complaint.

Example: Lindquist instructed Stephen Penner to admonish DPA Brian Leech for not saying hello back to members of Lindquist's leadership team who had greeted him.

Example: Juvenile Division Chief Kevin Benton was instructed to admonish DPA Diane Clarkson for not saying hello pleasantly enough when she returned a greeting from Chief of Staff Dawn Farina.

Witnesses: Steven Merrival, Michelle Walker, Stephen Penner, Brian Leech, Diane Clarkson, Kevin Benton, Lisa Hilligoss

IV. SUBSTANTIAL AND SPECIFIC DANGER TO PUBLIC HEALTH OR SAFETY

Given the unique and vital role of the prosecutor's office in enforcing the law and protecting the public, the activities of Lindquist in hiring less qualified staff, reassigning DPAs for personal reasons, requiring senior criminal management DPAs to edit civil appellate briefs, and basing charging and disposition decisions on media interest and defense attorney selection, the safety of the public has been compromised.

CONCLUSION

I make this whistleblower complaint in good faith and the information contained herein is true and correct to the best of my knowledge and belief.

[REDACTED]

Dated: 5/21/15 at [REDACTED] Washington

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[REDACTED]