

**STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS**

**In The Matter Of:**

**AARON SWANSON,**

**Petitioner.**

**OAH Docket No. 2013-LGW-0001**

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, & FINAL ORDER**

**I. ISSUES PRESENTED**

1.1 Did the City of Seattle unlawfully retaliate against Petitioner Aaron Swanson (herein "Mr. Swanson") under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity?

1.2 If so, what is the appropriate remedy?

**II. ORDER SUMMARY**

2.1 Yes. The City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040 for engaging in protected whistleblower activity.

2.2 Because the City of Seattle unlawfully retaliated against Mr. Swanson under SMC 4.20.860 and RCW 42.41.040, Mr. Ron Allen is assessed a penalty of \$1,000.00, the City of Seattle will pay Mr. Swanson's attorney's fees incurred with his whistleblower retaliation claim, and Mr. Allen is recommended for suspension from employment for six months without pay. Under RCW 34.12.039, all costs for the services of Office of Administrative Hearings (OAH) in this case shall be paid by Respondent City of Seattle without apportionment to, or contribution by, Petitioner Mr. Swanson. Post-judgment interest shall accrue on the unpaid balance of all sums herein awarded at the rate of twelve percent per annum.

**III. HEARING**

3.1 **Hearing Dates:** February 12-13, 2013; April 24-25, 2013; May 29, 2013; May 31, 2013; June 20, 2013; June 25, 2013

3.2 **Administrative Law Judge:** Lisa N. W. Dublin

3.3 **Petitioner:** Aaron Swanson

3.3.1 **Representative:** John P. Sheridan, MacDonald Hoague & Bayless

3.3.2 **Witnesses:**

- 3.3.2.1 Katherine "Kate" Flack
- 3.3.2.2 Kim Tran
- 3.3.2.3 Ronald Allen
- 3.3.2.4 Margaret "Peggy" Owens
- 3.3.2.5 Ken Busby
- 3.3.2.6 Solomon Adams
- 3.3.2.7 Annette L Dokes
- 3.3.2.8 Ron Tarrant, URD Lineman
- 3.3.2.9 Alice Lockridge
- 3.3.10 Charles Kennedy
- 3.3.2.11 Aaron Swanson, Petitioner

3.4 **Respondent:** Seattle City Light

3.4.1 **Representatives:** Assistant City Attorneys Katrina R. Kelly and Zahraa V. Wilkinson; others present on varying hearing days included D.C. Bryan, Gary Maehara, and Davonna Johnson.

3.4.2 **Witnesses:**

- 3.4.2.1 Ron Knox
- 3.4.2.2 Michael Brooks
- 3.4.2.3 Richard Owen
- 3.4.2.4 Frank Beatty

- 3.4.2.5 Tom Caddy
- 3.4.2.6 Heather Proudfoot
- 3.4.2.7 Andy McLeod
- 3.4.2.8 Barry Myers
- 3.4.2.9 Gary Legere
- 3.4.2.10 Ed Hill
- 3.4.2.11 Darlene Koopman Sakahara
- 3.4.2.12 Davonna Johnson
- 3.4.2.13 Karen DeVenaro
- 3.4.2.14 Kim Tran

3.5 **Exhibits:** Petitioner's Exhibits 1-27, 29-39, 41-45, 47-49, 52-55, 57A, and 58-61, and Respondent's Exhibits A-NN were admitted.

3.6 **Court Reporter:** Jeanne Gersten

#### IV. FINDINGS OF FACT

##### Background

4.1 Seattle City Light ("SCL") is a department of the City of Seattle. SCL manages and maintains the city's electrical services. SCL maintains a paid lineworker apprenticeship program to train and employ journey-level lineworkers. Its lineworkers belong to the IBEW Local 177 labor union (herein "Local 177"). During all relevant times hereto, Joe Simpson was the business manager for the Local 177.

4.2 Petitioner Aaron Swanson, age 37, works as a lineworker apprentice for SCL. Mr. Swanson obtained a Bachelor of Science in Business Administration from Oregon State University before beginning his apprenticeship.

4.3 In 2005, Ronald Allen, a journey-level lineworker with SCL, became an instructor of apprentices, teaching pole-climbing and "hot stick school." (Ex. DD) Mr. Allen is Mr. Simpson's nephew.

The First Year of Mr. Swanson's Apprenticeship

4.4 In February 2009, SCL hired Mr. Swanson into the lineworker apprentice program. At the time Mr. Swanson joined this program, it consisted generally of 6000 hours of training, spread out over three years of reasonably continuous employment, and included coursework and exams as well as hands-on training in the field. (See Ex. LL) These three years were divided into six six-month increments called "steps," with a wage increase at each step. The final 2000 hours of the apprenticeship involved "Hot Sticking and/or rubber glove work on energized primary circuits." *Id.*

4.5 Apprentices rotated between the North and South Service Centers where they received on-the-job training and monthly evaluations from the crew chiefs and lineworkers with whom they worked. Failure to meet expectations could lead to the imposition of Individualized Training Programs (ITPs), and/or extension or cancellation of the apprenticeship. *Id.*

4.6 In March 2009 Mr. Swanson began pre-apprenticeship training, and on August 26, 2009, after graduating from climbing school, began the first step of his apprenticeship. (Ex. E) SCL initially assigned Mr. Swanson to the South Service Center, where Mr. Allen was involved with training apprentices.

4.7 During the first year of Mr. Swanson's apprenticeship, his monthly evaluations from crew chiefs established primarily that he met expectations. On October 28, 2009, Crew Chief Mims scored Mr. Swanson as meeting expectations in five out of seven categories. Mr. Mims gave Mr. Swanson I's for "Improvement Required" in the following categories: "Actively participates in work, where appropriate," and "Correctly demonstrates skills taught when asked to apply them to the job." Ex. 26. In conclusion, Mr. Mims stated, "Aaron needs to focus on his climbing skills and technique as well as practicing knots + needs to be more aggressive toward the work." *Id.*

4.8 In his evaluation of Mr. Swanson's work in December 2009 and January 2010, Crew Chief Stotts graded Mr. Swanson primarily with C's ("79-70%"). Mr. Stotts noted that Mr. Swanson struggled with pole climbing and pole work, and repeatedly recommended he learn from repetition on a small crew. Mr. Stotts concluded, "Everything scored in this evaluation is predicated upon Aaron's climbing and becoming confident and comfortable. At this time he has made slight improvements, but not enough to allow Aaron to really start learning what he should be learning at this stage of his apprenticeship." (Ex. Q, pp. 0-6) Mr. Swanson agreed that he was not climbing as fast as others were, and that he was not fully comfortable with maneuvers.

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4.9 Crew Chief Doug Haven evaluated Mr. Swanson's work for April 2010, stating "Aaron has a good attitude and is willing to learn and works well with others. He needs a lot of work on the pole, with climbing and secondary work." *Id.*, pp. 11-12.

4.10 Over Summer 2010, Mr. Swanson received scores of "exceeds expectations" on his URD (underground work) evaluation. *Id.*, pp. 15-16. Regarding his linework, for July 2010, Crew Chief Tom Caddy documented that Mr. Swanson met or exceeded expectations in all categories. *Id.*, pp. 17-18. Regarding rigging in particular, Mr. Caddy noted, "the TRAINING NEEDS TO BE BETTER." Mr. Caddy concluded, "Aaron is a solid worker and is doing well in his progress!" *Id.*

4.11 In August 2010, Mr. Allen told the apprentices, including Mr. Swanson, that they would be orally tested on WAC 45. Although this oral exam was not prescribed by the apprenticeship program, each apprentice took it. (See Ex. 61, p.1) Afterward, Mr. Allen announced that they had all failed, and would be retested.

4.12 At this point, the testimony of the parties conflicted on material points. Mr. Swanson testified that Mr. Allen told the apprentices they "probably want to bring something with [them]" to the retest. When an apprentice asked, "Like a bottle of Jack?", Mr. Allen immediately responded, "Or Jameson." Mr. Allen, on the other hand, testified that after he announced the retest, an apprentice asked, "Would a bottle help?" Mr. Allen testified that he answered "no; know your Chapter 45". Mr. Allen denied saying "Jameson". Having carefully considered and weighed all of the evidence, including witness demeanor (as determined by voice, attitude, straightforwardness, unreasonable hesitancy in responses), party motivations, the reasonableness and consistency of testimony throughout the hearing and as related to prior document submissions in connection with the claim and claim response, and the totality of the circumstances presented, I resolve conflicting testimony in favor of Mr. Swanson at times and Mr. Allen at other times. The preponderance of the evidence establishes that an apprentice asked something akin to, "Would a bottle help?" and that Mr. Allen responded affirmatively to the group that a bottle of whiskey would help. The weight of evidence, including multiple investigative reports regarding the incident, confirm that Mr. Allen both solicited and accepted alcohol as an incentive for giving the apprentices a passing score on an unauthorized oral exam. (See Exs. U, X and BB)

4.13 On the day of the retest every apprentice except Mr. Swanson brought a bottle of whiskey to give Mr. Allen. The other apprentices then arranged to obtain a bottle of whiskey for Mr. Swanson to give Mr. Allen. Mr. Allen accepted each apprentice's bottle of whiskey, including Mr. Swanson's, and gave each apprentice a passing grade.

#### The Second Year of Mr. Swanson's Apprenticeship

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4.14 In September 2010, the second year of Mr. Swanson's apprenticeship, SCL hired Mr. Allen into the position of Craft Instructor-Apprenticeship (CIA); as such, Mr. Allen was the lead instructor for testing and training, and worked with curriculum development and personalized training of apprentices as needed. Mr. Allen also held a seat on a City subcommittee, the Electrical Crafts Advisory Committee (ECAC), which oversaw and made recommendations regarding the quality/control of all electrical crafts, including the lineworker apprenticeship program. Mr. Simpson appointed Mr. Allen to the ECAC.

4.15 During the second year of his apprenticeship, Mr. Allen became hostile toward Mr. Swanson, and Mr. Swanson's non-URD performance evaluations were increasingly negative. For August and September 2010, Crew Chief Reddy Landon rated Mr. Swanson with "meets expectations" in nine of thirteen areas, but noted concerns, specifically with rigging and climbing. (Ex. Q, pp. 19-20) Mr. Allen and Mr. Landon met with Mr. Swanson and asked him whether he wanted to be a line worker apprentice. Mr. Allen suggested that Mr. Swanson become a material supplier instead of a line worker; Mr. Swanson declined. Mr. Swanson did not agree with this evaluation, felt blindsided, and believed Mr. Landon and Mr. Allen were trying to get him to quit. Mr. Swanson believed Mr. Allen influenced this evaluation because he, i.e. Mr. Swanson, did not initially bring Mr. Allen a bottle of whiskey.

4.16 During the ensuing months, Mr. Allen made negative comments to and/or about Mr. Swanson, such as that Mr. Swanson had a reputation of hiding from work on the crews, and that Mr. Swanson had "better pull his head out of his ass." At a staff meeting in early 2011, Mr. Allen stated that SCL's aim should be getting apprentices out of the apprenticeship program who were not a good fit.

4.17 Mr. Swanson's performance evaluation from Crew Chief Mason for January and February 2011 again identified concerns with Mr. Swanson's climbing and rigging. Mr. Mason stated, "[Aaron] is not comfortable in his climbing and is clearly noticeable. When he reaches the work hole on the pole he has a difficult time doing his 2ndary work. He definitely needs more time before being advanced." (Ex. Q, pp. 25-26) Mr. Swanson did not challenge this evaluation; yet, he believed Mr. Allen negatively influenced his [Mr. Swanson's] daily interactions with the crew.

4.18 Mr. Swanson believed Mr. Allen influenced his evaluation from Crew Chief Stotts for March 2011. For March 2011, Mr. Stotts marked Mr. Swanson with "Concerns" or "Does Not Meet Expectations" in every aspect, including climbing and rigging, and concluded, "Aaron is struggling. Confidence seems to be his greatest area of concern. Especially on the pole. He's very tentative and doesn't lead. He will follow someone else's [sic] lead." (Ex. Q, pp. 29-33)

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4.19 In March 2011, the ECAC recommended extending Mr. Swanson's apprenticeship; Mr. Swanson agreed. (See Exs. F, M p.13) On March 30, 2011, the City of Seattle Joint Apprenticeship Training Committee (JATC), consisting of three union representatives and three City members, voted unanimously to extend Mr. Swanson's apprenticeship by an additional six months, and develop an ITP to be administered by the apprenticeship office. (Ex. 10)

4.20 Despite this, Mr. Swanson's performance evaluations showed increasingly poor results. For Mr. Swanson's work during the second of half of April 2011, Crew Chief Stotts stated, "Aaron appears to suffer from the paralysis of analysis," and went on to address Mr. Swanson's lack of confidence on the pole, and speed issues. (Ex. Q, p.42) Regarding his May 2011 evaluations from Crew Chief Dale Grant and crew, Mr. Swanson observed his previous performance evaluations from Crew Chief Stotts lying alongside Mr. Grant's new evaluation, which found he "does not meet expectations" in the areas of pole climbing and timeliness. (Ex. Q, pp. 43-45, Ex. 18, pp. 87-89) Mr. Swanson disagreed with these evaluations, and speculated that Mr. Allen gave Mr. Swanson's previous evaluations to Mr. Grant, and otherwise influenced these results. When Mr. Swanson questioned Mr. Grant about the similarity in evaluations, Mr. Grant stated, "Well, not everyone's cut out for this."

4.21 In June 2011, Mr. Allen approached Mr. Swanson at a safety meeting and recommended he look into a different apprenticeship. In July 2011, Mr. Allen had a flyer delivered to Mr. Swanson containing four new apprenticeship openings along with the message that Mr. Swanson look into a different apprenticeship. In July 2011, Crew Chief Michael Brooks' evaluation of Mr. Swanson again found Mr. Swanson fell below expectations for a fourth-period apprentice with regard to climbing, rigging, and timeliness. (Ex. Q, pp. 46-48) Journeyman Richard Owen's comments regarding Mr. Swanson's job performance were similarly negative. (Ex. Q, p. 49) Mr. Owen worked with Mr. Swanson much of the time, thought his handline was all over the place, and felt he could not give Mr. Swanson more difficult tasks because he was unsatisfied with Mr. Swanson's performance of more basic tasks. Mr. Owen also believed Mr. Swanson understood how things worked when on the ground, but when it came time to put it all together on the pole, Mr. Swanson started and stopped and crossed his arms in thought, displaying an apparent lack of confidence.

4.22 On or around Friday July 29, 2011, Mr. Allen told Lineworker Peggy Owens that the best thing about going on vacation was having someone fired while he was gone. Mr. Allen stated his sit-in on the ECAC was going to vote to fire someone; Mr. Allen did not say who the "someone" was.<sup>1</sup> On August 4, 2011, the ECAC voted to recommend canceling Mr. Swanson's apprenticeship. (See Ex. H)

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<sup>1</sup> Mr. Allen denied having this conversation with Ms. Owens. Under the totality of the circumstances, I find Mr. Allen's denial less credible than Ms. Owens' testimony regarding this conversation.

Mr. Swanson Reports Mr. Allen

4.23 In late August 2011, Mr. Swanson contacted the Department of Labor and industries and SCL's Human Resources to report Mr. Allen extorted alcohol in exchange for passing test scores. (Exs. 30 and 31) Mr. Swanson also expressed concern that he was receiving poor and/or unfair performance evaluations because of Mr. Allen. Shortly thereafter, Mr. Swanson reported Mr. Allen to the Seattle Ethics and Elections Committee (SEEC). Mr. Swanson's report was not the first report about improper behavior by Mr. Allen that the SEEC received.

4.24 SCL Human Resources commenced an investigation, and moved Mr. Swanson to the South Service Center, where he felt more comfortable, even though Mr. Allen also worked out of the South Service Center. This move bothered Mr. Allen because SCL moved Mr. Swanson without going through proper channels per the collective bargaining agreement. (Ex. 34)

4.25 On September 15, 2011, Mr. Swanson submitted a written complaint to the JATC regarding Mr. Allen. (Ex. T) When Mr. Allen saw Mr. Swanson at the South Service Center his first day there, September 19, 2011, he became upset and stated, "You're just a fucking squeak; you can't just decide to show up down South!" (Ex. 32) [Although, at the hearing, Mr. Allen denied making this statement, it is more likely than not that he did so, given Mr. Swanson's written report of the incident to Karen DeVenaro, the apprenticeship manager, the day it happened.] Mr. Swanson was then assigned to Crew Chief Todd Warren's crew; Mr. Warren is Mr. Allen's personal friend and also on the ECAC. Mr. Swanson observed Mr. Allen with a copy of this report in hand, showing it to groups of lineworkers on the dock.

4.26 On September 28, 2011, the JATC decided not to cancel Mr. Swanson's initiative. Although Todd Warren reported to the JATC that Mr. Swanson worked too slow, the JATC decided against cancellation because of evidence that Mr. Swanson had progressed in a number of areas, and because he had not received adequate individualized instruction under his ITP. (Ex. I) When Mr. Swanson emailed SCL Human Resources that day that he felt Mr. Warren's crew was a hostile working environment, SCL made arrangements for Mr. Swanson to move to another crew. Mr. Swanson protested the lower marks he received from Kath Johnson's crew for October 2011, attributing them to Mr. Allen's coercion of journey-level worker Bruce Lee. (See Ex. Q, pp. 55-65) Mr. Swanson's performance evaluations and biweekly reports from Mr. Busby's crew for November 2011 showed higher marks. See Ex. Q, pp. 66-71.

4.27 On December 13, 2011, SCL determined that Mr. Allen improperly accepted alcohol from apprentices in exchange for a passing test score. (Ex. U) The investigative report containing this determination was sent to the SEEC. When the SEEC interviewed Mr. Allen about the incident, he was angry, thought the incident



was a joke, and stated "this is the way we roll." Mr. Allen did not take personal responsibility for his behavior, but instead offered up excuses; Mr. Allen believed SCL passed through too many apprentices at too high a cost, and believed this was a big shortcoming of the apprenticeship program. That month, Mr. Allen resigned as CIA, and SCL retained outside investigator Ron Knox of the law firm of Garvey, Schubert, Barer to investigate whether Mr. Allen solicited the alcohol in addition to accepting it, and to investigate Mr. Swanson's retaliation claims.

4.28 In approximately January 2012, Mr. Swanson observed a poster of himself with the word "RAT" written on his chest, hung in the hallway of the North Service Center. (Ex. 57A) Mr. Swanson observed this in approximately January 2012, when he attended night school at the North Service Center, but did not report it at that time or take it down because he did not want to cause commotion.

4.29 In February 2012, SCL notified Mr. Allen he had been recommended for suspension without pay for 20 working days for his improper extortion of alcohol. On or around February 3, 2012, Mr. Swanson waived confidentiality regarding his whistleblower complaint to SEEC. (Ex. CC) That same day, he received an evaluation from his work on Crew Chief Campy's crew with eraser marks on scores that were altered down. (See Ex. Q, p.76) However, his evaluation from Crew Chief Fugate and crew for March 2012 fell short of "meets expectations" in only two areas, and stated, "Aaron has shown improvement while on the crew. Once he gets over the past evaluations and looks forward and at himself he will be fine!! Keep it up." (Ex. 17)

4.30 On April 3, 2012, the ECAC voted to extend Mr. Swanson's apprenticeship another six months for failure to progress. (See Ex. J) That month, on April 10, 2012, Mr. Knox issued a report finding that Mr. Allen accepted and received alcohol from all apprentices on test day, and on a more probable than not basis, responded affirmatively when asked, "Would a bottle help?," thus accepting alcohol in exchange for passing test scores. (Ex. X) This report did not address Mr. Swanson's retaliation claims because of the reticence of SCL employees to talk with Mr. Knox.

4.31 On May 2, 2012, SCL issued its determination that Mr. Allen violated SCL's Workplace Expectations, and the City of Seattle's Personnel Rules and Code of Ethics by admittedly accepting alcohol from each apprentice the day they were tested in August 2010. (Ex. Y) SCL suspended Mr. Allen for 20 work days effective May 3, 2012, and rendered him ineligible for any job promotion or discretionary out-of-class opportunities for one year. *Id.*

4.32 On May 23, 2012, the JATC decided not to accept the ECAC's recommendation to extend Mr. Swanson's apprenticeship, but rather to advance Mr. Swanson to the fifth period, i.e. primary, "hot" period, of his apprenticeship. (Ex. 4) By the time the JATC voted against this recommendation, Mr. Swanson had already spent an additional three months in his fourth step.

4.33 On May 31, 2012, Mr. Allen returned to work from his suspension. In approximately June 2012, Mr. Simpson removed Mr. Allen from the ECAC and appointed him to the JATC.

4.34 On July 18, 2012, Mr. Swanson reported to SCL Employee Relations Manager Heather Proudfoot that Mr. Allen became combative at a union meeting on July 12, 2012, calling Mr. Swanson a “fuck stick” and a “piece of shit,” accusing Mr. Swanson of stabbing him in the back, and inciting a fight with Mr. Swanson by asking Mr. Swanson to step outside. (See Ex. 41) SCL assigned Mr. Knox to investigate this incident, but the investigation was hindered by the Local 177 because the incident took place at a union meeting, outside of work.<sup>2</sup>

4.35 Mr. Swanson’s performance evaluations from Crew Chief Bob Hernandez for June and July 2012 showed Mr. Swanson “met expectations” for all listed criteria. The June 2012 evaluation stated Mr. Swanson “need [sic] to improve his rigging skill.” A journeyworker’s comment read in part: “Aaron is in the early stages of being hot. He is doing a good job at listening and giving a good effort. Needs to work on being more confident of his skills + not getting rattled.” (Ex. 15, pp. 44-45) The June/July 2012 evaluation stated, “Aaron has improved in the last 60 days, as he gains confidence in his abilities, he should keep improving in his skill set. With the right journeyworkers he should do well. The lineworkers on crew have spent a lot of time working and coaching Aaron to do his best work and he has responded. They have taken the time to teach.” (Ex. 16)

4.36 On or around July 13, 2012, Ms. Proudfoot learned of the poster of Mr. Swanson with the word “RAT” written on it. (See Ex. 57.) Mr. Swanson told Ms. Proudfoot he knew the poster had been there for several months and that he had left it up and had not worried about it because he did not want to stir the pot. Mr. Swanson told Ms. Proudfoot he was happy with his present crew and the South Service Center, and that he felt more supported than before. Ms. Proudfoot ordered the poster taken down.

4.37 In August 2012, Mr. Allen, who was speaking with his brother Josh (who is also a lineman) and others on the dock, stated it was no longer fun working there anymore. Crew Chief Legere was also present. Mr. Swanson overheard Mr. Allen say this, and saw one of the lineman gesture toward Mr. Swanson. In response, Mr. Allen stated, “Don’t worry, we’ll take care of him hook, line, and sinker.”

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<sup>2</sup> On January 25, 2013, Union Business Manager Joe Simpson, Mr. Allen’s uncle, emailed Ms. Proudfoot regarding the investigation of the July 12, 2012 union hall incident, stating: “What happens at a Union meeting is none of SCL’s business. ... SCL needs to stop pretending that the problems that they have with apprentices now, in the past, and probably in the future does not rest at the Union Hall but just down the hall at the apprenticeship office. I am not willing to spend the members money on silly investigations every time the apprenticeship office talks a apprentice into “crying wolf”.” (Ex. FF)

4.38 At this point, the testimony of the parties again conflicted on material points. Mr. Swanson testified that on October 30, 2012, he saw a sticker with the acronym PAL ("Pre-Apprentice Lineworker") on it, stuck to his locker when he arrived at work. Mr. Swanson testified that someone removed a sticker with the acronym PAL on it from a nearby locker and stuck it on the locker he was using. Mr. Swanson took a picture of the sticker on his locker, and emailed it to SCL Human Resources. (Ex. 44; Ex. Z) SCL Division Administrator Debra Koopman, on the other hand, testified that Mr. Swanson first saw this sticker on his locker on or around September 11, 2012, but did not report it to a supervisor or crew chief at the time because he did not want any negative attention. *Id.* Based on the totality of the circumstances, I resolve conflicting testimony in favor of SCL. Ms. Koopman spoke with Mr. Swanson shortly after he reported the sticker, and then documented in her January 7, 2013 investigative report Mr. Swanson's account of the date and approximate time he first observed the sticker. Mr. Swanson's testimony on this issue, however, is self-serving and less credible.

Thirty Days Prior to Mr. Swanson's Whistleblower Retaliation Complaint under Chapter 42.41 RCW and Chapter 4.20 SMC.

4.39 On or around October 11, 2012, Mr. Swanson received his performance evaluation from Crew Chief Legere for September 2012, which contained 10 "M"s for "Meets Expectations", 3 "C"s for "Concerns", and 1 "D" for "Does Not Meet Expectations" in the area of Rigging. With regard to this "D", Mr. Legere wrote:

Still needed help at rigging 1. need to be able to use hand line for on and off of secondary work (meat hook) 2. be able to rig equipment and wire up and down (on and off loads) 3. safely rig conductors under clearances and cutting of the conductors as needed to move wire safely (needs to be watched to make sure of what side is to be cut and location to have needed wire to make up).

Mr. Legere wrote:

The more complex the work the harder it is for Aaron to understand the hazards of the work and the overall safety of crew for the step that he is at, should at this time be able to help lower step personal for the step that he is and at this time this is not the case. The crew has to spend more time than is needed to watch over Aarons for the level that he is at, examples: working on rigging moving wire, checking loads on trucks and etc.

Working in the field on the pole Aaron initiative needs improvement for step doesn't fully understand the job at hand and this leads to

slow work for step and in the future be able to take on the harder skills needed for Pri. work and understanding end goal of job task.

Mr. Legere concluded:

At this time Aaron is behind in many areas for the step that he is working at, the crew has worked hard at training on the job and at this time I feel that Aaron needs to have extra training to be able to catch up to the step he should be working at. As in the report above Aaron has a harder time with tasks when the work becomes more complex/more pressure (for the step he should be working at). He has also made rigging mistakes in the field that he should not be doing at this time, working below his step and his driving record has had problems. I would like to see the Apts. office make up a work plan to help Aaron move to the level he should be working at this time.

(Exs. R & 13) Mr. Legere also circled the word "Yes" over the question "ECAC?" in the top right-hand corner of the front page of the evaluation. *Id.*

4.40 Mr. Legere credibly testified that Mr. Allen did not influence the above evaluation, and that he circled "Yes" for ECAC in order to get Mr. Swanson additional training. Mr. Legere did not believe this evaluation was negative, did not think of it as costing Mr. Swanson money, and wanted Mr. Swanson to have the advantage of extra training like he himself had, before topping out, when such training opportunities would not be as readily available.

4.41 Mr. Swanson disagreed with Mr. Legere that he was behind or needed extra training. Mr. Swanson was unaware in the field that anyone had issues with his performance. Mr. Swanson believed this evaluation was retaliatory, given (a) his previous positive recommendation from Mr. Hernandez, (b) that the concerns in the evaluation were not expressed to him as he worked, (c) that he received the evaluation after he left the crew, and (d) because it was common knowledge that he was a whistleblower. Mr. Swanson also believed that Mr. Legere previously shunned him in retaliation for his whistleblowing. When repeatedly asked by Ms. Proudfoot to submit a written statement regarding why he believed Mr. Legere's recommendation was retaliation, Mr. Swanson did not do so, allegedly because this statement would not be kept confidential. (See Ex. 53)

4.42 Mr. Legere's evaluation was accompanied by an evaluation from lineworker Andy McLeod. Mr. Swanson and Mr. McLeod had previously worked together under Crew Chief Campy. During this time, Mr. McLeod had said everything Mr. Swanson was doing was wrong. Mr. Swanson had consequently sought to avoid working with Mr. McLeod. Mr. McLeod's evaluation of Mr. Swanson while working with Crew Chief

Legere contained the following negative comments about Mr. Swanson and his performance:

Aaron has been on our crew for a little while now, and as much as I hate to say it, has not improved. When he first started with us he was doing well, it seemed like he improved but he spiraled down hill fast. Aaron and I had a conversation after work about a week or so after he came on the crew. He asked me if I had a problem with him being on crew. I answered shortly and said no. Then he said it seemed like I was picking on him and he didn't know why. I replied with "because for your level you don't know what you're doing". I stated times and problems that I saw, and he agreed with those that I saw. He had excuses for almost all of them, which most according to Aaron were not his fault. The issues I have with that are, these are second year problems. At this point, with him being a hot apprentice he should know how to do everything but the primary. He does not, nor does he take responsibility for his mistakes. This in my eyes is unacceptable. At the end of our talk Aaron shook my hand and told me "I will proof to you that I can do this and that I'm ready" [sic] That's not the case.

...

In a whole Aaron is not leaning [sic] at the rate of which an apprentice should be. He is extremely behind for his even a second year step much less a hot apprentice. I'm worried for his safety and the safety of the workers around him. In my opinion, Aaron should take a good long look in the mirror and ask himself if this is really what he wants to do.

(Ex. R; Ex. 14)

4.43 At the request of SCL Human Resources, Mr. McLeod edited this letter to remove much of the above two paragraphs. (Ex. S) Left in place were the following sentences: "In a whole Aaron is not leaning [sic] at the rate of which an apprentice should be. I'm worried for his safety and the safety of the workers around him." *Id.*

4.44 Journeyman Barry Myers, who also worked with Mr. Swanson on Mr. Legere's crew, wrote on the performance evaluation as follows: "I fell in this trade that there are leaders and followers. Aaron Swanson seems to be the 2<sup>nd</sup> of the two. I don't believe [sic] that has enough [sic] confidence in himself to do the job. I think he needs some different type of training to get him up to speed." (Ex. R) Upon SCL Human Resources' request, Mr. Myers modified the above language minimally while conveying the same message. (Ex. S)

4.45 Both Mr. McLeod and Mr. Myers denied any influence by Mr. Allen or anyone else in preparing these evaluations. Mr. Swanson completed his fifth period testing in December 2012, and advanced to sixth period, the last period of his apprenticeship.

4.46 On November 1, 2012, the SEEC sent Mr. Allen correspondence stating it intended to file the attached charges of ethics violations. (Ex. DD) On November 5, 2012, a Seattle Times internet article appeared about Mr. Allen accepting liquor from apprentices whom he was testing. (Ex. EE) On November 6, 2012, the union filed a Complaint Charging Unfair Labor Practices with the Public Employment Relations Commission. On or around this same day, Mr. Swanson overheard Mr. Kennedy mutter to another worker, while gesturing at Mr. Swanson, "I was just sent to Ethics by your buddy."

4.47 On November 7, 2012, at 2:56 a.m., someone claiming to be Mr. Swanson posted a response online to the November 5, 2012 Seattle Times article. This response stated:

Hi my name is Arron [sic] Swanson I was the one that brought all this up to save my job. I have not been doing well here at the city and this is my way of proving a point and saving my job that I might not have for much longer. I am saddened for what I have done to my union brother but it is already done. Sincerely Arron Swanson  
Seattle city light scc

(Ex. A, p.6; Ex. 54). Neither Mr. Swanson nor Ms. Proudfoot could determine specifically who posted this article.

4.48 On or around November 7, 2012, while working on a crew, someone took pictures of text messages on Mr. Swanson's cell phone, without Mr. Swanson's knowledge or authorization. These text messages were between Mr. Swanson and Training/Education Coordinator Alice Lockridge, and discussed the newspaper article response and Mr. Swanson's retaliation claims. These photos ended up at Local 177; Mr. Simpson then sent them to SCL Human Resources.

Mr. Swanson's Whistleblower Retaliation Complaint, and Thereafter

4.49 On November 9, 2012, Mr. Swanson submitted a complaint of unlawful whistleblower retaliation under SMC 4.20.860 and RCW 42.41.040 to the Office of the Mayor. (Ex. A) Thereafter, Mr. Knox issued two supplemental investigative reports regarding retaliation against Mr. Swanson. The first of these, dated February 11, 2013, stated in pertinent part:

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Allen inappropriately accepted gifts of alcohol from nine pre-apprentices under circumstances that suggested providing such gifts would assure a passing grade in an oral examination.

The evidence also suggests and I find that on a more probable than not basis, Allen engaged in lobbying activities directed at the Initiating Witness [Mr. Swanson]. There is evidence that the conduct escalated after the Initiating Witness provided information to SCL about Allen's alleged solicitation of alcohol from Apprentices. This involved at least lobbying efforts with crews to evaluate the Initiating Witness more poorly than was justified. This conduct appears retaliatory in nature and contrary to SCL Policy (Rule 1.3.4) and the City of Seattle Code of Ethics. SMC 4.16.070.

(Ex. BB)

4.50 Several witnesses told Mr. Knox that Mr. Allen talked with them about Mr. Swanson. Journey-level workers reported that Mr. Allen lobbied them to negatively impact Mr. Swanson's evaluations. None of the crew chiefs admitted being affected by Mr. Allen's lobbying. In the end, Mr. Knox was unable to conclusively determine specifically which performance reviews were the result of Mr. Allen's lobbying efforts.

4.51 Mr. Knox documented the "considerable and significant unexpected limitations" regarding his investigation, which included: (a) "extraordinary delays and/or total refusals" by various journeymen and their union representatives to meet and/or answer specific questions concerning the various allegations", (b) "refusal of witness to provide critical information due to perceived fear of retaliation from other union members," (c) witnesses' fear of speaking freely to Mr. Knox with the union representative present; and (d) refusal to give specifics and details due to fear of being identified as the provider, resulting in limited access and relationship with those who shared the information with them. Some witnesses would not talk to Mr. Knox because their union representative was not present, or because their union representative told them they could not answer his questions, specifically regarding the altercation between Mr. Swanson and Mr. Allen at the union hall on July 12, 2012. Others felt they needed two meetings with Mr. Knox; one with the union representative, and a later one without. *Id.*

4.52 Mr. Knox's second supplementary report dated May 23, 2013, addressed whether Mr. Allen retaliated against Mr. Swanson at the July 12, 2012 union meeting, and whether Mr. Legere's performance evaluation approximately three months after this union meeting was retaliatory. (Exhibit MM) Mr. Knox documented similar difficulty talking with witnesses about the meeting as he documented in his February 11, 2013 report. Mr. Knox stated he could not conclusively determine what exactly happened at the July 12, 2012 union meeting due to the conflicting, credible witness

statements, and that he could “find no independent evidence of a nexus between the Legere evaluation and the July 12, 2012 meeting.” Mr. Knox found Mr. Swanson credible, and his notes of the incident credible. Mr. Knox found Mr. Allen and Mr. Warren credible at times, and not credible at other times. Mr. Knox found Mr. Legere “very” credible. Mr. Knox concluded, “Based on the evidence available, I do not sustain the allegations of retaliation against Mr. Allen and Mr. Legere associated with the charges made.”

4.53 Following his November 9, 2012 retaliation complaint to the Office of the Mayor, in approximately December 2012, Mr. Swanson received a negative performance review from Crew Chief Caddy and his crew for October 2012. This evaluation reflected Cs or Ds in most all areas, including rigging and primary work. (Ex. Q, pp. 98-100) According to this evaluation, Mr. Swanson no longer seemed afraid of heights, but his work was slow, methodical, and inefficient. Mr. Caddy concluded that Mr. Swanson “does not show proficiency or skills of a 5<sup>th</sup> period apprentice lineworker,” and “is not at level of training to be a hot apprentice lineworker.” *Id.* Mr. Swanson disputed this evaluation, claiming it was influenced by Mr. Allen. Mr. Swanson received subsequent evaluations from Crew Chiefs Fugate and Busby that stated Mr. Swanson continued to have difficulty with rigging, and had to be told repeatedly how to complete tasks.

4.54 As a result, in approximately March 2013, the ECAC again recommended extending Mr. Swanson’s apprenticeship. Mr. Allen, though not a voting member of the JATC, attended the JATC meeting in May 2013 to serve as a subject matter expert. Despite Mr. Knox’s reports that the evaluations may have been negatively influenced in retaliation against Mr. Swanson, the JATC voted to extend Mr. Swanson’s apprenticeship another six months. Mr. Allen was present when the JATC voted. On June 24, 2013, Mr. Swanson began his sixth period testing.

## **V. CONCLUSIONS OF LAW**

5.1 It is unlawful for any local government official or employee to take retaliatory action against a local government employee because the employee provided information in good faith that an improper governmental action occurred. SMC 4.20.810C; RCW 42.41.040.

5.2 “Retaliatory action” means: (a) Any adverse change in a local government employee’s employment status, or the terms and conditions of employment including unsatisfactory performance evaluations, transfer, and/or reassignment, or (b) hostile actions by another employee towards a local government employee that were encouraged by a supervisor or senior manager or official. SMC 4.20.850; RCW 42.41.020.



5.3 The employee, as the initiating party, must prove his or her claim by a preponderance of the evidence. The administrative law judge shall issue a final decision consisting of findings of fact, conclusions of law, and judgment no later than forty-five days after the date the request for hearing was delivered to the local government. The administrative law judge may grant specific extensions of time beyond this period of time for rendering a decision at the request of either party upon a showing of good cause, or upon his or her own motion. RCW 42.41.040(6).

5.4 Relief that may be granted by the administrative law judge consists of reinstatement, with or without back pay, and such injunctive relief as may be found to be necessary in order to return the employee to the position he or she held before the retaliatory action to prevent any recurrence of retaliatory action. The administrative law judge may award costs and attorneys' fees to the prevailing party. The administrative law judge may, in addition, impose a civil penalty personally upon the retaliator of up to three thousand dollars payable by each person found to have retaliated against the employee and recommend to the local government that any person found to have retaliated against the employee be suspended with or without pay or dismissed. All penalties recovered shall be paid to the local government administrative hearings account created in RCW 42.41.060. RCW 42.41.040(7),(8).

5.5 The hearing dates in this case, which were well past the 45 days prescribed by RCW 42.41.040(6) for conducting the hearing and issuing an order, were agreed by the parties, upon a showing of good cause. Consequently, this Initial Order is issued within the time prescribed by the Administrative Procedures Act, Chapter 34.05 RCW. See RCW 34.05.461(8). The close of record was Friday July 19, 2013, the day the parties submitted written post-hearing closing statements.

5.6 From the outset of his apprenticeship, Mr. Swanson's performance evaluations indicated Mr. Swanson had difficulty with climbing and rigging, and was not progressing in his apprenticeship as expected. Mr. Swanson admitted these difficulties, and received an ITP and extension of his apprenticeship. Mr. Allen is a competent lineworker and longtime SCL employee, who worked for years training future generations of lineworkers. However, rather than working with Mr. Swanson to get him the resources he needed to improve quicker, Mr. Allen encouraged Mr. Swanson to drop out. When Mr. Swanson did not drop out, Mr. Allen then failed to provide Mr. Swanson with individualized training as his ITP required, bullied Mr. Swanson, and continued trying to persuade him to leave his apprenticeship, all of which undoubtedly impacted Mr. Swanson's confidence and the rate at which he learned and progressed in his apprenticeship. After Mr. Swanson reported improper governmental activity by Mr. Allen, i.e. that Mr. Allen solicited and accepted alcohol from apprentices in exchange for a passing grade on an oral exam, Mr. Allen lobbied line workers and crew chiefs to downgrade Mr. Swanson's performance evaluations in an attempt to cancel his apprenticeship.

5.7 Over the ensuing months, Mr. Swanson received numerous performance evaluations, some of which were positive, and many of which identified ongoing issues, particularly regarding timing and rigging. While some of these evaluations may be suspect, given that they were drafted by Mr. Allen's sympathizers, others were given by crew chiefs and lineworkers including Ken Busby, Kath Johnson, and Barry Meyers whom Mr. Swanson respected and found unbiased.

5.8 By a preponderance of the evidence, I find that Mr. Legere's and Mr. McLeod's evaluations of Mr. Swanson for the month of approximately September 2012 do not amount to retaliation against Mr. Swanson under Chapter 42.41 RCW and Chapter 4.20 SMC. Although Mr. Legere's evaluation was unsatisfactory in that it stated Mr. Swanson was not performing up to step in all areas, and that he needed additional training, Mr. Swanson has not established by a preponderance of the evidence that Mr. Allen in any way influenced Legere's evaluation. Mr. Swanson's problem areas as identified by Mr. Legere were nothing new to Mr. Swanson; crew chiefs had made similar comments regarding Mr. Swanson's rigging skills and preparation for years. In addition, in ten out of fourteen categories Mr. Legere found Mr. Swanson "Met Expectations." Mr. Legere circled "ECAC" not to threaten Mr. Swanson's apprenticeship or hold him back, but to get him the training he needed to improve, for his own safety and the safety of his fellow lineworkers.

5.9 Mr. McLeod's evaluation, which critiqued Mr. Swanson personally as much as his work, appears to arise out of ongoing, unresolved interpersonal conflict, and lacks any tangible link to retaliation. In fact, Mr. Myers made similar personal remarks about Mr. Swanson, yet because of their rapport, Mr. Swanson thanked Mr. Myers and appreciated learning from him. Mr. Swanson and Mr. McLeod had no such rapport; Mr. McLeod and Mr. Swanson clashed from earlier times they worked together. More likely than not, Mr. McLeod's personality and teaching style, not Mr. Allen, caused this clash, and negatively impacted Mr. Swanson's ability to work, learn, and improve.

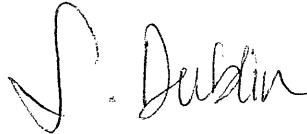
5.10 The PAL sticker and the impersonation of Mr. Swanson to the Seattle Times were undoubtedly hostile actions taken by SCL employees toward Mr. Swanson that Mr. Allen either vocally or tacitly encouraged, if not performed himself. Because I find that the PAL sticker was first on Mr. Swanson's locker earlier than 30 days prior to Mr. Swanson's retaliation complaint to the Office of the Mayor, I do not consider it in determining whether SCL violated Chapter 42.41 RCW and Chapter 4.20 SMC. However, at the time the impersonation of Mr. Swanson to the Seattle Times took place, Mr. Allen was in a secondary supervisory position with the City over Mr. Allen because of his participation with the JATC, a City committee with authority to negatively impact Mr. Allen's apprenticeship. Consequently, Mr. Allen's encouragement and/or commission of the impersonation of Mr. Swanson publicly to the Seattle Times is actionable retaliation under Chapter 42.41 RCW.

## VI. ORDER

IT IS HEREBY ORDERED that Respondent City of Seattle has violated Chapter 42.41 RCW. The following penalty is hereby assessed:

- (a) Mr. Allen is personally assessed a penalty of \$1,000.00, to be paid to the local government administrative hearings account created in RCW 42.41.060.
- (b) The undersigned recommends that Mr. Allen be suspended from employment with Seattle City Light for six months without pay.
- (c) The City of Seattle will pay the legal costs and attorney's fees Mr. Swanson incurred in asserting his whistleblower retaliation claim under Chapter 42.41 RCW.
- (d) Under the provisions of RCW 4.56.110(4) and RCW.19.52.020(1), post-judgment interest shall accrue on the unpaid balance of all sums herein awarded at the rate of twelve percent per annum.
- (e) Under RCW 34.12.039, all costs for the services of Office of Administrative Hearings (OAH) in this case shall be paid by Respondent City of Seattle without apportionment to, or contribution by, Petitioner Mr. Swanson.

Signed and entered at Tacoma, Washington, this 17<sup>th</sup> day of September, 2013.



\_\_\_\_\_  
Lisa N. W. Dublin  
Administrative Law Judge  
Office of Administrative Hearings

## NOTICE TO PARTIES OF FURTHER APPEAL RIGHTS

**PETITION FOR RECONSIDERATION:** This Final Order is subject to a petition for reconsideration if filed within ten days of service pursuant to RCW 34.05.470. Such a petition must be filed with the administrative law judge at his/her address at the Office of Administrative Hearings. The petition will be considered and disposed of by the administrative law judge. A copy of the petition must be served on each party to the proceeding. The filing of a petition for reconsideration is not required before seeking judicial review.

**JUDICIAL REVIEW AND ENFORCEMENT:** Judicial review and enforcement of this Final Order is governed by RCW 42.41.040(9) and RCW 34.05.510 - .598. Relief ordered by the administrative law judge may be enforced by petition to superior court. The Final Order is subject to judicial review under the arbitrary and capricious standard. RCW 42.41.040(9). Proceedings for review shall be instituted by paying the fee required under RCW 36.18.020 and filing a Petition for Judicial Review in the superior court, at the petitioner's option, for (a) Thurston county, or (b) the county of the petitioner's residence or principal place of business, or (c) in any county where the property owned by the petitioner and affected by the contested decision is located. RCW 34.05.514. Filing and service of a Petition for Judicial Review must be completed within thirty days after the date of mailing of the Final Order. RCW 34.05.514(1), .542; WAC 10-08-110(2)(c). If a petition for reconsideration is filed, this thirty-day period will begin to run upon the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3).

**Filing and Service of a Petition for Judicial Review, is further specified in RCW 34.05.542 as follows: "... (2) A petition for judicial review of an order shall be filed with the court and served on the agency, the office of the attorney general, and all parties of record within thirty days after service of the final order.**

(3) A petition for judicial review of agency action other than the adoption of a rule or the entry of an order is not timely unless filed with the court and served on the agency, the office of the attorney general, and all other parties of record within thirty days after the agency action, but the time is extended during any period that the petitioner did not know and was under no duty to discover or could not reasonably have discovered that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this chapter.

(4) Service of the petition on the agency shall be by delivery of a copy of the petition to the office of the director, or other chief administrative officer or chairperson of the agency, at the principal office of the agency. Service of a copy by mail upon the other parties of record and the office of the attorney general shall be deemed complete upon deposit in the United States mail, as evidenced by the postmark.

(5) Failure to timely serve a petition on the office of the attorney general is not grounds for dismissal of the petition.

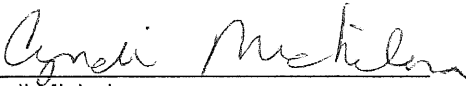
(6) For purposes of this section, service upon the attorney of record of any agency or party of record constitutes service upon the agency or party of record."

**Certificate of Service – OAH Docket No. 2013-LGW-0001**

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

|   |  |
|---|--|
| <b>Aaron Swanson</b><br><b>c/o John P. Sheridan</b><br><b>MacDonald Hoague &amp; Bayless</b><br><b>705 Second Avenue, Suite 1500</b><br><b>Seattle WA 98104</b>       | <input checked="" type="checkbox"/> First Class US mail, postage prepaid<br><input type="checkbox"/> Certified mail, return receipt<br><input type="checkbox"/> Campus Mail<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt |
| <b>John P. Sheridan</b><br><b>Partner</b><br><b>MacDonald Hoague &amp; Bayless</b><br><b>705 Second Avenue, Suite 1500</b><br><b>Seattle WA 98104</b>                 | <input checked="" type="checkbox"/> First Class US mail, postage prepaid<br><input type="checkbox"/> Certified mail, return receipt<br><input type="checkbox"/> Campus Mail<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt |
| <b>Katrina R. Kelly</b><br><b>Assistant City Attorney</b><br><b>Seattle City Attorney's Office</b><br><b>PO Box 94769</b><br><b>Seattle WA 98124-4769</b>             | <input checked="" type="checkbox"/> First Class US mail, postage prepaid<br><input type="checkbox"/> Certified mail, return receipt<br><input type="checkbox"/> Campus Mail<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt |
| <b>Zahraa Wilkinson, Co-Counsel</b><br><b>Assistant City Attorney</b><br><b>Seattle City Attorney's Office</b><br><b>PO Box 94769</b><br><b>Seattle WA 98124-4769</b> | <input checked="" type="checkbox"/> First Class US mail, postage prepaid<br><input type="checkbox"/> Certified mail, return receipt<br><input type="checkbox"/> Campus Mail<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt |
| <b>Carl Marquardt</b><br><b>Counsel to the Mayor</b><br><b>City of Seattle, City of the Mayor</b><br><b>PO Box 94749</b><br><b>Seattle WA 98124-4749</b>              | <input checked="" type="checkbox"/> First Class US mail, postage prepaid<br><input type="checkbox"/> Certified mail, return receipt<br><input type="checkbox"/> Campus Mail<br><input type="checkbox"/> Facsimile<br><input type="checkbox"/> 1st Class, postage prepaid, Certified mail, return receipt |

Date: September 17, 2013

  
Cyndi Michelena  
Office of Administrative Hearings