



**2018 ANNUAL  
REPORT TO THE  
LEGISLATURE**

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**WHISTLEBLOWER  
RETALIATION  
COMPLAINTS**

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Prepared by

**State Personnel Board**

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**June 2019**



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

**June 30, 2019**

**Introduction**

Government Code section 19683, subdivision (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 investigations of reprisals or retaliation for the disclosure of information by public employees, the State Personnel 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, 2018 through December 31, 2018.

**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.

Amendments to the whistleblower retaliation protections were made in 1987, 2000, 2001, 2004, 2010, 2011, 2012, and 2013. In 2002, SPB adopted regulations to implement the whistleblower retaliation laws.

Effective March 8, 2006, the SPB's regulations were revised to include the requirement that the Executive Officer refer cases for investigation or schedule an informal hearing before an administrative law judge. Effective August 18, 2010, the SPB's regulations concerning the whistleblower statutes were revised as part of a broader revision to SPB's regulations.

Effective January 1, 2018, SPB's regulations were revised again. Several procedural changes were made with respect to Whistleblower Retaliation cases where retaliation is found after an informal hearing. When such a determination is made and the Respondent has requested an evidentiary hearing, a Trial Setting Conference is now scheduled. The parties are required to file and serve a Trial Setting Conference Statement setting forth estimated time for hearing, a witness list, and unavailable dates for hearing.

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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 repealed as of January 1, 2000, Whistleblower Retaliation Reports have been produced on an annual basis beginning with the calendar year 2000.

## **Information**

Whistleblowing is defined as either disclosing information that an employee or applicant of a state agency, a community college, the California Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts, reasonably believes is evidence of an improper governmental activity, or refusing to obey an illegal order or directive.

Three agencies play major roles in investigating whistleblower retaliation, the California State Auditor (CSA), the Office of the Inspector General (OIG), and the SPB.

**CSA** accepts complaints in reference to improper governmental activities. CSA is the investigative agency that 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 may, with the approval of the complaining employee, forward its investigative findings to the SPB for the purpose of bringing disciplinary action against an employee who is found to have violated the retaliation provisions when the department fails to do so. As an independent agency, OIG reports to the Governor. OIG also provides impartial analysis and policy recommendations to the Governor, the Legislature, and correctional administrators.

**SPB** is the adjudicatory body that hears and decides whistleblower retaliation complaints filed by state civil service or community college employees; employees of the Supreme Court, Courts of Appeal, Superior Courts, or the Administrative Office of the Courts; or applicants, whom have alleged being subjected to an improper personnel action for disclosing improper governmental activity or refusing to obey an illegal order or directive.

The SPB has jurisdiction in whistleblower retaliation cases when all of the requirements listed below are met:

- A state or community college applicant or employee or employee of the Supreme Court, Courts of Appeal, Superior Courts, or the Administrative Office of the Courts files the complaint. "Employee" includes any former employee who met the above criteria during his or her employment.
- The complaint states a prima facie case of retaliation.
- The complaint is filed within one year of the most recent act of reprisal.
- The names and business addresses of each individual and entity alleged to have committed reprisal or retaliatory acts are provided.
- The complainant provides a sworn statement, under penalty of perjury, that the contents of the complaint are true.

SPB does not accept filed complaints when any of the above requirements are not met or the SPB does not have jurisdiction over the employing entity (e.g. University of California or California State University).

### **Complaint Activity**

In calendar year 2018, 39 whistleblower retaliation complaints were filed with the SPB, which is a 20 percent decrease from 2017 (49 complaints) and a 30 percent decrease from 2016 (55 complaints). In fact, 2018 saw the fewest complaints filed since 2001, when only 17 complaints were filed.

Of the 39 complaints filed in 2018, 10 complaints were accepted, representing an acceptance rate of 25 percent. This is an increase over the 2017 acceptance rate of 14 percent.

Of the 29 complaints that were not accepted, 38 percent of complainants chose not to amend their complaint following the SPB's dismissal with leave to amend, thereby voluntarily ending the process, a decrease from the two previous years. In 2017, 48 percent of complainants failed to amend their defective complaints, and in 2016, 51 percent failed to amend their complaint. This increased willingness to amend inadequate complaints may be indicative of a greater desire by complainants to utilize the SPB informal hearing process rather than pursue their claims in Superior Court or as an affirmative defense to pending discipline appeals.

Of the 10 complaints accepted, seven were initially referred to the informal hearing process, two were consolidated with an evidentiary appeal and set for evidentiary hearing, and one was referred to the investigatory hearing process. Of the seven referred to the informal hearing process, four were dismissed after hearing and one was granted after hearing. Two cases referred to the informal hearing process remain pending at the present time, as does the one case referred to the investigatory hearing process. One of the cases set for evidentiary hearing is also currently pending, while the other was resolved by stipulated settlement.

### **SPB Whistleblower Retaliation Complaints Activity Report**

<b>Total Filed</b>	<b>Complaints Accepted<sup>2</sup></b>	<b>Complaints Not Accepted<sup>3</sup></b>
39	10	29

<sup>2</sup> Of the 10 accepted complaints, nine had been previously rejected and subsequently amended.

<sup>3</sup> SPB does not accept filed appeals when: (a) The complaint fails to state a prima facie case of retaliation; (b) the complaint is not filed within one year of the most recent act of reprisal; (c) the complaint is not signed under penalty of perjury; or (d) the SPB does not have jurisdiction over the employing entity (e.g. University of California, California State University).

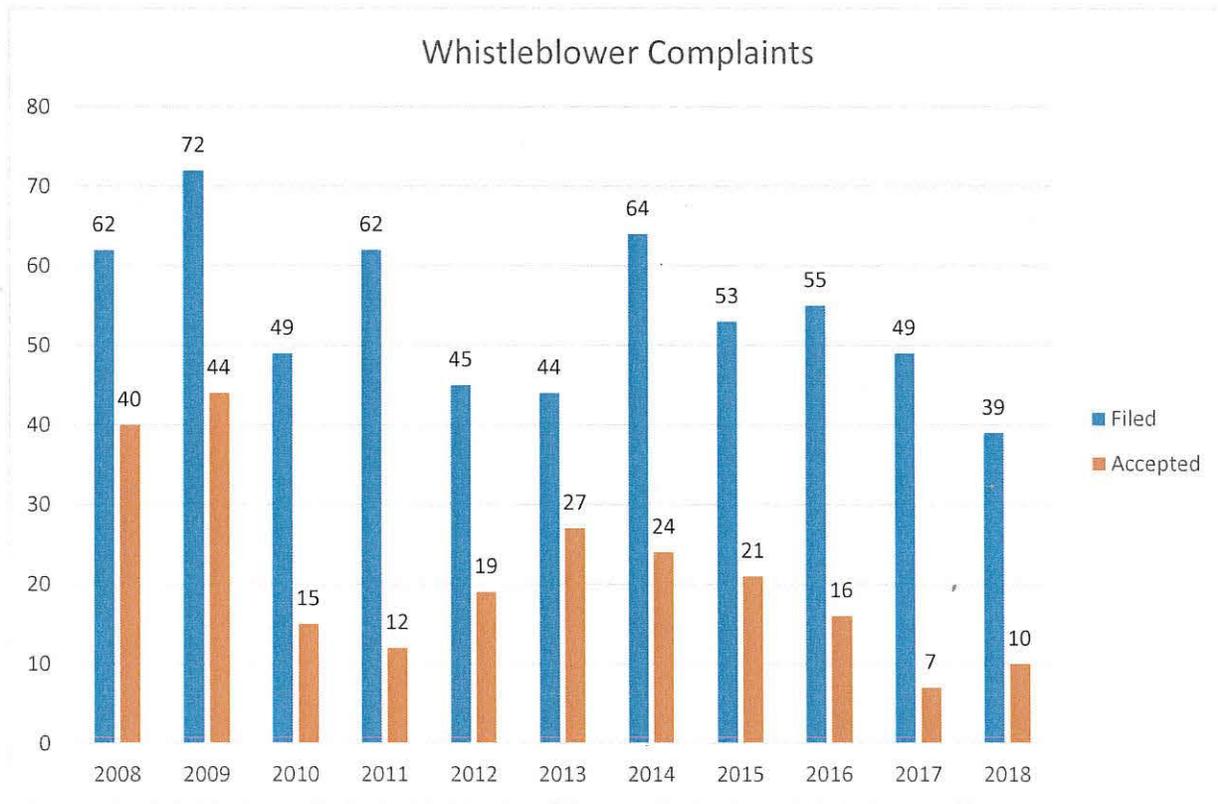
**I. Disposition of Whistleblower Retaliation Complaints Administered within the Informal Hearing Process**

Granted	Dismissed	Withdrawn
1	4	0

**II. Disposition of Whistleblower Retaliation Complaints Administered within the Evidentiary Hearing Process**

Granted	Dismissed	Settled
0	0	1

**III. Comparison of Whistleblower Retaliation Complaints Over Past Decade**

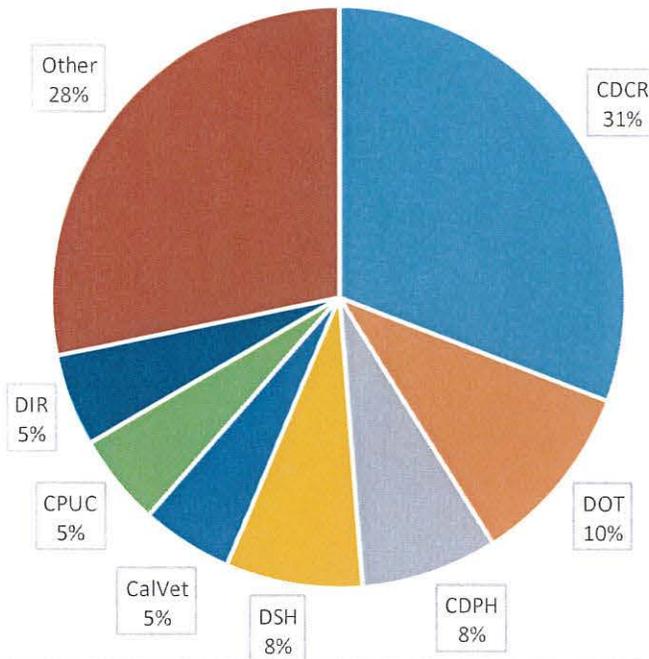


**IV. Whistleblower Retaliation Complaints by Department**

In 2018, approximately one third of Whistleblower Retaliation Complaints originated in the California Department of Corrections and Rehabilitation, totaling 12 complaints.

(CDCR is the largest state employer with more than 57,000<sup>4</sup> state employees.) All other Departments had four or fewer complaints in 2018.

2018 Percentage of Whistleblower Complaints by Department



- CDCR – California Department of Corrections & Rehabilitation
- DOT – Department of Transportation
- CDPH – California Department of Public Health
- DSH – Department of State Hospitals
- CalVet – California Department of Veterans Affairs
- CPUC – California Public Utilities Commission
- DIR – Department of Industrial Relations

**V. Special Concerns Regarding Complaints Against the California Courts**

In 2010, Government Code section 8547.13 was added to the California Whistleblower Protection Act to extend protections to employees of the Supreme Court, a court of appeal, a superior court, or the Administrative Office of the Courts. An employee of the courts may file a written complaint with the SPB within 12 months of the most recent retaliation. The SPB shall investigate any such complaint in accordance with the procedures of the California Whistleblower Protection Act. The SPB makes a recommendation to the judicial hiring entity regarding whether retaliation resulted in an adverse action as to the employee, and if so, what steps should be taken to remedy the situation.

Pursuant to Government Code section 18671.1, all costs incurred by the SPB Appeals Division are to be reimbursed by government agencies pursuant to statutes administered by the SPB or by interagency agreement. In Fiscal Year 2017/18, respondent agencies were assessed \$1650.00 for each whistleblower retaliation complaint filed and processed before the SPB.

<sup>4</sup> Department of Finance, <http://www.ebudget.ca.gov/budget/publication/#/e/2018-19/Agency/5210>, as of June 4, 2019.

On October 4, 2018, the SPB received a complaint from an employee of a superior court. The employee alleged that she had raised concerns regarding a judge's failure to properly advise criminal defendants of their due process rights while appearing before the court. The concerns were submitted to the presiding judge and county court management. The complaint further alleges that she was then subjected to various forms of retaliation which ultimately concluded with her termination.

Despite the SPB's repeated attempts, neither the Judicial Council nor the named superior court would agree to provide reimbursement to the SPB for processing a whistleblower retaliation complaint. Therefore, the SPB closed the complaint and informed the complainant of her right to file a civil action in court.

Without funding reimbursement by the respondent agency, the SPB is unable to cover its costs in processing appeals and complaints. Because the courts are not part of the Executive branch, there is no mechanism available for the SPB to enforce payment.

If the courts refuse to reimburse the SPB for costs associated with whistleblower retaliation complaints filed against the courts, complainants are left without an administrative avenue for relief. Consequently, a superior court employee's only recourse is to file an action in the very same court that is the subject of the complaint.

The SPB recommends that the legislature amend the Government Code to require that the courts or Judicial Council reimburse the SPB for costs incurred in processing whistleblower retaliation complaints filed against the courts.

**Detailed Listing – Whistleblower Retaliation Complaints  
Filed with SPB  
Calendar Year 2018**

	Number	Appeal Date	Case Status	Department	Consolidated <sup>5</sup>	RDAT <sup>6</sup>	Hearing Type
1	18-0008W	1/2/2018	Closed – Notice of Findings (Granted)	DOT		No	Informal
2	18-0087W	1/22/2018	Closed – No Prima Facie Case	DFA		No	
3	18-0138W	1/31/2018	Closed – No Prima Facie Case	DOT		Yes	
4	18-0223W	2/14/2018	Closed – No Prima Facie Case	CDCR		No	
5	18-0240W	2/16/2018	Closed – Notice of Findings (Dismissed)	CDCR		Yes	Informal
6	18-0259W	2/20/2018	Closed – No Prima Facie Case	CDCR		Yes	
7	18-0260W	2/20/2018	Closed – No Prima Facie Case	DSH		Yes	
8	18-0262W	2/20/2018	Closed – No Prima Facie Case	CalVet		No	
9	18-0333W	3/6/2018	Closed – No Prima Facie Case	CDCR		No	

<sup>5</sup> AA: Whistleblower Retaliation Complaint consolidated with prior Adverse Action appeal.  
DC: Whistleblower Retaliation Complaint consolidated with prior Discrimination Complaint.  
E: Converted to formal evidentiary hearing.  
WB: Whistleblower Retaliation Complaint consolidated with other Whistleblower Retaliation Complaint.

<sup>6</sup> RDAT: indicates whether complainant requested disciplinary action be taken.

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	<b>Number</b>	<b>Appeal Date</b>	<b>Case Status</b>	<b>Department</b>	<b>Consolidated<sup>5</sup></b>	<b>RDAT<sup>6</sup></b>	<b>Hearing Type</b>
10	18-0418W	3/19/2018	Closed – No Prima Facie Case	CDCR		No	
11	18-0422W	3/22/2018	Closed – No Prima Facie Case	Water Resources Bd.		Yes	
12	18-0459W	3/29/2018	Closed – No Prima Facie Case	DSH		No	
13	18-0460W	4/2/2018	Closed – Notice of Findings (Dismissed)	State Center Comm. College Dist.		Yes	Informal
14	18-0611W	4/27/2018	Closed – No Prima Facie Case	Parks		No	
15	18-0618W	4/30/2018	Closed – No Prima Facie Case	CCFC		No	
16	18-0649W	5/7/2018	Closed – No Prima Facie Case	DOT		No	
17	18-0654W	5/7/2018	Closed – No Prima Facie Case	CDCR		No	
18	18-0766W	5/23/2018	Closed – No Prima Facie Case	DOT		Yes	
19	18-0855W	6/7/2018	Closed – No Prima Facie Case	CPUC		Yes	
20	18-0935W	7/2/2018	Closed – Notice of Findings (Dismissed)	CalVet		Yes	Informal

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Calendar Year 2018**

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21	18-1064W	7/9/2018	Closed – No Prima Facie Case	CDPH		Yes	
22	18-1102W	7/16/2018	Closed – No Prima Facie Case	CDCR		Yes	
23	18-1103W	7/16/2018	Closed – Stipulated Settlement Agreement	CDCR	18-1103WEK (AA)	Yes	Evidentiary
24	18-1122W	7/19/2018	Closed – No Prima Facie Case	DIR		No	
25	18-1258W	8/13/2018	Closed – No Prima Facie Case	DSH		No	
26	18-1350W	8/23/2018	Closed – No Prima Facie Case	Student Aid Commission		Yes	
27	18-1449W	9/17/2018	Closed – No Prima Facie Case	CPUC		Yes	
28	18-1513W	9/26/2018	Open	CDCR		No	Informal
29	18-1541W	10/2/2018	Closed – No Prima Facie Case	CDPH		No	
30	18-1543W	9/28/2018	Closed – No Prima Facie Case	EDD		No	
31	18-1557W	10/4/2018	Closed – No Participation By Administrative Office of Courts	Amador Superior Court		Yes	

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Calendar Year 2018**

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32	18-1570W	10/8/2018	Closed – No Prima Facie Case	DHCS		No	
33	18-1617W	10/16/2018	Open	DIR		Yes	Informal
34	18-1700W	10/31/2018	Closed – No Prima Facie Case	CDCR		No	
35	18-1702W	10/22/2018	Closed – No Prima Facie Case	CDCR		No	
36	18-1714W	11/1/2018	Closed – Notice of Findings (Dismissed)	CDPH		Yes	Informal
37	18-1810W	11/19/2018	Closed – No Prima Facie Case	San Mateo Comm. College Dist.		No	
38	18-1914W	12/3/2018	Open	OES	18-1914WEK (AA)	Yes	Evidentiary
39	18-1918W	12/10/2018	Open	CDCR		Yes	Investigatory