



# **ANNUAL REPORT**

## **TO THE GOVERNOR AND THE LEGISLATURE**

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### **WHISTLEBLOWER RETALIATION COMPLAINTS** COMPLAINTS OF RETALIATION FOR THE DISCLOSURE OF INFORMATION BY PUBLIC EMPLOYEES

January 1, 2004, through December 31, 2004

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Prepared By The

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**ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE  
COMPLAINTS OF RETALIATION FOR THE DISCLOSURE OF INFORMATION BY  
PUBLIC EMPLOYEES (WHISTLEBLOWER RETALIATION)**

**June 30, 2005**

**Introduction**

Government Code section 19683(f) provides, "In order for the Governor and the Legislature to determine the need to continue or modify state personnel procedures as they relate to the investigation of reprisals or retaliation for the disclosure of information by public employees, the Board, by June 30 of each year<sup>1</sup>, shall submit a report to the Governor and the Legislature regarding complaints filed, hearings held and legal actions taken pursuant to this section." This report is prepared by the State Personnel Board (SPB) for the calendar year of January 1, 2004, through December 31, 2004.

**Background**

Protection for state employees from retaliation for having reported improper governmental activities was first provided in 1985. At that time, the SPB was assigned responsibility for investigation of complaints of whistleblower retaliation.

The law was amended in 1987 and changed to include the requirement that a complaint of improper governmental activity be filed with the Joint Legislative Audit Committee before being filed with the SPB; that the complaint be filed with the SPB within 12 months of the most recent act of reprisal; and that any person who intentionally engages in acts of reprisal be subject to a fine not to exceed \$10,000 and imprisonment in the county jail for a period of one year as determined by the courts. The changes included the requirement of an annual report from SPB to the Governor and the Legislature on complaints of whistleblower retaliation.

Effective January 1, 2000, the law was again amended to expand the protections granted to whistleblowers. The requirement for filing such complaints first with the Joint Legislative Audit Committee was deleted. The amendment made it easier for a whistleblower to file a complaint and include, as protected disclosure, the refusal to obey an illegal order. The amendment also changed the burden of proof in adverse actions. If any employee subject to adverse action demonstrates that their whistleblowing activity was a contributing factor in the appointing power's bringing the action, the burden is imposed upon the appointing power to prove by clear and convincing

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<sup>1</sup> Six reports were produced between 1987 and 1992. In 1992, Chapter 710 legislation (Government Code section 7550.5) instituted a moratorium on most reports to the Legislature. The moratorium was renewed in 1994 and 1996, and became inoperative on October 1, 1999. After the moratorium was finally repealed as of January 1, 2000, Whistleblower Retaliation Reports were again produced for calendar years 2000, 2001, 2002 and 2003.

evidence that it would have brought the action even if the employee had not blown the whistle.

The SPB added a "Frequently Asked Questions" (FAQs) section on whistleblower appeals to our Internet web site located on the appeals' home page in 2001.

In October 2001, Section 87164 of the Education Code relating to whistleblower protection for community college employees was amended to include procedures for the investigation and determination of retaliation complaints filed with the SPB. This amendment allowed community college employees who alleged whistleblower retaliation to file their complaint with the SPB. No cases involving community college employees alleging whistleblower retaliation were filed with the SPB in 2001; however, two whistleblower retaliation cases were filed in 2002 and three cases were filed in 2003.

In the year 2002, the SPB drafted regulations, (sections 56 through 56.2 to Title 2, California Code of Regulations), to implement the whistleblower laws. The regulations, operative August 14, 2002, codified the process for filing, processing, hearing and deciding complaints of whistleblower retaliation in state service. Additionally, the regulations were designed to inform complaining and responding parties of the standards and procedures utilized by SPB in processing whistleblower retaliation complaints, including the ability of the parties to conduct discovery, to respond to the allegations, and the time frame for the Executive Officer to issue a Notice of Findings concerning the complaint. The regulations also informed the parties which disciplinary actions may be taken against individuals found to have engaged in impermissible retaliation.

In the year 2004, the State Personnel Board was involved in several issues related to whistleblower laws. On March 22, 2004, SPB was provided an opportunity to appear before the Senate Select Committee on Government Oversight chaired by Senator Jackie Speier. The state's disciplinary process was the primary focus of the committee hearing. The hearing also included a discussion on the whistleblower retaliation complaints. Upon the hearing's conclusion, Senator Speier indicated that amendments to the whistleblower statutes were necessary to create a more effective process.

In August 2004, the Legislature passed AB 2637 (Reyes) which afforded employees of California State University (CSU) rights to investigation and determination of whistleblower retaliation complaints and appeals through SPB similar to those currently included in the California Whistleblower Protection Act. In September 2004, the Governor vetoed the bill noting that the existing statutory and CSU Executive Order provided adequate protection for employees that believed they had been retaliated against for having reported improper activities.

## **Information**

Whistleblowing is defined as either disclosing information that a state or community college employee, or applicant for state or community college employment, reasonably believes is evidence of an improper governmental activity or refusing to obey an illegal order or directive.

Three agencies play major roles in whistleblower retaliation, the Bureau of State Audits (BSA), the Office of the Inspector General (OIG) and the SPB.

**BSA** accepts complaints in reference to improper governmental activities. BSA is the investigative agency and has jurisdiction to investigate the underlying improper governmental activity.

**OIG's** specific responsibility in whistleblower retaliation complaints is to investigate complaints of retaliation against those who report misconduct on the part of state correctional agencies and employees. OIG can, with the approval of the complaining employee, forward its investigative findings to the SPB in support of the complaining employee's request and ask the SPB to bring disciplinary action against employees who retaliate against whistleblowers if the department does not. As an independent agency, OIG reports to the Governor. As a result of the audits, reviews and investigations, OIG provides impartial analysis and policy recommendations to the Governor, the Legislature and correctional administrators.

**SPB** is the adjudicatory body that hears and decides disciplinary appeals. SPB accepts the appeal of the state civil service or community college employee or applicant who believe s/he has been subjected to improper personnel action, threatened with an improper personnel action, or that such action is based, in part, on the fact s/he disclosed improper governmental activity or disclosed a refusal to obey an illegal order or directive.

The SPB is considered to have jurisdiction in Whistleblower Retaliation cases when all of the requirements listed below are met:

- A perjury statement is included with the complaint.
- The appeal is filed within one year of the most recent act or reprisal.
- A state or community college applicant or employee files the complaint.
- The complaint states a prima facie case of retaliation.

SPB does not accept filed appeals when (a) there is a No Grounds/No Prima Facie Case; (b) the complainant failed to provide required information timely after the SPB's request of same (No Timely Response); or (c) there is no jurisdiction.

## **Complaint Activity**

Forty-six whistleblower retaliation complaints were filed in the calendar year 2004, which is an 11.54 percent decrease from 2003 (52 complaints received). Twenty-three of those complaints were accepted.

Of those twenty-three cases, 10 were “denied”, 12 are “pending decision” and 1 case was “withdrawn.” A detailed complaint activity chart appears on page 5.

**SPB Whistleblower Retaliation Complaints  
Activity Report  
(January 2004 – December 2004)**

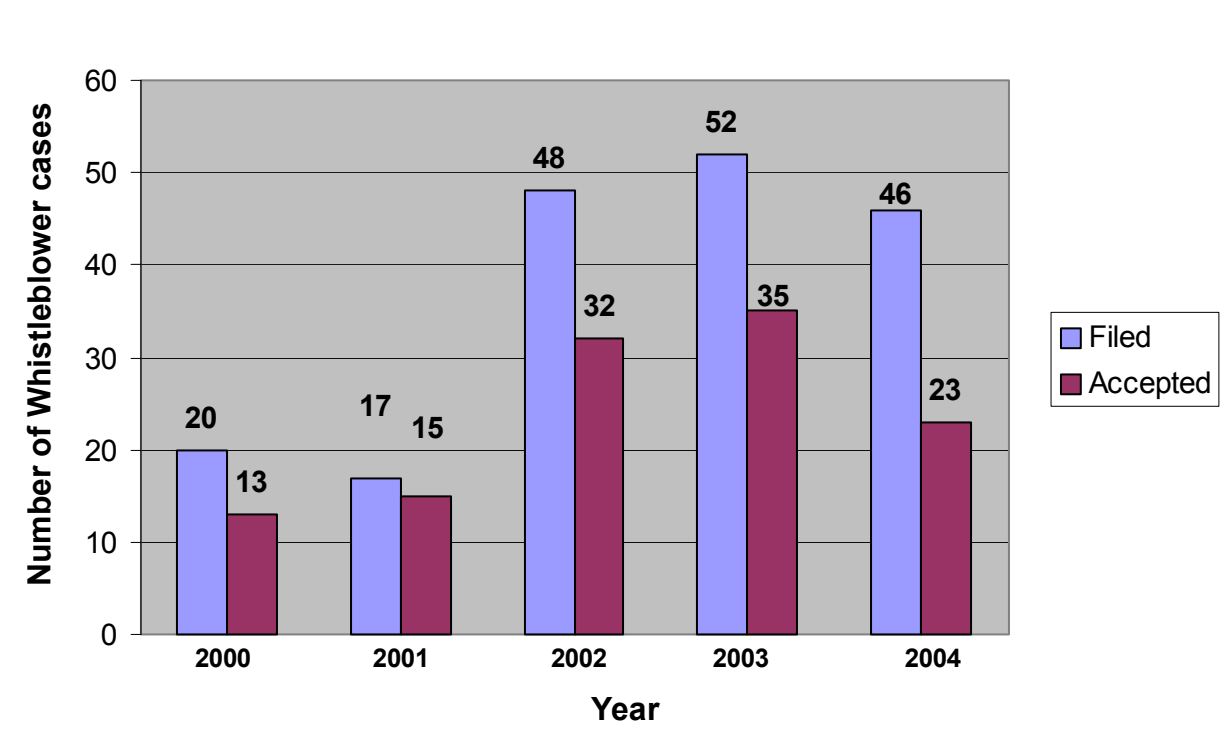
**I. Whistleblower Appeals filed**

Total Filed	Appeals Not Accepted <sup>2</sup>	Appeals Accepted
46	23	23

**II. Disposition of Whistleblower Appeals Accepted**

Denied	Appeal Withdrawn	Pending Decision	Total
10	1	12	23

**III. Comparison of Whistleblower Appeals filed each year**



<sup>2</sup> Appeals are not accepted when (a) there is No Grounds/No Prima Facie Case; (b) no sworn statement was provided, (c) the complainant failed to provide a timely response to the State Personnel Board's request for required information or the complaint was not timely; or (d) there is no jurisdiction.

Detailed Listing – Whistleblower Retaliation Complaints  
 Filed with SPB  
 Calendar year 2004

	<b>Appeal Date</b>	<b>Case #</b>	<b>Status</b>	<b>Department</b>	<b>Consolidated</b> <sup>3</sup>	<b>RTFC</b> <sup>4</sup>
1	01/10/04	04-0002	Appeal not accepted	Cooperative Personnel Services	N	N
2	01/12/04	04-0003	Pending Decision	Corrections	N	Y
3	01/13/04	04-0019	Pending Decision	Franchise Tax Board	Y - Dismissal	Y
4	01/13/04	04-0011	Appeal not accepted	Corrections	N	Y
5	02/23/04	04-0428	Denied - Notice of Finding	State Controllers Office	N	Y
6	02/25/04	04-0432	Pending Decision	Social Services	N	Y

<sup>3</sup> AA: Whistleblower Retaliation Complaint consolidated with prior Adverse Action Appeal  
 DC: Whistleblower Retaliation Complaint consolidated with prior Discrimination Complaint  
 RA: Whistleblower Retaliation Complaint consolidated with prior Reasonable Accommodation Complaint  
 All such consolidated cases are brought before an Administrative Law Judge for an evidentiary hearing

<sup>4</sup> RTFC: indicates whether complainant sought adverse action against individually named respondent(s)

Detailed Listing – Whistleblower Retaliation Complaints  
 Filed with SPB  
 Calendar year 2004

	<b>Appeal Date</b>	<b>Case #</b>	<b>Status</b>	<b>Department</b>	<b>Consolidated<sup>3</sup></b>	<b>RTFC<sup>4</sup></b>
7	02/25/04	04-0433	Pending Decision	Social Services	N	Y
8	03/01/04	04-0486	Denied - Notice of Finding	Transportation	N	N
9	03/08/04	04-0518	Appeal not accepted	Corrections	N	N
10	03/19/04	04-0627	Appeal not accepted	Industrial Relations	N	N
11	03/23/04	04-0624	Pending Decision	Corrections	N	Y
12	03/25/04	04-0639	Denied - Notice of Finding	Veteran Affairs	N	Y
13	03/26/04	04-0629	Appeal not accepted	Toxic Substance Control	N	N

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Detailed Listing – Whistleblower Retaliation Complaints  
Filed with SPB  
Calendar year 2004

	Appeal Date	Case #	Status	Department	Consolidated <sup>3</sup>	RTFC <sup>4</sup>
14	03/29/04	04-0640	Appeal not accepted	Office of Inspector General	N	N
15	04/12/04	04-0835	Appeal withdrawn	Justice	Y - DC (04-1046)	N
16	04/20/04	04-0881	Appeal not accepted	Corrections	N	Y
17	05/03/04	04-0924	Appeal not accepted	Mental Health	N	N
18	05/25/04	04-1145	Appeal not accepted	University of California	N	N
19	06/07/04	04-1306	Denied - Notice of Finding	Agricultural Labor Relations Board	N	Y
20	06/07/04	04-1371	Denied - Notice of Finding	South Orange County Comm. College District	N	Y
21	06/17/04	04-1358	Denied - Notice of Finding	Developmental Services	N	Y

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Detailed Listing – Whistleblower Retaliation Complaints  
Filed with SPB  
Calendar year 2004

	Appeal Date	Case #	Status	Department	Consolidated <sup>3</sup>	RTFC <sup>4</sup>
22	06/17/04	04-1374	Appeal not accepted	Corrections	N	N
23	06/21/04	04-1357	Appeal not accepted	Health Services	N	N
24	07/03/04	04-1435	Appeal not accepted	CSU - Cal State University	N	N
25	07/08/04	04-1491	Appeal not accepted	Fish and Game	N	Y
26	07/12/04	04-1487	Appeal not accepted	Industrial Relations	N	N
27	07/12/04	04-1490	Pending Decision	Health Services	N	Y
28	07/14/04	04-1492	Pending Decision	Corrections	Y - DC (04-1541)	Y

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 Filed with SPB  
 Calendar year 2004

	Appeal Date	Case #	Status	Department	Consolidated <sup>3</sup>	RTFC <sup>4</sup>
29	07/29/04	04-1734	Appeal not accepted	Developmental Services	N	N
30	08/09/04	04-1740	Appeal not accepted	San Francisco Police Department	N	Y
31	08/12/04	04-1778	Denied - Notice of Finding	Health Services	N	Y
32	08/13/04	04-1803	Appeal not accepted	Transportation	N	Y
33	08/30/04	04-1900	Denied - Notice of Finding	Public Employees Retirement System	N	Y
34	09/09/04	04-2026	Appeal not accepted	Alameda County	N	Y
35	09/27/04	04-2264	Appeal not accepted	Corrections	N	Y

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 Filed with SPB  
 Calendar year 2004

	Appeal Date	Case #	Status	Department	Consolidated <sup>3</sup>	RTFC <sup>4</sup>
36	10/04/04	04-2268	Appeal not accepted	Consumer Affairs	N	Y
37	10/15/04	04-3077	Pending Decision	Education	N	N
38	10/20/04	04-3078	Pending Decision	Transportation	N	N
39	11/02/04	04-2701	Pending Decision	Corrections	Y - DC (04-2498E)	N
40	11/02/04	04-2517	Denied - Notice of Finding	Coast Community College District	N	Y
41	11/03/04	04-2633	Appeal not accepted	Sierra Joint Community College District	N	N
42	11/08/04	04-2598	Appeal not accepted	CSU - Cal State University	N	N

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Detailed Listing – Whistleblower Retaliation Complaints  
 Filed with SPB  
 Calendar year 2004

	Appeal Date	Case #	Status	Department	Consolidated <sup>3</sup>	RTFC <sup>4</sup>
43	11/15/04	04-2616	Appeal not accepted	Corrections	N	N
44	11/30/04	04-2676	Denied- Notice of Finding	Transportation	N	Y
45	12/13/04	04-2902	Pending Decision	Justice	Y - DC (04-2910)	Y
46	12/24/04	04-2920	Pending Decision	Health Services	Y –DC (04-1357E)	N

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