

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In The Matter Of:

DANIEL BINSWANGER,

PETITIONER.

Docket No. 02-2017-GOV-00004

FINAL ORDER

Agency: Port of Port Angeles

Program: Local Government Whistleblower

1. ISSUES PRESENTED

- 1.1. Did Respondent Port of Port Angeles retaliate against Petitioner Daniel Binswanger in violation of Chapter 42.41 RCW?
- 1.2. If so, what is the appropriate remedy?
- 1.3. Under RCW 34.12.039, what percentage of costs will each party pay for services provided by the Office of Administrative Hearings (OAH) in the above-captioned matter in excess of twenty-four (24) hours?

2. ORDER SUMMARY

- 2.1. The Port of Port Angeles did not retaliate against Mr. Binswanger for his whistleblower complaint in violation of RCW 42.41.
- 2.2. Because no violation occurred, no relief is appropriate.
- 2.3. Under RCW 34.12.039, Petitioner and Respondent will each pay 50% of costs for services provided by OAH in the above-captioned matter in excess of twenty-four (24) hours.

3. HEARING

- 3.1. Hearing Dates: April 24, 2017; May 3, 2017; May 17-18, 2017
- 3.2. Administrative Law Judge: Lisa N. W. Dublin
- 3.3. Petitioner: Daniel Binswanger ("Mr. Binswanger"), *pro se*

3.3.1. Witnesses:

- 3.3.1.1. Holly Hairell, Human Resources Manager
- 3.3.1.2. Steven Burke, Port Commissioner
- 3.3.1.3. John Nutter, Director of Finance and Administration
- 3.3.1.4. Connie Beauvais, Port Commissioner
- 3.3.1.5. Colleen McAleer, Port Commissioner
- 3.3.1.6. Karen Goschen, Executive Director
- 3.3.1.7. Simon Barnhart, legal counsel to the Port
- 3.3.1.8. Susan Scott, Business Development Administrator

3.4. Respondent: Port of Port Angeles ("Port")

3.4.1. Representatives: Jerome Rubin and Reshvin Sidhu, Williams Kastner & Gibbs

3.4.2. Witnesses:

- 3.4.2.1. Karen Goschen, Executive Director
- 3.4.2.2. John Nutter, Director of Finance and Administration
- 3.4.2.3. Susan Scott, Business Development Administrator
- 3.4.2.4. Holly Hairell, Human Resources Manager

3.5. Exhibits: The following exhibits were admitted into the evidentiary record:

- 3.5.1. Petitioner's Exhibits A, B (p. 1 only), C, F-H, J, K (p. 1 only), L, N (pp. 29, 91-97, 103-105, 112-121, 160-168 only), O-T, W-Z, and CC-UU
- 3.5.2. Respondent's Exhibits 1, 11, 23-25, 28, 31, 39-44, 47, 49, 53-56, and 61-62

3.5.3. At the hearing, I reserved judgment on the admission of Exhibit BB into the evidentiary record. After deliberation, I hereby admit Exhibit BB due to its tangential background relevance to Mr. Binswanger's whistleblower claim.

4. FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

Jurisdiction

4.1. On or around February 3, 2017, Mr. Binswanger reported the Port unlawfully retaliated against him by terminating his employment based on his whistleblower complaints of improper governmental action. Ex. 47. On February 17, 2017, following its investigation, the Port issued a determination that it reviewed Mr. Binswanger's complaint and that his discharge remained unchanged. See Ex. O. That same day, Mr. Binswanger requested an administrative hearing with the Office of Administrative Hearings ("OAH") under Chapter 42.41 RCW.

Mr. Binswanger and The Port

4.2. The Port is the largest industrial real estate owner in Clallam County, with ownership of industrial property, two airports, and two marinas. The Port actively recruits businesses and industry to Clallam County, and leases its industrial building space, in furtherance of the Port's mission to attract and create jobs in the area. At all times relevant hereto, the Port was comprised of three commissioners – Steven Burke, Colleen McAleer, and Connie Beauvais – and a team of directors, managers and staff under Executive Director Karen Goschen.

4.3. Mr. Binswanger is a real estate professional and business operator/developer who was acquainted socially with Commissioner McAleer prior to joining the Port. When the position of Director of Business Development opened, Mr. Binswanger applied. The position description posted by the Port online stated in relevant part:

The Director is responsible for developing business strategies to promote job growth in Clallam County, creating a communications plan, marketing Port facilities & the

community, working closely with the EDC & local, state and federal agencies on economic development, grant opportunities & regulations, negotiating complex commercial agreements & supporting workforce development. ... This position oversees a property manager with a portfolio of 90+ leases.

Ex. A.

4.4. The formal Position Description for the Director of Business Development similarly provided that “[t]he Director will negotiate complex commercial contracts and oversee the Property Manager with a portfolio of 90+ leases.” This position description identified essential duties and responsibilities in the areas of business development, marketing, communication and public relations, as well as in real estate property management. Regarding real estate property management, essential duties included the following:

- *Supervise and manage the Property Manager and all facets of industrial and commercial leases*, including lease negotiation, lease conditions, determination of market lease rates, prospectus sheets, tenant relations, assuring compliance with lease agreements and regulatory requirements;
- Analyze the real estate market to establish market comparable rates and identify investment opportunities.
- Develop and implement real estate strategies that position properties for development to attract investment, create new jobs and generate revenues. Consider disposition and/or acquisition and development of new properties.
- *Plan for maximum return on investment of Port properties consistent with policies set forth by the Port Commission. Must maintain awareness of changing land use requirements, present lessee requirements, potential lessees, availability of property, and Comprehensive Plan uses and alternative uses for Port properties and the competitive position of the Port.*

Ex. B, pp. 2-3 (Emphasis added). The essential, general management duties set out in this job description included “engag[ing] in and advis[ing] the Executive Director on all proposals, agreements and transactions in all lines of business,” and “creat[ing] a positive and team-oriented environment.” *Id.*, p.3. This position description concludes with the following disclaimer:

The job duties, elements, responsibilities, skills, functions, experience, educational factors, requirements and conditions listed in this job description are representative only and not exhaustive of the tasks that an employee may be required to perform. The Port reserves the right to revise this job description at any time and to require employees to perform other tasks as circumstances or conditions of its business, competitive considerations or work environment change.

Id., p.4.

- 4.5. Both before and after Mr. Binswanger applied for the position, Mr. Binswanger spoke with the Port’s Executive Director, Karen Goschen about the position. Ms. Goschen told Mr. Binswanger that she would rely heavily upon the successful candidate, who would be part of her senior team. Ms. Goschen also explained that she intended to discharge the existing property manager, Tanya Kerr. Ms. Goschen explained that she was changing the property manager position into a contract manager position, and that the new Business Development Director would need to focus on leases more heavily until this new contract manager position could be filled. Ms. Goschen also explained that that the new Business Development Director would participate in the hiring process for the new contract manager.
- 4.6. The Port had recently hired an outside consultant – Jeannie Beckett -- to develop a strategic plan for the Port, and then to help implement it by properly aligning people with duties. In furtherance of this objective, Mr. Binswanger and others took the Clifton StrengthsFinder assessment. See Ex. BB. The results of Mr. Binswanger’s assessment, which he submitted to the Port, showed that Mr. Binswanger’s lowest-ranked talent theme out of 34 talent themes was adaptability, i.e. “going with the flow”. Ms. Goschen read Mr. Binswanger’s assessment before hiring him.

Mr. Binswanger, Business Development Director

- 4.7. On September 16, 2016, the Port offered Mr. Binswanger the full-time, at-will position of Director of Business Development beginning September 20, 2016. Ex. A, pp. 5-7. Ms. Goschen intended for Mr. Binswanger to spend approximately 50% of his time working on organizing and managing existing leases, and the other 50% on business development. See Ex. 61. On September 21, 2016, at Port expense, Mr. Binswanger attended the AAPA Leasing Workshop in Houston, Texas. See Ex. B.
- 4.8. While Mr. Binswanger was in Houston, the Port discharged Property Manager Tanya Kerr. When Mr. Binswanger returned, he was displeased with this, and asked Ms. Goschen to rehire Ms. Kerr. Ms. Goschen arranged for Ms. Kerr to return to the Port for approximately two weeks to transition her knowledge of Port leases to Mr. Binswanger. Mr. Binswanger spent only approximately two hours with Ms. Kerr over the course of the two weeks, allegedly because he did not know she would be there for two weeks.
- 4.9. Shortly thereafter, Ms. Goschen worked with Mr. Binswanger to develop the job description and title for the new contract manager. Mr. Binswanger recommended a business acquaintance, Susan Scott, for the position. After Ms. Scott successfully completed the selection process, the Port hired Ms. Scott as Business Development Administrator in November 2016. Although Ms. Scott had been a licensed real estate broker, she did not have any previous experience with commercial or industrial leases.

Mr. Binswanger and Ms. Goschen

- 4.10. Over the course of his first several weeks with the Port, Mr. Binswanger displayed comfort and ease in meeting and talking with people regarding business development, and positivity about the Port. However, Mr. Binswanger was not as concentrated on the Port leases, and believed Ms. Goschen was asking him to do work he had not been hired to perform. After approximately the first month, their relationship began to deteriorate.
- 4.11. Mr. Binswanger expressed to Mr. Nutter that he did not feel he was part of the team at the Port. In response, Mr. Nutter met with Mr. Binswanger on December 13, 2016, to share some observations staff allegedly made of Mr. Binswanger, and offer him constructive criticism. These observations were

that Mr. Binswanger was condescending, arrogant, rude and disruptive. Mr. Nutter was trying to help Mr. Binswanger integrate better into the office. The meeting ended relatively well, but Mr. Binswanger's behavior did not change.

- 4.12. In approximately December 2016, Ms. Goschen asked Mr. Binswanger to list out the priority issues on the leases and projects. Ex. L, p.26. The list Mr. Binswanger gave Ms. Goschen did not meet her expectations, and indicated that Mr. Binswanger did not fully understand such issues. See Ex. L, p.23.
- 4.13. One particular lease at issue was the Port's month-to-month lease of an industrial building to the Composite Recycling Technology Center ("CRTC"), a company that recycled airplane material waste. See Ex. 55. Because this building was unfinished inside, the U.S. Department of Commerce's Economic Development Administration ("EDA") awarded the Port a grant to develop the building with the functionality the CRTC needed. See Ex. 56. Per the terms of this grant:

Each lease agreement for building, a portion of a building or any improvement(s) on real property funded by this Award shall be subject to the prior written approval of the ... EDA. Prior to EDA granting said approval, it must be satisfied, inter alia, that the terms and conditions of the lease are consistent with the authorized general and special purpose of the Award; that relationship with the prospective tenant will provide adequate employment and economic benefits for the area in which the property is located; that said lease agreement is consistent with EDA policies concerning, but not limited to, non-discrimination, and that the proposed Lessee is providing adequate compensation to the Lessor for said lease. Adequate compensation is typically determined by the reasonable fair commercial rental value in the community which the project is located. Typically, EDA relies on written verification of this rental value form [sic] a local real estate broker (when applicable).

Id., p.3.; Ex. HH, p.7.

- 4.14. Ms. Goschen tasked Mr. Binswanger with researching the EDA requirements, reviewing the appraisal report (See Exs. 54, KK), and talking with CRTC among other things to ascertain a fair market valuation of the CRTC building, and to work toward a new, long-term lease with CRTC that would meet with EDA approval.
- 4.15. At the Port commission meeting on January 9, 2017, Mr. Binswanger brought to the attention of the commission what he determined to be a financial discrepancy of approximately \$79,000.00 between the appraisal and the Port's lease with CRTC over the long-term, which had not (and as of the evidentiary hearing still had not) yet gone into effect. At this point, the testimony of Port witnesses conflicted on material points. Ms. Goschen and Finance & Administration Director John Nutter recalled Commissioner Burke commenting that the Port could play a "shell game" with the money. Commissioners Burke, Beauvais, and McAleer did not recall any such statement.
- 4.16. Based on the totality of the circumstances, I resolve conflicting testimony in favor of Ms. Goschen and Mr. Nutter, finding that Commissioner Burke suggested playing a shell game to account for the financial discrepancy. Both Mr. Nutter and Ms. Goschen gave consistent testimony regarding the Port's regular practice of diverting funds from the general fund as an enterprise accounting strategy, and that this is what they understood Mr. Burke meant by "shell game".
- 4.17. Ms. Goschen then tasked Mr. Binswanger with writing a letter to the EDA, explaining the discrepancy between the appraisal and the current rent terms under the lease, as well as other value the Port and the community received from the lease to CRTC under current terms. Instead of doing this himself, Mr. Binswanger contacted outside legal counsel to prepare such a letter. Then in response to Ms. Goschen's email about the status of this project, on January 18, 2017, Mr. Binswanger responded:

[A]s you know, the Port did not do proper due diligence when determining the lease rate which led to the deficiency in the amount in the MOU and month to month lease compared to fair market. As such, I am at a loss as to what to write in a letter like this, other than the Port made a mistake so, it makes more sense for you, with your deep knowledge in

regard to this matter, to write the explanation.

Ex. C.

- 4.18. Later that day, Mr. Binswanger emailed Ms. Goschen his strategic plan for his job, along with a letter of explanation he hoped would “explain where I’m coming from and a way I know will work for me to be successful in my endeavors at the Port.” Ex. 25. Mr. Binswanger copied Ms. Scott and the consultant, Ms. Beckett, on this email. Mr. Binswanger concluded this email to Ms. Goschen by stating, “I hope you can simply set me free to do my job resting assured it will be more than satisfactory.” *Id.* In his letter of explanation, Mr. Binswanger concluded by stating in part, “I also know that unless you allow me to be who I am and to bring the skills I have in doing things the “certain way” I have come to know is an almost guaranteed path to success, our work together will be challenging at the very least.” *Id.*, p.3.
- 4.19. Ms. Goschen was offended by this letter, which copied a subordinate, and questioned Ms. Goschen’s skill and judgment.
- 4.20. Also on January 18, 2017, in response to Ms. Goschen’s cancelling a meeting with Ms. Beckett due to Mr. Binswanger’s failure to produce the dual lists she previously requested, Mr. Binswanger emailed Ms. Goschen, stating in relevant part:

I am deeply disappointed you have chosen to put off what I firmly believe is an absolutely necessary meeting, and I implore you to put this meeting back on your schedule. If it is truly your intention for me to be successful in my work at the Port, there should be no higher priority on your list.

Rest assured, it didn’t take me long to learn the priorities of the Port and more importantly, its weaknesses. I believe the problem is not with my lack of understanding of learning about operating in a public entity, it’s about your lack of understanding how entrepreneurial business actually works to produce bottom line results.

I am more than capable and ready to roll out plans that will achieve the Commissions [sic] Strategic Plan goals. I simply need you to allow me to do what I do – in a way that I am

certain will work.

Ex. 23. Angered by this, Ms. Goschen began to feel that she no longer needed Mr. Binswanger's services at the Port.

- 4.21. On January 20, 2017, Mr. Binswanger met with Human Resources Manager Holly Hairell and stated he was stressed by his working relationship with Ms. Goschen, feeling increasingly ill, and needed help. He expressed dissatisfaction with Ms. Goschen's management style and stated things were not going well. Mr. Binswanger was upset.
- 4.22. The testimony of the parties at this point conflicted on material points. Ms. Hairell testified that Mr. Binswanger did not give specifics regarding his working relationship with Ms. Goschen. Mr. Binswanger, on the other hand, testified that he told Ms. Hairell that he had been asked to cover up a lease discrepancy and that he was afraid. Based on the totality of the circumstances, I resolve this conflict in favor of the Port. There is no evidence in the record to corroborate Mr. Binswanger's self-serving testimony offered near the end of the hearing, despite Ms. Hairell's extensive testimony throughout the hearing.
- 4.23. The afternoon of Friday January 20, 2017, Ms. Goschen met with Mr. Binswanger and told him that he was not meeting her expectations. After this meeting concluded, Mr. Nutter showed Ms. Goschen an email that Mr. Binswanger sent to Ms. Scott, copying Ms. Hairell, on January 18, 2017. This email stated in particular part:

I think it is important for you to know I am making every effort I can to encourage Karen to operate in a more entrepreneurially professional way. I recognize she has great abilities but it is crystal clear senior management leadership is not one of them at this time.

Please know, I will continue to do all I can to push back from the dysfunctional management we have all been forced to operate under....

Ex. 24. Ms. Goschen felt Mr. Binswanger was undermining her and behaving in an insubordinate fashion.

4.24. On Saturday January 21, 2017, Ms. Goschen decided to discharge Mr. Binswanger. On Sunday January 22, 2017, Ms. Goschen contacted Commissioners Beauvais and McAleer to state it was not working out with Mr. Binswanger. That evening, Ms. Goschen emailed Mr. Binswanger stating in particular part:

I appreciate you sending me the priorities/task list and that you put it together this weekend.

I know this past Friday was a difficult meeting. ... It appears that you understand my expectations. I don't feel comfortable that you embrace them. I have re-read your recent messages and have reflected upon many interactions we have had. I feel your support is conditional, that it is only when it is aligned with doing things your "certain way" or if you also agree it is a priority. I am seeing a pattern of disrespect for my leadership role. That concerns me.

Ex. 31. Ms. Goschen spoke with Commissioner Burke on Monday January 23, 2017, regarding Mr. Binswanger, as she had with the others the day before.

4.25. Meanwhile, Mr. Binswanger told Commissioner McAleer that Ms. Goschen did not know how to lead an executive team effectively. Commissioner McAleer advised Mr. Binswanger that he needed to work within her style, to focus on leasing, and that it was Ms. Goschen's prerogative as Executive Director to do so.

Mr. Binswanger's Whistleblower Claim and Job Separation

4.26. The morning of Monday January 23, 2017, Mr. Binswanger emailed Human Resources Manager Holly Hairell and asked to meet with her "sometime soon about Karen's most recent contentious meeting" with him. Ex. G. Later that day, Commissioner Beauvais asked Mr. Binswanger in passing, "How are you?" Mr. Binswanger responded that he could do a lot better if allowed to do his job without one arm behind his back.

4.27. Later that afternoon, Mr. Binswanger met with Ms. Hairell, stated he was not getting along with Ms. Goschen, that she was harassing him, that he was unhappy with her management style, and that he wanted to take action

regarding her unethical government action relative to a lease. Mr. Binswanger asked what “hostile work environment”, “harassment”, and “whistleblower complaint” meant. Ms. Hairell read the definitions of hostile work environment and whistleblower complaint from the employee handbook, and neither seemed to apply to Mr. Binswanger’s concerns. Mr. Binswanger stated that if he filed a whistleblower complaint, it would be about the CRTC lease and the EDA. Mr. Binswanger and Ms. Hairell also discussed the Port’s problem resolution policy. Ms. Hairell stated she had to leave, but would think about it and suggested they talk again the following day.

- 4.28. After leaving work, Ms. Hairell called her supervisor, Mr. Nutter, and informed him of her meeting with Mr. Binswanger. Mr. Nutter then reported this to Ms. Goschen, who stated she was not surprised and that she had talked to the commissioners over the weekend about Mr. Binswanger.
- 4.29. That evening, Ms. Goschen emailed Mr. Binswanger and placed him on paid administrative leave. Ex. J. The following morning, January 24, 2017, Mr. Binswanger emailed Ms. Hairell and stated he “would like to immediately initiate a whistleblower complaint against Ms. Goschen and the Port of Port Angeles.” *Id.*
- 4.30. On January 27, Mr. Nutter convened a *Loudermill* hearing with Mr. Binswanger, which lasted approximately one hour. See Ex. 39. At the outset of the hearing, Mr. Nutter gave Mr. Binswanger a written statement from Ms. Goschen, with supporting documentation, regarding the reasons for the disciplinary action against him. During the hearing, Mr. Binswanger first questioned the authenticity of the emails Ms. Goschen had provided (*Id.*, pp. 4-5). He stated there had been a communication breakdown between him and Ms. Goschen from approximately a month after he started (*Id.*, p.7), that he did not want to fight with the Port or Ms. Goschen (*Id.*, p.11), that he wanted to get back to work (*Id.*, p.12), and that working directly with Mr. Nutter “would be the functional solution” (*Id.*, p.13). Mr. Binswanger identified that Ms. Goschen had been absent for personal reasons (*Id.*, p.8), and not spent the time with him that he needed to be successful (*Id.*, pp. 13-14). Mr. Binswanger stated that Mr. Nutter had a teaching style that he better understood, and worked similar hours (*Id.*, pp. 14-15). Mr. Binswanger apologized for any disrespect Ms. Goschen “may have felt from” him, and reiterated his desire to continue his work at the

Port. (*Id.*, p. 21) Mr. Binswanger did not mention his whistleblower complaint or the CRTC lease, nor allege any improper governmental action taken by Ms. Goschen or the Port. Mr. Binswanger later claimed he did not do so because he wanted to resolve the issues between them and return to work. Ex. TT.

- 4.31. Later that day, Mr. Binswanger emailed Mr. Nutter stating he “sincerely hope[d] we can put this unfortunate action behind us, and I can get back to work.” Ex. L, p.1. Mr. Nutter responded, attaching Ms. Goschen’s written statement with supporting documentation given to Mr. Binswanger just before the *Loudermill* hearing. *Id.* This written statement identified the bases for disciplinary action against Mr. Binswanger, including insubordination, unsatisfactory work performance, and inability to meet deadlines. *Id.*
- 4.32. The evening of January 30, 2017, Ms. Goschen emailed Mr. Binswanger that the Port intended to discharge him for insubordination and unsatisfactory conduct as set out in the Employee Handbook. Ex. 41. Ms. Goschen did not apply progressive discipline as provided in the Employee Handbook because she believed Mr. Binswanger’s behavior did not warrant it. Ms. Goschen offered Mr. Binswanger the choice of (1) immediate discharge effective January 30, 2017, or (2) discharge effective February 1, 2017 in exchange for an orderly exchange of Port property and a status update on each of his Port contacts. *Id.* Mr. Binswanger chose the latter. Ex. 44.
- 4.33. Shortly thereafter, Mr. Binswanger filed a report with Red Flag Reporting, an outside agency, claiming his “boss has been confrontational and hostile with him,” and making “unreasonable demands”. Ex. 49. This report did not allege improper governmental conduct in relation to the CRTC/EDA, and stated “He wants to file a whistle blower complaint.” *Id.*, p.2. Mr. Binswanger identified this report as a whistleblower complaint. See Ex. 50. Red Flag Reporting forwarded this report to Ms. Hairell, who commenced an investigation. See Ex. 47.
- 4.34. On February 3, 2017 Mr. Binswanger wrote a letter to Ms. Hairell regarding DJB-POPA: Redflag Report/Whistleblower Action. *Id.* In this letter, he stated in part, “Also, as you know, I was subsequently fired which clearly reeks of retaliatory action, and of which I am convinced it was.” *Id.*, p.1. Mr.

Binswinger told Ms. Hairell that he was afraid for his family's safety as well as his own, including the family dog, and attached supporting documentation in furtherance of his whistleblower retaliation claim. *Id.*

- 4.35. On February 17, 2017, Mr. Nutter notified Mr. Binswanger that, after reviewing the documentation he submitted February 3, 2017 and other materials, the decisions to discharge Mr. Binswanger remained unchanged. Ex. O. Regarding his whistleblower complaint, the Port determined that no improper governmental action took place with regard to the CRTC lease, and that there was no basis for a whistleblower claim. *Id.*

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. I have jurisdiction over the parties and subject matter under Chapters 34.05, 34.12, and 42.41 RCW.

Whistleblower Retaliation under Chapter 42.41 RCW

- 5.2. Every local government employee has the right to report to the appropriate person or persons information concerning an alleged improper governmental action. RCW 42.41.030(1).
- 5.3. "Improper governmental action" means any action by a local government officer or employee: (i) that is undertaken in the performance of the officer's or employee's official duties, whether or not the action is within the scope of the employee's employment; and (ii) that is in violation of any federal, state, or local law or rule, is an abuse of authority, is of substantial and specific danger to the public health or safety, or is a gross waste of public funds. RCW 42.41.020(1)(a).
- 5.4. "Improper governmental action" does not include personnel actions including but not limited to employee grievances, complaints, appointments, promotions, transfers, assignments, reassignments, reinstatements, restorations, reemployments, performance evaluations, reductions in pay, dismissals, suspensions, demotions, violations of the local government collective bargaining and civil service laws, alleged labor agreement

violations, reprimands, or any action that may be taken under chapter 41.08, 41.12, 41.14, 41.56, 41.59, or 53.18 RCW or RCW 54.04.170 and 54.04.180. RCW 42.41.020(1)(b).

- 5.5. It is unlawful for any local government official to take retaliatory action against a local government employee because the employee provided information in good faith that an improper governmental action occurred. RCW 42.41.040(1).
- 5.6. "Retaliatory action" means any adverse change in a local government employee's employment status, or the terms and conditions of employment including unsatisfactory performance evaluations, unwarranted and/or unsubstantiated letters of reprimand, denial of promotion, dismissal, suspension, or other unwarranted disciplinary action. RCW 42.41.020(3).
- 5.7. The employee, as the initiating party, must prove his or her claim by a preponderance of the evidence. RCW 42.41.040(6).
- 5.8. Costs for OAH services for the initial twenty-four (24) hours of services on a local government whistleblower hearing under Chapter 42.41 RCW shall be billed to the local government administrative hearings account. RCW 34.12.039. Costs for services beyond the initial twenty-four (24) hours of services provided by OAH with regard to local government whistleblower proceedings shall be allocated to the parties by the administrative law judge, the proportion to be borne by each party at the discretion of the administrative law judge. The charges for these costs shall be billed to the affected local government that shall recover payment from any other party specified by the administrative law judge. *Id.*

The Port Did Not Retaliate Against Mr. Binswanger in Violation of Chapter 42.41 RCW.

- 5.9. In the present case, over the course of his communications with Ms. Hairell on January 23, 2017 in person, and then January 24, 2017 by email, Mr. Binswanger reported alleged improper governmental activity, i.e. filed a whistleblower claim, relative to the CRTC lease. Although his verbal report to Ms. Hairell was insufficiently hypothetical on January 23, 2017, it sufficiently conveyed the subject matter, i.e. alleged unethical practices relative to the CRTC lease and the EDA, in the event he went forward with his whistleblower complaint. Such alleged unethical practices involved

alleged waste of public funds, not just personnel action which does not amount to improper governmental action. Combined with his clear statement the following day by email that he wanted to immediately initiate his whistleblower complaint, Mr. Binswanger effectuated his whistleblower complaint on January 24, 2017, under RCW 42.41.020.

- 5.10. However, at the time he filed his whistleblower claim on January 24, 2017, Mr. Binswanger was already on paid administrative leave pending a decision regarding discharge due to insubordination and unsatisfactory job performance. As is well-documented in the evidentiary record and set out above, Mr. Binswanger repeatedly undermined Ms. Goschen and improperly challenged her authority over him in the performance of his job duties. During the *Loudermill* hearing, when Mr. Binswanger had ample opportunity to review and discuss Ms. Goschen's stated reasons for disciplining him, Mr. Binswanger first challenged the authenticity of the emails, and then blamed his unsatisfactory performance on Ms. Goschen, who allegedly worked odd hours and did not spend enough time with him. Mr. Binswanger took no responsibility for his insubordinate conduct, did not discuss his whistleblower claim, and did not address how his work performance would improve if reinstated, other than to state he preferred to report to Mr. Nutter instead.
- 5.11. It is unclear from Mr. Binswanger's January 31, 2017 Red Flag report whether he intended to submit another whistleblower claim, a whistleblower retaliation claim, neither, or both. However, on February 3, 2017, two days after his resignation became effective, Mr. Binswanger clarified that he was claiming whistleblower retaliation under Chapter 42.41 RCW. The Port investigated both his whistleblower claim and his retaliation claim. The Port found no improper governmental action took place, and upheld the grounds for Mr. Binswanger's discharge. Given that (a) Mr. Binswanger's working relationship with Ms. Goschen admittedly began to deteriorate within weeks after he started work at the Port, (b) Mr. Binswanger undermined Ms. Goschen directly, as well as to the commissioners and others, and (c) Mr. Binswanger did not satisfactorily perform the lease management work he was hired to perform per his job description, the Port properly discharged Mr. Binswanger effective February 1, 2017, for insubordination and unsatisfactory performance, not in retaliation for his whistleblower complaint. Mr. Binswanger has thus not met his burden of establishing unlawful whistleblower retaliation under Chapter 42.41 RCW.

5.12. Because both parties participated in good faith in the local government whistleblower retaliation claim process, and to avoid any chilling effect on such participation, it is reasonable to assign the costs incurred by OAH in excess of 24 hours evenly between the parties under Chapter 34.12 RCW.

6. IT IS HEREBY ORDERED THAT:

- 6.1. The Port of Port Angeles did not retaliate against Mr. Binswanger for his whistleblower complaint in violation of Chapter 42.41 RCW.
- 6.2. Because no violation occurred, no relief is appropriate.
- 6.3. Under RCW 34.12.039, the costs of OAH services in this matter in excess of twenty-four (24) hours shall be apportioned fifty percent (50%) to Petitioner and fifty percent (50%) to the Port of Port Angeles.

Issued from Tacoma, Washington, on the date of mailing.



ALJ Lisa Dublin
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS

PETITION FOR RECONSIDERATION

Within 10 days of the service of this order, any party may file a petition for reconsideration with the Office of Administrative Hearings at 949 Market Street, Suite 500, Tacoma, WA 98402. The petition for reconsideration must state the specific grounds upon which relief is requested. RCW 34.05.470(1). WAC 10-08-215.

The petition for reconsideration will not stay the effectiveness of this order. Id. at (2). An order is not required to file a petition for reconsideration before filing a petition for judicial review. RCW 34.05.470(5).

PETITION FOR JUDICIAL REVIEW

This order becomes final on the date of mailing unless within thirty (30) days of mailing, a party files a petition for judicial review with the Superior Court. RCW 34.05.542(2). The petition for judicial review may be filed in the Superior Court of Thurston County, of the county where petitioner resides, or of the county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514(1). The petition for judicial review must be served on all parties of record within thirty (30) days of mailing of the final order. Service of the petition for judicial review on opposing parties is completed when deposited in the U.S. Mail, as evidenced by the postmark. RCW 34.05.542(4).

The petition for judicial review must include the following: (1) the name and mailing address of the petitioner; (2) the name and mailing address of the petitioner's attorney, if any; (3) facts that demonstrate that the petitioner is entitled to obtain judicial review; (4) the petitioner's reasons for believing that relief should be granted; and (5) a request for relief, specifying the type and extent of relief requested. RCW 34.05.546.

CERTIFICATE OF MAILING IS ATTACHED

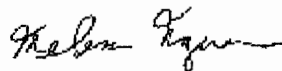
CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 02-2017-GOV-00004

I certify that true copies of this document were served from Tacoma, Washington via Consolidated Mail Services upon the following as indicated:

Daniel Binswanger PO Box 3125 Sequim, WA 98382 Appellant	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
John Nutter Director of Finance & Administration Port of Port Angeles 338 West 1 st Street Port Angeles, WA 98362 Respondent	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Simon Barnhart Platt Irwin Law Firm 403 South Peabody Street Port Angeles, WA 98362 Respondent Representative	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Jerome Rubin Williams, Kastner & Gibb, PLLC Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 Respondent Representative	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
Reshvin Sidhu Williams, Kastner & Gibb, PLLC Two Union Square 601 Union Street, Suite 4100 Seattle, WA 98101 Respondent Representative	<input checked="" type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail

Date: Monday, July 17, 2017

OFFICE OF ADMINISTRATIVE HEARINGS



Melesa Noguera
 Legal Assistant 2