Pierce County
Human Resources Department

Ginny Dale
Director

615 South 9th Street, Suite 200
Tacoma, Washington 98405-4670
(253) 798-7480

October 23, 2015

Mr. Steve Merrival
PO Box 1656
Tacoma, WA 98401

Dear Mr. Merrival,

The Pierce County Human Resources (HR) Department received a complaint filed by you alleging misconduct committed or endorsed by the Pierce County Prosecuting Attorney. Your complaint, received on May 13, 2015, was filed with the Washington State Auditor's Office and the Pierce County Human Resources Department.

As established by the Pierce County Charter, Title 2, the Pierce County Prosecuting Attorney's Office is a separately-elected County office and is not an executive branch department of the County. As such, this substantially limits the authority of the Pierce County Executive and executive departments to oversee the office of an independently elected county official. Pierce County Charter, Article 3, further removes the administrative authority of the executive branch over elected-office staffing and operations. The PCPAO employees serve at will and at the discretion of the elected county Prosecutor, unless represented by the PCDPA Association. However, county code vests authority in the HR department to receive and take action as appropriate on Whistleblower and Equal Employment Opportunity complaints.

My office reviewed the complaints and determined that based on the complexity, nature, and extent of the allegations, an independent investigation was necessary. The investigation conducted by Mr. Busto is now complete and attached. In light of findings in this report and due to the jurisdictional limitations outlined above, I have made several recommendations for the Prosecuting Attorney's consideration. Additionally, because there are findings included in the report that potentially implicate the Pierce County Code of Ethics, I will be sending a copy to the county Ethics Commission.

Please be reminded that retaliation is specifically prohibited. Any form of retaliation against the complainant(s) and/or any person who participates in a complaint or investigation is prohibited by law and a person who has been subjected to retaliatory action may obtain appropriate relief as defined in RCW 42.41.040.

Sincerely,

Ginny Dale
Pierce County Human Resources Director

Attachment

cc: Brian Moran, Orrick, Herrington & Sutcliffe, LLP

SEBRIS BUSTO JAMES
a professional service corporation

Mark R. Busto
mrb@sebrisbusto.com

(425) 450-9600

October 22, 2015

Ginny Dale, Director
Pierce County Human Resources Department
615 S. 9th Street, Suite 200
Tacoma, WA 98405-4670

Re: Investigation of Whistleblower Complaints Against Pierce County Prosecutor Mark Lindquist

Dear Ms. Dale:

Enclosed is my Report of Investigation. Thank you for the opportunity to serve Pierce County.

Sincerely,

SEBRIS BUSTO JAMES

Mark R. Busto

Enclosure

COPY

Pierce County requested that I investigate whistleblower/personnel complaints against Pierce County Prosecutor Mark Lindquist. This is the report of my investigation.

The first whistleblower complaint, dated May 12, 2015, was filed by Deputy Prosecuting Attorney ("DPA") Steve Merrival with you and Jim Brownell, Whistleblower Manager of the State Auditor's Office ("Merrival Complaint"). The Merrival Complaint generally claimed that Lindquist[1] engaged in "misconduct and retaliation," created a "hostile work environment," interfered with "collective bargaining" and disregarded "merit based employment." The second whistleblower complaint, dated May 21, 2015, was filed by Chief Criminal Deputy Stephen Penner with you and Mr. Brownell ("Penner Complaint"). The Penner Complaint generally claimed that Lindquist violated federal, state and county law, and engaged in "gross waste of public funds" and an "abuse of authority."[2]

Witnesses

I interviewed the following persons as a part of the investigation.

1. Craig Adams, Commissioner, Pierce County Superior Court (telephone);
2. Stacia Adams, Forensic Interviewer (telephone);
3. Sabrina Ahrens, DPA;
4. Margaret Archer, attorney (telephone);
5. Kerri Arnold, Forensic Interviewer;
6. Jared Ausserer, Chief, Homicide Division;
7. Kevin Benton, Chief, Juvenile Division;
8. Brent Bomkamp, Chief, Pierce County Sheriff's Department ("PCSD") (telephone);
9. Alicia Burton, DPA (telephone);
10. Diane Clarkson, DPA;
11. Patrick Cooper, Team Chief, Unit I;
12. Barbara Corey, attorney (telephone);
13. James Curtis, DPA (telephone);
14. Heather DeMaine, Asst. Team Chief, Unit IV;
15. Zach Dillon, DPA (telephone);
16. Dawn Farina, Chief of Staff;
17. Maureen Goodman, Team Chief, Unit V (telephone);
18. Denise Greer, Asst. Chief, Civil Division;
19. Greg Greer, Asst. Chief Criminal Division;
20. Annie Guttierez, DPA;
21. Dan Hamilton, Civil Division Litigation Team Lead (telephone);
22. Dione Hauger, DPA;

[1] For ease of reference, I will use last names throughout the report.

[2] Both Merrival and Penner and other Pierce County Prosecuting Attorney Office ("PCPAO") employees subsequently filed claims alleging retaliation. This report does not include those claims.

23. Bryan Hershman, attorney (telephone);
24. Lisa Hilligoss, PCPAO Human Resources Manager;
25. Tom Howe, Asst. AG (telephone);
26. Michelle Hyer, Team Chief, Unit II (telephone);
27. Tim Jones, Team Chief, Unit IX;
28. Kelly Kelstrup, Office Services Manager;
29. Michelle Knox, Legal Assistant;
30. Sunni Ko, attorney (telephone);
31. Frank Krall, Asst. Team Chief, Unit III (telephone);
32. Brian Leech, DPA;
33. Tim Lewis, Chief, Misdemeanor Division;
34. Mark Lindquist, Prosecuting Attorney;
35. Kawyne Lund, DPA;
36. Mark Maenhout, Pierce County Risk Manager (telephone);
37. Rosie Martinelli, DPA;
38. Rob Masko, Undersheriff, PCSD;
39. Joan Mell, attorney (telephone);
40. Steve Merrival, DPA;
41. Andrew Morrison, attorney (telephone);
42. John Neeb, DPA;
43. Sven Nelson, Team Chief, Unit IV;
44. Ray O'Dell, DPA;
45. Steve Penner, Chief Criminal Deputy;
46. Scott Peters, Team Chief, Unit III;
47. Dave Prather, DPA (telephone);
48. Kit Proctor, Chief, Appeals Division (telephone);
49. Scott Provost, Sgt., PCSD (telephone)
50. Brett Purtzer, attorney (telephone);
51. Sarah Richardson, Team Chief, Family Support (telephone);
52. Mary Robnett, Asst. AG (former Chief Criminal Deputy);
53. James Schacht, DPA;
54. John Sheeran, Felony Division Chief;
55. Jennifer Sievers, DUI Supervisor (telephone);
56. Mike Sommerfeld, DPA (telephone);
57. Heather Songer, PCPAO Communications Asst.;
58. Judge Phillip Sorenson, Pierce County Superior Court;
59. Larry Steinmetz, attorney (telephone);
60. Becky Stover, Victim Advocate;
61. Lisa Wagner, DPA;
62. Michelle Walker, Manager, Justice Services/Victim Witness;
63. Angelica Williams, DPA (telephone);
64. Fred Wist, Asst. AG (telephone); and
65. Denny Wood, Detective Sergeant, PCSD (telephone).

I have attached a PCPAO telephone list (numbers redacted) that lists DPAs and staff by unit that will provide an overview of the office's organization. Exhibit 1.

Documents

I received and reviewed the following documents, which I have described by category due to their volume.

1. Merrival and Penner whistleblower complaints;
2. Retaliation complaints by Merrival, Penner and Knox;
3. PCPAO's Potential Impeachment Evidence ("PIE") policies and related materials;
4. PIE files of Detective Glenda Nissen, Detective Mike Ames and Detective Sgt. Denny Wood;
5. PCPAO telephone lists, organizational charts and summaries of job changes of PCPAO personnel;
6. Emails and text messages;
7. Newspaper articles;
8. Investigation of complaints about Brent and Michelle Hyer;
9. Notes from PCPAO personnel;
10. Sheeran letter to attorneys filing declarations in *Ames* matter;
11. Invoices from attorneys representing Pierce County;
12. Photograph of white board in PCPAO with list of DPA names;
13. Email from Lindquist, dated January 20, 2011, re "affidavits of prejudice;"
14. Various court pleadings;
15. Personnel file documents;
16. Complaints to the Washington State Bar Association and Lindquist's and Farina's response to them;
17. Some of Lindquist's "Zen Lawyer" columns printed in the Tacoma Pierce County Bar Association's ("TPCBA") *Pierce County Lawyer*;
18. Press releases and statements issued by the PCPAO;
19. Demographic information for the PCPAO;
20. PCPAO and Pierce County policies on email, internet use and electronic records;
21. Summary of Hilltop gang conspiracy cases; and
22. CLE presentations.

Findings of Fact[3]

I. Alleged Violations of Federal, State and County Law[4]

A. "Brady" Violations[5]

1. PCPAO PIE Policy.

Allegation: The Merrival Complaint alleged that the PCPAO's policies and procedures related to the disclosure of potential impeachment evidence ("PIE") are inadequate in the following respects: PIE information is not timely disclosed, which deprives a defendant of the benefit of the PIE when considering a plea; the PIE policy has not been effectively communicated to DPAs; and, the identity of PIE witnesses are unknown to DPAs.

Summary of the Findings of Fact: The County's LINX database system notifies DPAs that a witness has PIE when the witness is subpoenaed to appear at trial; DPAs are not notified in advance of trial at a time when many, if not most pleas are negotiated;[6] the PCPAO did not distribute the policy to DPAs; and, the PCPAO does not maintain a list of designated PIE witnesses.

Summary of the Evidence: PCPAO adopted a PIE policy on September 17, 2013 based on the Model Policy of the Washington Association of Prosecuting Attorneys ("WAPA").[7] Upon adoption, representatives of the PCPAO met with each law enforcement agency in the County and the law enforcement officers' guilds to discuss the policy and to address any concerns. According to many witnesses, including Penner and Judge Phillip Sorenson who were responsible for developing and implementing the policy, the process was difficult because every PIE policy must balance the constitutional rights of criminal defendants and the concerns of law enforcement about officers' privacy and reputations.

For example, the PCPAO does not maintain a list of "Brady officers," largely due to the resistance of the officers and their guilds. Instead, the PCPAO sends a letter annually to every law enforcement agency in the County requesting that they supply the PCPAO with any PIE of which they are aware. If the PCPAO hears about possible PIE from other sources, such as criminal defense attorneys, the office sends the law enforcement agency an email requesting the information. The PCPAO then forwards the information to the involved individual to give him/her an opportunity to respond.

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[3] I have been asked to reach findings of fact and not conclusions of law.
[4] The organization of the report generally tracks the Merrival Complaint.
[5] "Brady" is a reference to *Brady v. Maryland*, 373 U.S. 83 (1983). *Brady* and its progeny impose an affirmative duty on prosecutors to disclose Potential Impeachment Evidence ("PIE") to a charged defendant.
[6] Whether DPAs are notified "too late" is an issue of law, which I do not decide, and opinion, which I do not offer.
[7] An earlier policy adopted during the Horne administration dealt with the more limited obligation under *Brady* to disclose exculpatory evidence.

The PCPAO has created a committee of senior leadership that reviews all PIE information. Penner chairs the committee and schedules meetings to discuss the information received. The committee determines whether the information is PIE and, if so, it identifies the individual in LINX, the county-wide database of court filings and other case data. When the individual is listed as a witness and subpoenaed for trial, LINX sends an email "flag" to the responsible DPA, who is instructed to discuss the PIE with Penner. The DPA and Penner review the case and Penner decides whether disclosure is required.

The PIE policy was not distributed to DPAs when adopted; rather, the PCPAO distributed a single sheet summarizing the policy to team chiefs and asked them to discuss the policy with their DPAs. The procedure appears to have been ineffective because most DPAs interviewed stated that they were unaware of the PIE policy. All they recalled was a requirement "to call Penner."[8]

The system, as one might expect, is not foolproof. For example, Merrival described a case involving a defense attorney who notified him that one of the witnesses listed by the PCPAO was a PIE officer. Penner determined that the List of Witnesses in the case was dated September 11, 2014 and the LINX notice was sent to the DPA on September 24, 2014. He was unable to determine why the "flag" was delayed two weeks.

Many DPAs echoed Merrival's opinion that PIE should be disclosed as soon as possible so that defense counsel know their leverage during plea bargaining and can properly advise clients. In other words, according to these DPAs, disclosing PIE when trial subpoenas go out is too late to protect the rights of the criminal defendant. Others witnesses maintained that defendants have a right to the information at the time of trial only; when criminal defendants enter a plea, they give up their legal arguments and the right to review all of the evidence. I will not opine on the law as it relates to PIE, but note that DPA Brian Leech said that the Pierce County policy is similar to the Kitsap and King County policies, which likewise take the position that PIE is not required to be disclosed until trial.

Finally, even if the PIE is disclosed, DPAs uniformly stated that they routinely file motions to exclude the evidence at trial. The trial judge determines the ultimate question of the admissibility of the PIE.

2. Vengeful Application of the PIE Policy.

Allegation: The Merrival Complaint alleged that Lindquist "publically and aggressively labeled the two officers known to be critical of him as 'Brady' officers" (Ames and Wood), but not other officers whose honesty has been questioned, *i.e.*, Detective Debbie Heishman. I address each of these allegations below.

[8] One DPA said that attorneys in the Misdemeanor Division received training on PIE.

Summary of the Findings of Fact: The designation of Detective Mike Ames as a PIE officer is the subject of litigation so I will not review it here; Lindquist was frustrated with Detective Sgt. Wood's investigation of the Robnett death threat, discussed more fully below, but Wood's designation as a PIE officer resulted from his own misconduct and was not done for improper reasons; and, the PCPAO had not designated Detective Debbie Heischman as a PIE officer prior to the Merrival Complaint because Penner had not received notice of any PIE pertaining to her, but the office has subsequently designated Heischman upon review of the evidence.

Summary of the Evidence: I review the evidence related to each of the detectives below.

a. Detective Mike Ames. The PCPAO has identified Ames as a PIE officer. The PIE includes: declarations signed by Ames in *Dalsing v. Pierce County* that contain allegations that are disputed in signed declarations filed by civil DPAs assigned to the case; and, a report of investigation of allegations by Ames against employees of the PCPAO and the PCSD that concluded there was "no evidence" to support the claims.

The *Dalsing v. Pierce County* civil litigation is ongoing. In addition, the appeal of the dismissal of Ames' "name-clearing" action, brought specifically to determine if "dishonest, unfounded, unsupported accusations of dishonesty… [is] Brady material," was recently argued in Division II of the Court of Appeals.[9] Under these circumstances, where multiple courts will reach findings of fact and conclusions of law regarding Ames' PIE information, I will not review it here.

b. Detective Sgt. Denny Wood: The PCPAO has identified Wood as a PIE officer. The PIE is summarized in a letter that includes nineteen allegations for which Sgt. Scott Provost, who signed the letter, stated there was a factual basis. The allegations involve a relationship between Wood and the widow of a homicide victim in a case where Wood was the lead detective. The PCSD subsequently conducted an internal investigation of Wood's conduct, which resulted in his demotion and suspension. According to witnesses from the PCSD and the PCPAO, Wood compromised the homicide investigation and the disclosure of PIE regarding his conduct was wholly appropriate.

Wood acknowledged that his conduct "got him in trouble with the Department," but said that the PIE letter signed by Provost was written by the PCPAO for the purpose of embarrassing him. Wood said that Lindquist targeted him because Wood refused to cooperate with Lindquist's goals in the investigation of a death threat against then Chief Criminal Deputy Mary Robnett. According to Wood, Lindquist's goals were to identify Detective Nissen as the sole suspect in the death threat investigation and to determine whether DPA Lisa Wagner was

[9] Argument of Ames' attorney, Joan Mell, as quoted in "Appeals Court Wrestles With Deputy's Claim of Prosecutor Falsehood," Tacoma News Tribune ("TNT"), September 18, 2015.

providing internal, PCPAO information to Nissen.[10] As evidence of Lindquist's desire to identify Nissen as the sole suspect, Wood said (and former DPA Craig Adams confirmed) that the PCPAO asked Wood to sign a declaration in response to a civil action brought by Nissen indicating that Nissen was the only suspect in the investigation. Wood said the statement was not true and demanded that it be changed. Wood also cited examples of Lindquist and his staff resisting Wood's efforts to identify and investigate other possible suspects, including a DPA with a history of conflict with Robnett.

Regarding Wagner, Wood said that Lindquist called him and demanded his investigation report before he submitted it; Wood responded that he had never done that before and it would be improper if he did; and, the case was going to a different county for review, so Lindquist didn't need the information. According to Wood, Lindquist told him he didn't need it for prosecution; he needed it to make decisions in his office about personnel, *i.e.*, DPA Wagner.

Lindquist said that his only concern during the investigation was to determine who sent the death threat ("we go where the evidence leads"); that Robnett was "110% convinced" Nissen was the author of the death threat; and, that his goal was to support Robnett, his Chief Criminal Deputy.[11] Lindquist further stated that he did not care if the Sheriff's Dept. investigated Wagner; that he expected that people vent about issues; and, that Wagner did not disclose any confidential information, so was not concerned about her venting.

Robnett, the object of the death threat, confirmed that both she and Lindquist believed that Nissen sent the death threat and were concerned that the PCSD was not doing enough to investigate the matter. Robnett also recalled that Lindquist wanted to know whether Wagner provided Nissen with the information contained in the email Nissen sent to the TNT critical of Lindquist and the PCPAO. Robnett described Lindquist's insistence on finding Nissen's information source as off-putting, misdirected and very strong – "not the way a prosecutor would talk to experienced detectives."

As further evidence of Lindquist's singular focus on Nissen as a suspect, Robnett said that Lindquist "kind of flipped out" when Nissen filed a Public Records Act ("PRA") action against the County after the settlement of her civil suit against Lindquist. Robnett said that she had considered filing a lawsuit against Nissen at the time of the civil suit but later decided against it. Nevertheless, Lindquist continued to press Robnett to sue Nissen. The conversation came to a head in October 2011. Robnett had a pointed discussion with Lindquist, told him that she was not prepared to sue Nissen and then left on a long road trip. She decided during the trip that she could no longer work for Lindquist and the PCPAO and resigned upon her return.

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[10] The death threat was sent shortly after Nissen wrote an email critical of Lindquist and the PCPAO, which was the principal reason the PCSD identified her as a suspect.

[11] However, Lindquist admitted that he asked the County spokesman to request that the TNT remove a statement from an article that the death threat investigation had not identified a suspect.

Commissioner and former DPA Craig Adams reported that the PCSD got a tip that another person associated with the "Craig's List" murder cases (which Robnett prosecuted) could have authored the death threat. Adams recalled that he was called into a meeting with Lindquist, Farina, Robnett and his superiors in the Civil Division[12] and was questioned about his conversations with the Sheriff about the new suspect. Adams, who was the DPA assigned to the PCSD, said that his communications with the Sheriff were privileged and he could not disclose them unless the Sheriff waived the privilege. Lindquist dismissed Adams and asked the Sheriff to join the meeting, where Lindquist and his staff requested he waive the privilege. The Sheriff refused. Lindquist summoned Adams again and asked him to produce other evidence about the investigation of the "Craig's List" suspect. Adams said that Lindquist and the others were upset at the existence of another suspect that could exonerate Nissen. They were also "very pissed off" at him for not disclosing the privileged communication about the alternative suspect; and, they told him he was not a "team player" because he had a duty to inform them about anything that could affect the PCPAO.

Robnett confirmed that Lindquist was very unhappy with Adams because of his refusal to disclose his conversations with the Sheriff. Lindquist complained that Adams was not effectively communicating the Prosecutor's position to the PCSD and suggested to Doug Vanscoy, Adams' supervisor, that Adams' office needed to be moved back to the PCPAO because he was getting too cozy with the PCSD.[13] Lindquist also suggested that Adams should be replaced at the PCSD and possibly terminated.[14] Adams, knowing that he had angered Lindquist, soon thereafter took a position as a Pierce County Superior Court Commissioner and left the PCPAO after 20 years in his position.

Finally, Mike Sommerfeld, the DPA assigned to the PCSD, said that Penner sent him a letter inquiring about PIE information involving Wood. He said that he used the PCSD's internal affairs investigation report as a basis for a letter he drafted to Penner summarizing the PIE information in the PCSD's possession. Sgt. Provost said that he worked with Sommerfeld to edit the letter and was satisfied that all the information in it was accurate, so he signed it and sent it to Penner. Penner said that Wood's PIE letter, dated May 8, 2013, was unusual in its specificity and unlike any he has seen during his tenure as Chief Criminal Deputy. However, he said that the PCPAO had not finalized its PIE policy at the time and had no established protocols for the submission of PIE. Sommerfeld, Penner and Provost all denied having any basis for believing that the letter was written to embarrass Wood.

In light of this evidence, I find that Lindquist sought to focus the PCSD's investigation of the Robnett death threat on Nissen and away from other possible suspects; and, Lindquist attempted to secure evidence during the investigation that Wagner supplied information about

[12] Lindquist's personal attorney attended the meeting by telephone.
[13] Adams' office was physically located at the PCSD.
[14] Robnett recalled that Vanscoy, to his credit, "stood up to Lindquist" and said, "If Adams says it's privileged, then it is."

the PCPAO to Nissen.[15] However, I also further find the PCPAO had a legitimate basis for identifying Wood as a PIE officer and the PIE letter its DPA helped draft was not intended to embarrass him, notwithstanding any frustration that Lindquist had regarding Wood's investigation of Nissen.

c. Detective Debbie Heischman: According to Penner, Detective Heischman retired on February 29, 2012. Her last case was the *Dalsing* case, in which she made a statement based on personal knowledge that the room in the photograph used by the PCPAO to identify and charge Dalsing was, in fact, Dalsing's bedroom. As it turned out, the bedroom in the photo was clearly not Dalsing's, based on obvious characteristics of her bedroom, which made Heischman's statement sufficiently suspect to warrant disclosure as PIE.

After Merrival filed his Complaint and identified Heischman as an officer who should have been identified as a "Brady officer", Penner set up a meeting of the PIE committee on June 2, 2015 to discuss her. They reviewed the Dalsing materials (the probable cause declaration and relevant police reports) and other evidence and ultimately concluded that the Dalsing materials needed to be disclosed as PIE. The PCPAO has now identified her as a PIE officer. When Penner was asked about the delay in designating her, he said the PIE issue was never presented to the PCPOA, probably because *Dalsing* was the last case before her retirement. I credit Penner's explanation and, given the circumstances of Heischman's retirement, I conclude that the PCPAO did not fail to designate Heischman a PIE officer for improper reasons.

B. Intimidating Public Servants/Witnesses

Allegation: The Merrival Complaint alleged that,

> On or about May 1st of 2014 in the matter of *Ames v. Pierce County*, 13-2-13551-1 a number of members of the local bar filed declarations to oppose efforts to sanction Det. Ames and his attorney for seeking a name clearing hearing against the PCPAO. When the declarations were filed, PCPAO leadership disseminated a list of the declarants to DPAs. Supervisors instructed DPAs to discriminate against these declarants and treat them poorly. Those DPAs who chose not to act improperly, who questioned this directive, and failed to comply with the directive have been and continue to be admonished.

Penner's Complaint added that Lindquist dubbed the attorneys who submitted declarations ("declarants") the "confederacy of dunces" and instructed team leaders not to give them good deals.

Summary of the Findings of Fact: Lindquist called the declarants in the Ames name-clearing matter the "confederacy of dunces;" Felony Division Chief John Sheeran sent a letter to

[15] *See also*, "Lindquist Involvement in Deputy Investigation at Center of Phone Records Case", Tacoma News Tribune, June 10, 2015.

the declarants stating that they were mistaken about the facts stated in their declarations; the PCPAO made the declarations available for DPAs to review and Team Chiefs shared the declarants' names with DPAs, but they did not circulate a list of declarants; senior leaders told Team Chiefs to tell DPAs that the declarants could not be trusted because they lied about their fellow DPAs, so be wary of them and get things in writing; Lindquist told Penner to tell trial negotiators not to give the declarants "good deals," but later retracted the directive when Penner gave him the opportunity; DPAs in the Special Assault Unit ("SAU") were told not to give the declarants any "special treatment" or "special favors," which was intended to mean that DPAs should treat them like any other criminal defense lawyer; and, senior leaders admonished numerous DPAs and staff members for treating the declarants sociably, in a manner befitting their long-term professional relationship.

Summary of the Evidence: It is undisputed that Lindquist and his senior staff met with PCPAO leadership about the declarations filed by members of the local bar in the Ames name-clearing hearing. Lindquist admitted that he used the phrase "confederacy of dunces" to describe the declarants because he believed some of them made allegations of misconduct against DPAs without personal knowledge.[16] Lindquist claimed that the "dunces" reference was an attempt to bring levity to a rancorous situation. However, according to witnesses in leadership positions, Lindquist firmly believed that Gary Clower was the leader of the group; he said in conversations about the declarants that Bryan Hershman had personal issues; he said "nothing but negative things about Joan Mell," Ames' attorney; and, he was generally pejorative when talking about the group. I find under these circumstances that Lindquist intended the "confederacy of dunces" phrase to be derogatory and not humorous, as claimed.

In any event, witnesses largely recalled the same message Lindquist and his senior staff delivered to the leadership. Sheeran said that the message to team chiefs was: the declarants have maligned your coworkers and accused them of unethical conduct without personal knowledge; you have to be wary of them because they will malign you, too, and challenge your integrity; be aware of the situation but don't take that out on their clients; communicate with them in writing; and, they would do the same thing to you if they thought it would benefit them or their client. There is no evidence that senior leadership told the leadership at the meeting not to give their client good deals. One senior leader said that s/he would have recalled such an instruction because, "There is no way I would sit for it."

Sheeran also said that the idea for the PCPAO to communicate directly with the declarants came up in a leadership meeting. He offered to draft a letter, which he sent to all declarants in various forms. The letter stated that s/he filed a declaration containing mistaken assertions; it provided information to the declarants about the case; and, it enclosed declarations filed by DPAs at the hearing. Witnesses could not recall the PCPAO ever sending a similar letter to declarants in a civil action.

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[16] *A Confederacy of Dunces* is a novel by American John Kennedy Toole. The book's title refers to an epigraph from a Jonathan Swift essay, "When a true genius appears in the world, you may know him by this sign, that the dunces are all in confederacy against him."

Penner recalled that Lindquist specifically asked him to go to the negotiators for the trial teams and tell them that the declarants should not be getting good deals during plea bargaining. Penner alleged in the Complaint that the instruction followed a conversation with Lindquist involving a high profile embezzlement case: the DPA assigned was Asst. Team Chief Frank Krall; defendant's counsel was Gary Clower. Penner said that the defendant had paid sufficient restitution to bring down the amount of stolen property below the $5,000 guideline for participation in the office's diversion program. Penner told Krall that he should treat the case like any other, so Krall agreed to dismiss the case to diversion. Penner said that Lindquist was upset with him and Krall because he did not want the media reporting that the case had been dismissed, particularly when the defendant was represented by Clower.

Krall recalled Penner telling him that he should treat the embezzlement case coming up like any other, which Krall thought was odd because he didn't know any reason why he would treat it differently. However, after he sent the case to diversion, Sheeran told him that he should not send cases to diversion that involve "taxpayer money." Krall responded to Sheeran, "I didn't know that there was such a policy." Krall said he has the heaviest caseload in the office and had historically sent a lot of welfare fraud and other taxpayer money cases to diversion. He surmised that the "policy" probably resulted from two facts: the case involved taxpayer money, and, the defendant was represented by Clower. Krall wondered, "If the case involved taxpayer money, why didn't they tell me their concern beforehand?"

In any event, Penner said that during his conversation with Lindquist about the embezzlement case, Lindquist instructed him to tell the negotiators (like Krall) that the declarants (like Clower) should not get good deals. Penner said that he was so concerned with Lindquist's request that he discussed the matter with counsel later and met with Lindquist the next day to give him a chance to withdraw his instruction. He told Lindquist and Farina that he may have misunderstood what Lindquist asked – Lindquist said not to give declarants a good deal, which could not be what he meant because it would be unethical to treat defendants differently based on the identity of their defense attorney. Lindquist reportedly responded, "Well, you don't say that out loud; you use subtext." Penner said he replied, "I know subtext, but I want to make sure I know what you want me to communicate." At that point, Penner said that Lindquist knew that he wasn't going to deliver the message, so Lindquist told him that there are certain attorneys that we can't trust to tell the truth about a conversation later and all communications should be in writing.

Lindquist said he didn't recall the first conversation, but recalled the second conversation and thought it was odd. Lindquist said that Penner asked whether the negotiators should not be giving deals to attorneys, to which Lindquist responded, "Of course not; you need to treat them like any other client." Lindquist also said that he would not have given such an instruction to Penner because Sheeran was responsible for the trial teams. Finally, Lindquist said that Penner told PCPAO HR Manager Lisa Hilligoss that he got confused about how to deal with these attorneys, went to Lindquist for clarification and received it.[17]

[17] Hilligoss stated in a declaration filed in support of Lindquist and Farina's response to a WSBA complaint:

During her investigative interview, Hilligoss acknowledged to me that Penner came to her concerned that Lindquist asked him to give the declarants "no deals." Importantly, regarding Penner's second conversation with Lindquist, she recalled that "Penner gave Lindquist the opportunity to get off the hook and Lindquist took the opportunity."

I find that Lindquist gave Penner the "no good deals" instruction and later remanded it based on the following: Penner reported his conversations with Lindquist to Hilligoss on the same day; she recalled the second conversation as he described it – he gave Lindquist the chance to withdraw his instruction and he did so; Lindquist asked Penner to speak to the trial team negotiators because Krall had given a deal to a client of Clower, a declarant; and, by all accounts, Lindquist was upset with the declarants, particularly Clower, and instructed his leadership that they could not be trusted, which could justify, at least in his mind, treating them differently during plea negotiations.

The instruction was also consistent with Lindquist's political instincts. Penner reported and a senior leader confirmed that Lindquist responded, when he was told he had to treat Merrival the same after Merrival filed his Complaint: "I am a politician; you don't understand; you need to attack the person who makes the accusations."

The only unit that reported receiving a "no good deals" instruction was the SAU.[18] Assistant Team Chief Heather DeMaine said that Homicide Division Chief Jared Ausserer informally called the team DPAs into a hallway meeting. He had an affidavit with him and said that criminal defense attorney Bryan Hershman had "called out" the office and said Koiman and Lewis were dishonest. DeMaine recalled that Ausserer told them "give no deals to Hershman." DPA Sabrina Ahrens, who did not attend that meeting, said that DeMaine relayed the "no deals" instruction to her shortly after it occurred. In contrast, Ausserer thought he said that the SAU negotiators were not to give declarants any "special favors," which meant that the declarants were not to get special treatment with back door discussions, *e.g.*, bypassing Ahrens and speaking with Ausserer before plea negotiations were completed. Robnett likewise recalled that DeMaine told her that Sheeran said "no special favors for these guys." Angelica Williams, another DPA in SAU, recalled the meeting and said that Ausserer told them they should not feel that they should have to give the declarants any "special deals," *i.e.*, they should treat all defense attorneys alike. Williams said that Ausserer never said they should not give the declarants any

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> Late last year or earlier this year, Mr. Penner came to me and stated that he thought Mark Lindquist had told him not to give a defendant on a case a good deal. Mr. Penner expressed concerns that he was being told to do something unethical. Mr. Penner and I discussed options for resolving his concerns. A day or two later, Mr. Penner came to me and stated that he had resolved the issues. He stated that he had asked Mr. Lindquist if he had intended for him to purposely not give a good deal or words to the effect that imply unethical behavior without explicitly stating so, and Mr. Lindquist said that was not what he meant and confirmed that Mr. Penner should handle the case appropriately.

[18] Various DPAs recalled the instruction a little differently, which explains why it is sometimes referred to as "no good deals," "no deals" or "no special deals" or "no special treatment."

deals at all. She believed that Ausserer referred to Clower and Hershman specifically and meant that the declarants like them, who had special relationships with the PCPAO, should not get any special treatment.

Under these circumstances, I find on a more-probable-than-not basis that Ausserer told SAU negotiators that they were to give "no special favors" or "no special deals" to the declarants, meaning that they should be treated like all other defense attorneys. DeMaine heard the instruction as "no deals," which was reasonable in light of the rest of the message to the DPAs, *i.e.*, don't trust the declarants. This finding is supported by testimony of two other team chiefs, Scott Peters and Michelle Hyer, who recalled that another team chief specifically asked Sheeran if DPAs were not to give declarants the same deals as before. Sheeran reportedly answered in the negative – treat them just as they had been treated before.[19]

Finally, numerous DPAs reported that PCPAO leadership admonished them for conversing with the declarants in a friendly manner, despite their long-term, professional relationships with the declarants.

- Team Chief Sarah Richardson said that she saw Robnett at a TPCBA event, said "hello" and spoke with Robnett for about 15 minutes because she had not seen her for awhile. Several days later, Farina told Richardson that someone had seen her "gushing" with Robnett, who was one of declarants that DPAs should not talk to. Farina said she had no recollection of admonishing Richardson. I credit Richardson's specific recollection over Farina's lack of recall. Further, as a Team Chief, she is not likely to fabricate an incident like this involving her superior.

- Dave Prather, a DPA in the Civil Division, said that Farina passed him talking with criminal defense attorney Peter Kram near the County/City building. One-half hour later, Farina knocked on his door and said that neither she nor Lindquist appreciated DPAs talking to attorneys who filed declarations "against Mark." Prather told her that he had no idea what she was talking about, so Farina explained that a number of attorneys filed declarations in a case against Lindquist and they didn't want DPAs speaking to them. Prather responded that he was only chatting with Kram because he had known him for 30 years. Farina said she had no recollection of admonishing Prather. Again, I credit Prather's specific recollection over Farina's lack of recall because he has no reason to fabricate the encounter.

[19] There is no conclusive evidence that any declarant or their clients received any discriminatory treatment during plea negotiations. For example, Hershman reported that his long-term relationships with most DPAs protected against any disparate treatment of his clients. In contrast, Harry Steinmetz said that DPA Frank Krall offered limited County Jail time to a client of his; Team Chief Scott Peters took over the case and withdrew the offer; and, after another attorney replaced Steinmetz on the case, Peters re-instated the offer. Steinmetz concluded that Peters withdrew the deal because Steinmetz was a declarant, and re-instated it after his client replaced him on the case. Krall said the offer changed because another DPA filed an additional criminal charge against the defendant. I decided that further inquiry into the facts of the case were beyond the scope of this investigation.

- DeMaine said that she was on the telephone with Clower arguing about a bail amount, when Sheeran appeared in her doorway and told her to come into Team Chief Sven Nelson's office. According to DeMaine, Sheeran laid into her: "Do you know who is on the list of 33 attorneys who filed affidavits?" When DeMaine told him that she didn't know who was on the list other than Hershman, Sheeran said: "We are a family and we need to have each other's back. When one of us is called a liar, then all of us are called a liar." Sheeran went on to admonish DeMaine not to be so friendly with Clower and the other declarants. Nelson recalled that Sheeran saw DeMaine on the phone with Clower, getting him some information that he could have gotten himself the next day. Nelson said that Sheeran told DeMaine, "We are not telling you not to speak to people (act professionally), but you don't need to do special favors for people in active litigation with the office."

- Lindquist's assistant, Kelly Kelstrup, said that she went to a retirement party for DPA Carl Hultman and spoke to many people, including some defense attorneys. Later, Lindquist told her that she should be careful when she is speaking to defense counsel at parties because they may lie about their conversation.

- DPA Ray O'Dell reported that his Team Chief, Michelle Hyer, came into his office and said that Sheeran told her "attorneys" were being nice to the people "on the list." O'Dell responded, "This is high school bullshit," to which Hyer said, "I just don't want you in trouble in Mark's office." Hyer said she relayed the conversation to Lindquist. Later, O'Dell said he got a visit from Penner, who told him: "Mark heard that you called him immature; he wanted me to communicate to you that if you want to be in leadership, this is not the way to act." O'Dell said he replied: "Are you kidding me, why are we having this talk." Penner answered: "I am doing what I was asked to do; is there anything that you want me to say to Mark?" Penner confirmed the gist of the facts reported by O'Dell (and Hyer), so I find them credible.

C. Public Records Act Allegations

Allegation: Both the Merrival and Penner Complaints allege violations of the Public Records Act, RCW 42.56 et seq. The Merrival Complaint alleged that the PCPAO discourages email and other forms of electronic communication, permits text communications on private devices but does not retain them, and creates public records for the purpose of prejudicing the subject of the communication. The Penner Complaint further alleged that Lindquist schedules meetings on his calendar by stating "Meeting" only to avoid public disclosure of the meeting agenda. Both Complaints cite examples of these more general allegations.

Summary of the Findings: The PCPAO discourages its staff from sending emails when the purpose of the communication is "better accomplished" by using the telephone or walking down the hall; Lindquist created an email regarding "affidavits of prejudice" against Superior Court Judge Stephanie Arend for the purpose of retaliating against her for her treatment of

former Homicide Chief Kevin McCann at trial;[20] Lindquist put "Meeting" on the office calendar to avoid disclosure of the meeting agenda, copies of which are collected after the meeting; and, Lindquist told Penner he wasn't a "team player" because Penner would not play along with Lindquist's preference to have a cell phone conversation on a "PRA-proof" basis, *i.e.*, private cell phone to private cell phone.

Summary of the Evidence: The evidence pertaining to each of the allegations follows.

1. **The PCPAO's Policy.** By way of background, on April 26, 2013, Farina emailed PCPAO employees about the status of the *Nissen v. Pierce County* public records act case, which sought Lindquist's private cell phone records, and advised: "In the interest of employee privacy and to avert litigation, please be reminded that while it is sometimes unavoidable in serving the public, the use of personal phones for county business is discouraged." According to Robnett and others, Lindquist regularly used his personal cell phone for County business. The *Nissen* case made clear the risks of such use, so the PCPAO clarified the policy regarding the use of personal cell phones for County business to protect personal cell phone records and to "avert litigation," like the *Nissen* case.

Later that year, on November 25, 2013, the PCPAO revised its "E-Mail, Internet Use, and Electronic Records Policy." The office adopted the County policy with the following additions: "Email should not be used where the purpose would be better accomplished with a face-to-face conversation or phone call;" and, office-wide and division-wide emails, including "reply all," were restricted to designated office managers.[21] According to Farina, the policy was consistent with Lindquist's philosophy to communicate, and to communicate in person, if possible. She added that policy was also intended to lighten the workload of PRA officers – more emails mean more documents to produce, which is taxing on public resources.

2. **Impact of the Policy.** Every witness confirmed that they have been told repeatedly not to put anything into writing when you can call on a telephone or walk down the hall and talk in person. The office has also advised DPAs to be cognizant that emails are public records; as one member of leadership said, "You need to be thinking of public records requests when you write emails – what to write and how to write it." A number of witnesses, including members of leadership, said that they were told to use the "front page test" (my words) – don't put anything in writing that they don't want to see on the front page of the Tacoma News Tribune ("TNT"). DPAs reported being admonished for any failure to follow the policy and these instructions.

[20] "Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he or she cannot, have a fair and impartial trial before such judge...." RCW 4.12.050(1).

[21] Consistent with the revised policy, Farina's email transmitting the policy to employees stated, "If you have any questions, please do not hesitate to give me a call or stop by my office."

Witnesses also confirmed that Lindquist has "Meeting" placed on attendees' calendars without identifying the agenda. Lindquist's assistant recalled that she was instructed to adopt the procedure and assumed, like others, that the purpose was to limit the amount of information available regarding the meeting in the event of a PRA request. The assistant's understanding is confirmed by the office's practice of passing out agendas at leadership meetings and asking attendees not to take them when they leave. In addition, one former Team Chief said that he would routinely make summaries of the Team Chief meetings and would send them by email to the DPAs in his unit, including summaries of half-yearly statistical information. He said that Robnett made clear to him that Lindquist did not want the information in writing and it should be conveyed orally instead. I find on the basis of this evidence that these practices were intended to limit the information disclosed in response to a PRA request.

Merrival specifically alleged that, as example of the policy, DPAs were instructed not to write down the names of "Brady officers" and the PCPOA maintained no "Brady list." He further claimed that his supervisor directed him not to document "Brady" issues in emails. As noted, the PCPAO has not created a "Brady list" of officers for which they maintain PIE information at the behest of law enforcement agencies, officers and guilds; such a list, without more, could have a potential negative impact on the reputation of the officers. This practice is a matter of PIE policy, not the office's email policy. Regarding the alleged instruction not to document "Brady" issues in email, his supervisor, Team Chief Maureen Goodman, recalled that Merrival had concerns about a Fife officer based on video footage in the criminal file. Goodman recalled telling Merrival not to contact the officer because, if the footage indicated wrongdoing, then the officer had certain rights.[22] Goodman said that she looked at the video, decided it was problematic for the officer, discussed the matter with Penner and Sheeran, and later cooperated with the detective assigned to the department's IA investigation. Ultimately, the PCPAO dismissed the case and Fife fired the officer. According to Goodman, she responded to Merrival's concerns, she followed proper procedures, the matter was investigated and eventually it became public. I find that the PCPAO's response to these specific events was motivated by a legitimate effort to balance the rights of the officer and the office's constitutional obligations, and not an effort to evade the PRA.

Penner alleged in his Complaint that in early 2015 Lindquist called Penner, from private phone to private phone, about the reversal of the conviction in *State v. Darcus Allen*. Lindquist asked Penner if he had read the Seattle Times article about the case and, when Penner said, "no," Lindquist asked him to read it and call him back. When Penner returned the call, Lindquist admonished Penner for calling his personal cell phone from Penner's work phone and told Penner to call back using Penner's personal cell phone.[23] The next day Lindquist told Penner that he did not understand the Court of Appeals decision in the *Nissen* litigation and again

[22] Goodman does not recall that she told Merrival, in particular, not to document the situation in an email. However, the alleged direction would be consistent with the PCPAO's policy regarding emails described above.
[23] By calling Lindquist's personal cell phone from his work phone, Penner put Lindquist's private cell phone number in his work phone call logs, which could be subject to a PRA request.

admonished him, this time for not being a team player for putting Lindquist's cell phone records at risk of disclosure.

Penner reiterated and confirmed these events in his interview. Lindquist responded that he was reaching out to Penner on a personal level as a friend to provide him with support. He said if Penner intended to discuss work, Penner should have returned the call to Lindquist's work cell phone. Lindquist did not deny admonishing Penner for the return call.

I credit Penner's version of the conversation. If Lindquist was calling Penner as a friend, Lindquist would not have told Penner to read the newspaper article and call him back; the details of the article would be irrelevant to any expression of sympathy or understanding. The details would only be important if Lindquist wanted to fashion a public statement in response to the decision, or discuss the impact of the decision on the case and/or the office, which are work-related conversations. Under these circumstances, I find that Lindquist told Penner he wasn't a team player because Penner would not play along with Lindquist's preference to have the conversation on a PRA-proof basis.

3. **Prejudicial Public Records.** Finally, the Merrival Complaint alleged that Lindquist prepared and sent an e-mail because he thought it would hurt the political campaign of a judicial candidate if it was produced in response to a public disclosure request. Lindquist sent the email referred to in the Complaint, dated January 20, 2011, to members of leadership regarding "affidavits of prejudice." Exhibit 2. Lindquist wrote, "Judge Arend repeatedly treated two of our outstanding DPAs, Kevin McCann and Steve Penner, disrespectfully and unprofessionally." He said that members of the victims' families complained about the treatment and advised DPAs to consider filing an affidavit of prejudice against Judge Arend "on our more serious cases."

According to Penner, he and former Homicide Chief Kevin McCann prosecuted a case in November 2010 involving a defendant who assisted the accused murderer of the Lakewood police officers. Penner said that Lindquist assigned McCann to the trial and directed him to do any public appearances associated with it because McCann was campaigning for a judicial position at the time.[24] Pierce County Superior Court Judge Stephanie Arend presided over the trial and, according to Penner, seemed to treat McCann poorly for reasons that were unclear to them. Judge Arend treated Penner just fine, so he and McCann decided that Penner would argue important motions during the trial. Penner said that Lindquist spoke about running someone against Judge Arend, but Penner had no knowledge regarding the origin of the email.

Lindquist said that he had high respect for Judge Arend as a person and judge and wrote the email after the case was resolved due to concerns expressed by the family. He recalled that Judge Arend was not running for election in 2011 (judges run in presidential years, which was 2012) and said that he stayed out of her next race because her opponent was on the TPCBA

[24] Penner also emphasized that McCann was well-qualified to handle the case and was more experienced than Penner.

magazine's editorial board. Lindquist's Chief of Staff, Dawn Farina, labeled the allegation "ridiculous;" she said Lindquist met with Judge Arend and her political consultant about Lindquist's concerns afterwards and "everything worked out."

Lindquist's former Chief Criminal Deputy Mary Robnett had a completely different recollection. She said that Lindquist was unhappy with Judge Arend and worked on several drafts of an email stating that Judge Arend had done some things that were prejudicial to the office and McCann. She confirmed that Lindquist assigned McCann to the case because he was running for office at the time and would get free publicity from the trial. And, Robnett recalled that Judge Arend was critical of McCann, so Lindquist wrote the email to make her sorry for treating McCann that way. Lindquist told Robnett that it will look really bad when the TNT asked for the email during the next election cycle.

I find that the allegation in the Merrival Complaint is credible, *i.e.*, Lindquist drafted the "affidavits of prejudice" email for the purpose of retaliating against Judge Arend for her treatment of McCann. First, many witnesses confirmed that Lindquist supported McCann's judicial aspirations in a variety of ways, some of which are described more fully below. Witnesses also said that Lindquist saw himself as a judge-maker; one former Superior Court judge said that Lindquist once stated, "I elect judges, the people don't."[25] Most importantly, Robnett was one of Lindquist's most trusted deputies at the time and was in a position to share with Lindquist his most intimate confidences. Her recollection is consistent with Penner's and, in my opinion, she has more to lose than gain from revealing those confidences.

D. Violation of State and Federal Labor Relations Acts

Both the Merrival and the Penner Complaints allege that Lindquist engages in various activities that interfere with the operation of the Pierce County Prosecuting Attorney's Association ("Guild"), which is the DPA's collective bargaining representative.

1. The Guild First Vice President Election.

Allegation: Both Complaints alleged that Jim Schacht decided to run for the Guild's First Vice President position in 2014 and afterwards DPA Erica Nohavec, a supporter of Lindquist's, decided to run against him.[26] Division Chief Tim Lewis allegedly instructed junior DPAs in the Misdemeanor Division to vote for Nohavec, but Lindquist refused to take any action because it was a "Guild issue."

Summary of the Factual Findings: Team Chief Erica Nohavec decided to run for the Guild position before DPA Jim Schacht and Lindquist did not encourage her to do so, at least in an effort to defeat him; Lindquist explicitly and implicitly communicated to leadership that they should encourage DPAs to vote for Nohavec instead of Schacht in the election; Misdemeanor

[25] Judge Arend did not return my two telephone calls to her courtroom.
[26] Merrival alleged that Lindquist encouraged her to oppose Schacht.

Division Chief Tim Lewis questioned DPA Annie Guttierez about what went on at a Guild meeting where the candidates spoke and how specific DPAs were going to vote; Guttierez, a Guild officer, reported Lewis' conduct to the Guild; Lindquist passed Guttierez over for promotion because she reported Lewis, one of his Division Chiefs, to the Guild; Lindquist has promoted the last four Guild Presidents to leadership positions in his administration.

Summary of the Evidence: Lindquist said that Nohavec was already in the race when he heard about it and he did not encourage her to run for the position. Team Chief Scott Peters said that he was the incumbent First Vice President of the Guild at that the time, but had decided to give up the position to run for President and replace Jared Ausserer when he was promoted out of the bargaining unit. Peters said that Nohavec was the first person who contacted him about the position, followed by Schacht a few days later. I find on the basis of this evidence that Nohavec decided to run before Schacht and Lindquist did not encourage her to do so, at least in an effort to defeat him.[27]

During the election campaign, Lindquist said he heard that the race had become mildly divisive and some people weren't going to vote. So, he spoke with Lewis and told him that Misdemeanor DPAs should vote, and for anyone they wanted. Penner disputed Lindquist's version of events; he said that Lindquist told leadership they should tell the DPAs to vote for Nohavec over Schacht. Lewis said that Lindquist wanted to know from him whether the Misdemeanor DPAs were voting in the election. Lewis knew that Nohavec was a good friend of Lindquist's and he was fond of her work, so Lewis understood that Lindquist wanted the junior DPAs to support Nohavec. I find that Lindquist explicitly and implicitly communicated to leadership that they should encourage DPAs to vote for Nohavec instead of Schacht in the Guild election.

Lewis said he asked at least one DPA, Annie Guttierez, if the Misdemeanor Division DPAs were voting and if Nohavec had their support. He said that Guttierez was uncomfortable with the question and told him that she had an obligation to tell the Guild's Executive Board, which Lewis said he understood. He recalled that Guttierez was crying and he told her it was going to be OK.

Guttierez' version of the situation wasn't nearly so benign. She recalled that the First VP was the only contested position at the time and the election was quite contentious. Lewis, her Division Chief, questioned her about what happened at the Guild meeting where the candidates made their pitches to the membership. He tried to confirm negative statements about Nohavec made by DPA John Neeb and asked if DPAs in Misdemeanor "know how they should be voting [*i.e.*, for Nohavec]." He also asked Guttierez how specific DPAs were going to vote, which gave her the impression that he was tallying votes. Guttierez responded that she was Secretary of the Guild and was not comfortable answering his questions. She also believed that, as a member of

[27] Nohavec is on leave of absence from the office so I was unable to speak to her about the Guild election and could not confirm Lindquist's claim that he did not encourage Nohavec to run for the position.

the Guild's Executive Board, she had to do something, so she reported Lewis' conduct to DPA Lisa Wagner (a Guild officer), who promised to keep her identity confidential.

Subsequently, on two different occasions, Lewis questioned Guttierez to determine who had reported him to Wagner. During this process, Lewis offered Guttierez the opportunity to try a four-person homicide case, which shocked Guttierez because the prospect of trying a homicide case had never been discussed with her in her performance evaluations or otherwise.[28] Finally, Lewis again questioned her about whether she had reported him saying, "There are questions on the 9th floor [where the senior leadership offices are located]; people are questioning your judgment. Annie, did this come from you?" When she finally broke down and told Lewis, "yes," he said, "I understand; I will go to 9 and fix this." He came back a few minutes later and said, "Annie, everything is going to be fine. You are going to get the next County Attorney II," which would be a promotion for her.

Unfortunately for Guttierez, Lewis could not deliver on his promise because Guttierez was passed over for promotion around the same time period as the Guild vote. Lindquist said that when Guttierez' promotion was presented to him, no one suggested that her complaint was a reason for her not being recommended for promotion. Farina said that Guttierez was passed over because others were ahead of her, and Guttierez had "checked out" and was not acting as a mentor to less senior DPAs in the Misdemeanor Division. Since then, according to Farina, Guttierez was promoted because she responded appropriately by improving.

I don't find these explanations credible. Team Chief Michelle Hyer, Guttierez' mentor, said that Lindquist spoke to her briefly about Guttierez to find out whether Guttierez was a "team player" after Guttierez questioned whether Lewis overstepped his boundaries. Consequently, Hyer suggested to Guttierez that she apologize to Lindquist and Farina out of concern for her "career-wise." Guttierez' supervisor, Jennifer Sievers, said that Lewis told her leadership didn't know if Guttierez could get promoted because they were not able to trust her. And, as noted, Lewis told Guttierez that "the 9th floor" leadership was questioning her judgment. On the basis of this evidence, I find that Lindquist passed Guttierez over for promotion because she reported Lewis, one of Lindquist's Division Chiefs, to the Guild.

Another phenomenon related to the Guild is worth mentioning here. That is, the last four Guild Presidents have all been promoted to leadership positions and replaced by the then sitting First Vice President: Robnett was the Guild President when she was the Team Chief of SAU, and then left the position and the bargaining unit after Lindquist promoted her to Chief Criminal Deputy; John Sheeran, the Guild First Vice President at the time, took over as Guild President until Lindquist promoted Sheeran to Felony Division Chief; Jared Ausserer followed Sheeran as Guild President until Lindquist promoted him to Homicide Division Chief; and, Scott Peters, the current Guild President, followed Sheeran. Lindquist appointed Peters to the position of Team Chief of Team III when he assumed the role of Guild President.

[28] Assignment of a multi-person homicide case is a vote of confidence in the PCPAO and would be viewed favorably for promotion purposes.

Lindquist explained this pattern by observing that leadership qualities are the same wherever they manifest themselves, so it makes sense for Guild Presidents to assume leadership positions in the office. Farina said that she understood the perception that Guild Presidents have been selected for leadership. Her explanation was similar to Lindquist's – these DPAs were selected as Guild President because they stood out as good lawyers and colleagues, which is a perfect match for leadership positions in the office. Whether the phenomenon is simply an effective leadership selection tool, or a method of influencing the Guild and co-opting its leaders, it might explain the interest of Nohavec and other Lindquist supporters in seeking the Guild's First Vice President position.

2. Monitoring Guild Activities.

Allegation: The Merrival Complaint further alleges that "Lindquist monitors all Guild activities and gathers information from members to influence the collective decision making (sic)."

Summary of the Factual Findings: Lindquist closely monitored the activities of the Guild, particularly as they pertained to matters important to him, such as the amicus brief in *Dalsing*; and, Lindquist rewarded and retaliated against DPAs' because of their union activities.

Summary of the Evidence: Lindquist said that he doesn't ask what goes on in Guild meetings, but "the information filters up to me." One senior leader said he has been in leadership meetings and what happened in Guild meetings was discussed, so the information got back to Lindquist. Sunni Ko, a former Team Chief, said that she and others reported to Lindquist what happened at Guild meetings, which she described as "the normal protocol." She said that Lindquist expected her to report back and wanted to control the Guild. Robnett said that it is "absolutely true" that Lindquist was interested in the Guild meetings. He asked DPAs what happened at meetings (*e.g.*, who said what; how people voted; whether the Guild was going to endorse a particular candidate) and people would go by his office to tell him.

For example, Robnett recalled that Lindquist was very interested when McCann, who Lindquist supported, was running for judge. Lindquist wanted to know about the Guild discussion and who said what because the Guild's endorsement and financial support was important to McCann. Merrival said that early in Lindquist's tenure Lindquist introduced a new performance evaluation tool, which the Guild discussed. When DPAs expressed concern that it might be used to get rid of employees, Merrival suggested that they should give it a try. Merrival said that after that meeting Lindquist thanked him for standing up for him. Lindquist said he had others there that could have done the same thing and, "I don't know why they didn't."

DPA Brian Leech had a similar but more negative experience. During a Guild meeting to decide if the Guild was going to sign an amicus brief in the *Dalsing* case, Leech said he commented that the brief was not accurate and the Guild needed more time to consider it. He said that DPA Jason Ruyf, a Lindquist supporter, became upset with Leech and asked in a raised

voice, "What good can become of this [delay]?" Other witnesses confirmed this exchange. DPA Annie Guttierez said that shortly after the meeting she saw Lindquist in Ruyf's office. First thing the following Monday, Penner said that Lindquist called him into his office and asked, "What is wrong with Brian Leech," saying that Leech argued against the *Dalsing* amicus brief at the Guild meeting. Lindquist told Penner, "Talk to Dawn about moving him back to Remann Hall."[29] Penner said he never did talk with Farina; instead, he spoke with Sheeran a few days later, who said they were not going to move Leech.

I find that Lindquist closely monitored the activities of the Guild, particularly as they pertained to matters important to him, such as the proposed performance evaluation tool, judicial endorsements, and the amicus brief in *Dalsing*. Furthermore, as the foregoing examples indicate, the union activities of DPAs are sometimes rewarded by Lindquist (Merrival and Ruyf), and at other times they lead to retribution by him (Guttierez and Leech).

3. Elimination of Union Position.

Allegation: Penner's Complaint alleges that in 2013, former DPA Grant Blinn decided to seek the Lakewood Municipal Court Judge position. To support his candidacy, Lindquist moved Blinn from his Misdemeanor Division Chief position to leader of the homicide trial team, reclassified the position to a Division Chief to protect Blinn's salary, and renamed the position "Homicide Chief." Penner claimed that Lindquist believed that the title of Homicide Chief would help Blinn's judicial application. Penner alleged that Lindquist made the change unilaterally and without notice to the Guild, despite the fact that it eliminated a bargaining unit position.

Summary of the Factual Findings: Lindquist laterally transferred Blinn from his position as Misdemeanor Division Chief to Homicide Division Chief; Lindquist replaced Blinn with Lewis and upgraded Lewis' classification to Division Chief, thereby removing his position from the Guild bargaining unit; the PCPAO upgraded Lewis' position unilaterally and without notice to the Guild; the evidence suggests that Lindquist's motive in transferring Blinn was to keep him at the PCPAO, but the Homicide Chief position has been a stepping stone to a judgeship, which Blinn eventually took advantage of.

Summary of the Evidence: According to Lisa Hilligoss, the PCPAO's Human Resources Manager, Blinn retained his position and salary as a Division Chief when he moved to the homicide position; it was a straight lateral transfer. Instead, the office reclassified Tim Lewis' County Attorney 3 position when he replaced Blinn as Misdemeanor Division Chief. Farina stated in an email to Hilligoss, dated September 24, 2013:

> Please draft a letter to Human Resources asking that Tim Lewis (CA3 position) be reclassified to Senior Supervising Deputy Position (Misdemeanor Division

[29] Remann Hall houses the Juvenile Division and is reputedly where Lindquist transfers DPAs who are considered "malcontents." *See,* Section V., *infra.*

> Chief). Tim is being reassigned to our Misdemeanor Division as its Chief. Please state in the letter that Tim will supervise a division that files more than 10,000 case (sic) per year, with a staff of more than 29. Double check on the number of staff in the misdemeanor division. Please also state that we will absorb the costs in our 2013/2014 budget. Cindy can give you the cost of the reclass.
>
> Grant will be keeping his position and moving to the Homicide Team where he will be the lead attorney overseeing the homicide unit.

Hilligoss admitted that the move was made unilaterally by the office, without notice to the Guild, with the effect of eliminating a position in the bargaining unit, the County Attorney 3 position formerly occupied by Lewis.

Regarding Lindquist's motive for moving Blinn, Sheeran, Blinn's brother-in-law, said, "I know this one pretty well – it was not done to promote Blinn's judgeship; Mark wanted him to stay and gave him the position to encourage him to stay." Sheeran said that Blinn took the position because it was interesting and he could try any homicide case in the office, but eventually Blinn "jumped" to the judiciary.[30] Lindquist and Farina both confirmed that they made the move to encourage Blinn to stay with the PCPAO.

That said, the movement from Homicide Chief to the judiciary is a phenomenon similar to the movement from Guild President to PCPAO leadership described above. Kevin McCann and Jerry Costello, who preceded Blinn, both moved from the Homicide Chief position to judgeships in Lakewood Municipal Court and Pierce County Superior Court respectively.[31] Undoubtedly, it was this history that caused many witnesses to speculate that Lindquist moved Blinn into the position to be next in line.

E. Violation of Family Leave Act

Allegation: The Penner Complaint alleged that Lindquist directed then Criminal Deputy Phil Sorenson to contact DPA Jared Ausserer, then SAU Team Chief, to return to the office from FMLA leave to re-file charges against Dalsing.

Summary of the Factual Findings: The allegation is true.

Summary of the Evidence: Farina confirmed that Ausserer's leave began on December 21, 2013. She said he came into the office about once a week during his leave to check on his cases until his leave ended on March 15, 2014. Farina further stated that the office did not instruct Ausserer to return to the office before his leave ended; he made the final charging decision after he came back.

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[30] I did not interview Blinn because I was advised that he preferred not to participate, but would cooperate fully and honestly, if asked. I chose to honor his preference.

[31] The position was not classified as a Division Chief when McCann and Costello occupied it.

Ausserer said that he told Lindquist that he planned to take a 3-month leave of absence and would return to the office one or two times a week to keep up with his cases. As it turned out, Ausserer said that he returned to the office 17 times to handle multiple hearings on various cases.

In early February, Ausserer said that former Chief Criminal Deputy Phil Sorenson called him and said he had to come into the office to charge Dalsing. Ausserer asked, "Did you get any new information? I am not going to come in and charge her unless you have something new; I'm not going to do it." Sorenson responded that it was not him that was asking, but Farina, who wanted him to come in the next day. Ausserer said that he was planning to come in on Friday anyway, so he went in and checked his emails, spoke with the detectives on the Dalsing case and determined there was no new information. So, Ausserer told Sorenson and Sheeran that there was no basis to charge her.

Ausserer said that he returned to the office from leave as scheduled on March 17, 2014. After he returned, DPA Jim Richmond provided him with new information on Dalsing (*see* declaration of probable cause), which Ausserer had the detectives follow up on. Ausserer said he determined that the new information supported a charge and filed new charges in late March.[32]

In short, while on leave, Ausserer voluntarily returned to the office a couple of times a week to work on his cases. Once, in early February, he returned at Sorenson's and Farina's direction on a day he was planning to visit the office anyway. He refused to re-file charges on Dalsing at that time, as Farina requested. He re-filed them when he returned to work in mid-March after his leave.

F. Violation of State and Federal Employment Laws

Both the Merrival and Penner Complaints contain numerous allegations of employment law violations. I will review those in the Merrival Complaint first, followed by the Penner Complaint.

1. Lack of Diversity.

Allegation: The Merrival Complaint alleged that the PCPAO does not have any person of color or of minority status in the administration; minorities are not well represented among DPAs; and, the office does not reflect the diversity of the community.

Summary of the Factual Findings: No person of color holds a leadership position in the PCPAO; minorities have historically not been well-represented among DPAs; however, as a result of efforts of the office generally and the Diversity Committee in particular, the minority

[32] I do not make a finding here regarding who made the decision to file new charges against Dalsing. One DPA reported that Ausserer told him at the WAPA conference in June 2015, when the subject of the whistleblower complaints came up: "I don't make the decisions; Dawn doesn't make the decisions; Mark makes them."

population of DPAs in the office is improving, and the population in the Misdemeanor Division in particular is on par with the local community.

Summary of the Evidence: Regarding the issue of minorities in leadership, Hilligoss said that DPA James Curtis, who is African American, is Chair of the PCPAO's Diversity Committee. In that capacity, she said that he attends the Team Chief meetings and the two leadership team meetings (a full day in the spring; 2½ days in the fall). While Curtis acknowledged his role as Chair of the Diversity Committee, he agreed ("absolutely true") that the office has no minorities in leadership positions.

Hilligoss also provided minority demographics for the PCPAO (Misdemeanor DPAs; DPAs Overall; Office Overall) as of October 2013, compared to various populations: UW and Seattle University Law Schools; Pierce County; State of Washington. Exhibit 3. She updated and expanded the analysis on August 20, 2015 to include various minority populations. Exhibit 4. Her take on the data was:

> [A]lthough our percentage of minorities for the entire office is low, our percentage of minority population in the Misdemeanor Division is on par at 32%. This is important to note as all new staff hired at the Prosecutor's Office start in the Misdemeanor Division. This shows that although historically the office might not have done a great job of ensuring a diverse work group, this is not true any longer. Additionally, over time this diverse group will expand to other areas of the office as employees promote out of the Misdemeanor Division.

Curtis said that he recruits minorities in a variety of ways. He attends the Minority Job Fair, recruiting and urging the hiring of minorities as interns; he has brought students of color to the office as a part of the Think Together program; and, he makes presentations at all local high schools. He said that there were only five African Americans in the office, for example, but he believes that the work of the Committee has been effective.

G. Hostile Workplace

1. Culturally Insensitive Remarks.

Allegation: Merrival alleged that Lindquist made the following culturally insensitive remarks.

Summary of the Factual Findings: The evidence does not support the allegation.

Summary of the Evidence: The evidence of each alleged remark is summarized below.

a. "Are you going to the casino?" Merrival (a tribal member) alleged that Lindquist asked him this when they pass outside the courthouse. Lindquist agreed

and said he asked Merrival about eating at the Emerald Queen casino because the two of them used to have lunch at the casino on a semi-regular basis. A number of other witnesses thought the allegation was odd because Lindquist, Merrival and others often went to the casino for lunch.

b. "You should get rid of these payments to tribal members because they just use them to buy guns." Merrival alleged that Lindquist made the statement to him when they were eating at the casino. Lindquist said that he and Merrival had a discussion about how the Puyallup and Tulalip tribes use casino money differently, but he did not say they used the money to buy guns. I cannot determine whose recollection is accurate because no other persons participated in the conversation.

c. "Tribal loyalty." Merrival alleged that Lindquist refered to "tribal loyalty" in his annual speech to the office, *i.e.*, "people in the office need to stick together, those who do will succeed." Lindquist said that Peggy Noonan[33] ends one of her books, "Be good to your tribe," a concept he finds useful and has used. Many witnesses confirmed that Lindquist relies on various business leadership books to guide his management of the office.

2. Use of "N" Word in Closing Argument.

Allegation: This allegation refers to Farina's closing argument in *State v. Walker*. The Washington Supreme Court overturned the defendant's conviction, in part, because Farina used a PowerPoint slide in her closing that superimposed over the defendant's picture a quotation from the defendant that included the "N" word. The Court concluded that the use of the word wrongfully introduced race when there was no indication of a racial motive in the murder.

Summary of the Factual Findings: Farina did use the "N" word in her closing argument in the *Walker* case, which was related to the evidence in the case and is not indicative of a hostile work environment in the PCPAO.

Summary of the Evidence: Lindquist said that he has great respect for Farina as an attorney and does not believe that she intended to insert race into the case inappropriately. However, whether he agreed or disagreed with the Court, he said the PCPAO must play by the rules set down by the Washington Supreme Court. DPA Jim Schacht, regarded by most witnesses as a very good trial lawyer, said that the use of the word was related to the specific arguments made in that case, so he did not consider it to be evidence of a hostile work environment in the office. He said that, as the appellate courts have issued opinions regarding the use of PowerPoint in closing arguments, the Appeals Division Chief, Kit Proctor, has sent out emails admonishing DPAs about the use of PowerPoint and urging them to read the cases.[34]

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[33] Peggy Noonan is an American author of several books on politics, religion, and culture, and a weekly columnist for The Wall Street Journal.

[34] DPA Annie Guttierez recalled that DPAs in the Misdemeanor Division have received training on the use of PowerPoint in closing arguments.

3. Assigning DPA James Curtis to Prosecute a Predominately African American Caseload.

Allegation: Merrival said that he believes Curtis, an African American DPA, has been pigeon-holed because of his race.

Summary of the Factual Findings: Curtis is on the Gang Team at his own request because he wants to litigate Class A felonies and violent crimes and to help the Hilltop community where he lives. The PCPAO did not assign him to prosecute gangs because of his race.

Summary of the Evidence: Curtis works on the Gang Team prosecuting crimes committed by gangs, including Black gangs in the Hilltop area of Tacoma. He said that the allegation offended him and it was wrong to suggest that he targeted defendants based on race. Curtis recalled that he worked on his first gang case in the drug unit with Penner that involved a homicide victim Curtis knew. After they tried the case and secured a conviction, Curtis asked Lindquist if he could transfer to the gang unit because he grew up in the Hilltop community and wanted to prosecute Class A felonies and serious violent crimes. Curtis said that gangs affect his community and he is passionate about serving persons from there.

Greg Greer, the Asst. Criminal Division Chief and team leader of the Gang Team, said that the allegation did not make sense to him; he did not agree that a juror will decide against a African American defendant because the prosecutor is African American. Greer stated that he has tremendous respect for Curtis, who has a unique perspective because he grew up on the Hilltop. According to Greer, Curtis does a lot of work in African American community and his effort to give back is unparalleled.

4. Disparate Treatment of Hispanic DPA.

Allegation: The Merrival Complaint alleged that leadership forced out a Hispanic DPA for failing to prosecute cases aggressively, yet did not similarly target a Caucasian DPA who lacked aggressiveness, but displayed a Lindquist campaign poster in his office.[35]

Summary of the Factual Findings: Lindquist engaged in active performance management of a Hispanic DPA who, by all accounts, had serious performance issues; the Caucasian DPA also had performance issues, but Lindquist did not take personnel action against him because he was retiring soon. Race does not appear to be a factor in these cases.

Lindquist said that he supervised the Hispanic DPA when he was the Team Chief of the Drug Team. He reported to leadership that the DPA was falling short of expectations in many ways and the DPA resigned. Lindquist could not recall if the DPA resigned in lieu of termination. Kevin Benton, Chief of the Juvenile Division, opined that the Hispanic DPA did

[35] It is unclear whether the allegation is disparate treatment because of race or political activity.

not perform well as a prosecutor. In contrast, Benton said that the Caucasian DPA had the ability but lost interest over time and is now retired. Lindquist said that Merrival and others complained about the Caucasian DPA's work, but no one "went down that road very far," so the situation never approached termination. Lindquist also offered that he was unaware that the Caucasian DPA was a supporter in any of his campaigns. Finally, another DPA stated that the Caucasian DPA was ineffective and "a lot of people clean up his messes," but people overlooked his shortcomings because he was getting ready to retire.

5. Older DPAs Don't Have a Future in the Office.

Allegation: The Merrival Complaint alleged that Lindquist made statements to the effect that he keeps older DPAs around to cultivate the careers of younger ones.

Summary of the Factual Findings: Lindquist told a long-term prosecutor, "We are here to cultivate the careers of younger attorneys. I expect you to assist." The remark was made in the context of the transfers of the long-term DPA to try Class B/C felonies, and the transfer of a relatively inexperienced DPA, who was Lindquist's campaign manager, to try Class A felonies, an assignment she sought.

Summary of the Evidence: According to DPA Kawyne Lund, Lindquist made a similar statement to her. Lund is a County Attorney 4 who has been with the PCPAO since 1980. In 2012, she was transferred against her wishes to the Appeals unit. Lund said she wanted to get back to a trial unit from the beginning of the assignment and finally got the word from Penner in July 2014 that she was moving to Team 1 to prosecute Class B/C felonies. Initially, she was ecstatic with the transfer because she assumed that there was no opportunity to try Class A felonies, but learned later that day that DPA Jim Schacht was being transferred to Appeals and Bryce Nelson was replacing Schacht on Class A felonies. She expressed her displeasure to Penner, who said, "We have to give these young attorneys a chance." Lund said she responded, "Why can't he wait like the rest of us did?"

First thing the following Monday, Lund said that Lindquist called her into his office and told her, in effect, he was not happy that she was not satisfied with her transfer. When Lund asked why Nelson, a much less experienced DPA, wasn't assigned to prosecute Class B/C felonies to get more trial experience, Lindquist said (three times), "We are here to cultivate the careers of younger attorneys and I expect you to jump in and do it." Lund said that she responded, "No other major employer uses that business model," to which Lindquist reportedly replied, "All of them do!" After the exchange, Lund sent a text message to another DPA to document Lindquist's statement, which she believed was ageist: "We don't promote based on ability, experience, (can't remember third, but like time w/ office), we are here to cultivate the careers of younger attorneys. I expect you to assist. (quote)."

Lindquist said that he probably did not use those words, but does believe that one of the organization's goals is to cultivate younger talent. Sheeran had been telling him that Nelson

needed to try Class A felonies and they were looking for a position for him. Lindquist told me that he was "trying to cultivate the careers of the young trial attorneys and give them a chance to try big cases."

I find that Lindquist made the statement quoted in the text message for the following reasons: Lund has nothing to gain (in fact, she is concerned that she has everything to lose) by making the statement; she recounted the statement contemporaneously in a text message to a coworker; and, Lindquist agreed that he transferred Nelson to Class A felonies (instead of Lund) because he was "trying to cultivate the careers of the young trial attorneys."

6. Lindquist Prefers to Hire Physically Attractive People.

Allegation: The Penner Complaint alleged generally that Lindquist prefers to hire and surround himself with physically attractive people; he offers jobs and assignments to attractive people over potentially more qualified candidates; and, he jokingly used the phrase, "the person meets our hiring criteria," as a euphemism for being physically attractive.

Summary of the Factual Findings: Lindquist has made remarks about the physical appearance of candidates and appearance is a factor in his decision-making.

Summary of the Evidence: Penner said the Lindquist has commented a couple of times, "She meets our hiring criteria," followed by a laugh, referring to the candidate's appearance. Lindquist denied commenting on a candidate's physical appearance, but said he has expressed the opinion that it is important to hire people who present well in court. Physical appearance is not a factor, according to Lindquist – rather, what is important is how the person conducts him/herself. Farina likewise denied hearing Lindquist comment on a candidate's looks and emphasized that she has interviewed all interns, volunteers, DPAs and support staff with him. She said that Lindquist explains in the interviews that he is looking for the "trifecta" (if the applicant a good colleague, a good worker and a good emissary for the office).

Robnett had a different recollection; she said that Lindquist wanted to know applicants appearance before he hired them. She recalled Lindquist asking what pending hires looked like - "It mattered to him." Former PCPAO Human Resources Manager Becky Stover said that she heard Lindquist ask several times if a female applicant was "HWP," meaning "height weight proportionate." One of Lindquist's team chiefs recalled Lindquist commenting that two young Misdemeanor DPAs (male and female) were "incredibly good-looking people." The team chief observed that it was an "odd thing to say about coworkers."

I find on the basis of these witnesses' testimony that the physical appearance of candidates is a factor that Lindquist considers during the hiring process, but not a motivating factor in his decision-making. I further find that he has made comments about the physical characteristics of both employees and applicants.

More specifically, Penner also offered the following as examples of Lindquist's focus on physical appearance during the hiring process.

a. Appeals Division Hire. Penner's Complaint alleged that the Appeals Division hires two new law students every year for two-year internships. In 2013, Lindquist allegedly passed over the top choice of Kit Proctor, Chief of the Appeals Division, and selected two lesser-ranked choices because the top candidate was overweight. One of these two choices then decided at the last minute not to start the position, leaving the Appeals Division one intern short for the next two years.

Penner said that Proctor ranked four candidates and sent them to Lindquist and Farina for interviews. He said someone told him that the top ranked candidate was overweight and Lindquist and Farina picked the second and the third ranked applicants. He never heard why they chose them. When one of the candidates refused the offer, Penner went back and made an offer to the first candidate, who had taken another job by that time.

Lindquist did not recall the selection process. Farina simply recalled interviewing interns from the appellate unit and agreeing on the top candidate with the qualifications and personality to argue before the Court of Appeals. She did not recall a candidate being overweight.

Proctor said she sent three candidates to Lindquist for final approval. She confirmed that her first choice (female) was not selected, but did not recall much weight difference between her first two choices, both women. Proctor recalled that she discussed all three candidates with Lindquist after he interviewed them and said that Lindquist liked her favorite candidate, but "just really liked the guy," the third candidate.

I find no basis to conclude that Lindquist rejected the first candidate because of her appearance.

b. Public Information Officer. Penner's Complaint alleged that Lindquist created a "public information officer" position in 2013 and selected a new legal assistant with no legal experience in media relations to fill the position. The Complaint stated that "the basis for the decision appeared to be that she was young and physically attractive." Lindquist gave her an office next to his. The woman, who had been hired to be a legal assistant, ended up quitting after having to write press releases about the horrific crimes prosecuted by the office.

In addition to the above, Penner said that he met Emily Conlee, Communications Assistant, soon after she started. Conlee told him that she was hired as an extra-hire legal assistant and shortly afterwards was hired to do communications work. Lindquist recalled that he wanted to "open [the hiring process] up," but Farina said that she had a good person for the position who was articulate and a good writer. Farina said that Conlee was a volunteer legal

assistant, but had done some communications work in a previous job.[36] Farina said the move was a band aid fix; HR Manager Becky Stover had been doing both HR and communications and the office wanted to split the jobs. Stover said she was happy to focus on just one job and Conlee was competent and capable with relevant experience. Lindquist's assistant, Kelly Kelstrup recalled that Conlee was a legal assistant in the office already and had a lot of web experience, which she believed was the reason Conlee was selected for the position. Kelstrup didn't think that her selection was because of her appearance. Stover said that Conlee resigned because she wanted to go to law school and she had to prepare for the LSAT exam.

I find no basis to conclude that Lindquist selected Conlee because of her appearance.

c. Legal Assistant in the Homicide Unit. Penner's Complaint alleged that Lindquist made the final decision to hire a legal assistant in the homicide unit in 2013 based on her appearance because he had to walk past her every time he goes to his office.

Penner said that Lindquist commented in a meeting that he wanted to make sure the hire was someone that he didn't mind looking at because he has to walk by there every day. Penner also stated that the person hired, Dani Crosswhite, was attractive but also a very good legal assistant. Lindquist said that the allegation was "absolutely false" and didn't know who Penner was talking about. Sheeran, who would have made hiring recommendations to Lindquist, according to Penner, said "I believe I know what happened; the only other person being considered was grumpy."

I find that physical appearance was not the motivating factor in Lindquist's selection.

d. Misdemeanor DPA. The Penner Complaint alleged that in 2014 three DPA positions became available in the Misdemeanor Division. Misdemeanor Chief Tim Lewis and PCPAO HR Manager Lisa Hilligoss interviewed seven candidates and Lewis ranked the successful candidate seventh. Nevertheless, Lindquist told him to make the candidate, an attractive young woman, "passable." Since then, she has performed poorly in trial.

Penner recalled being in a meeting with Lewis, who had seven candidates for the position with the successful candidate ranked last. Lewis said in the meeting that the candidate was not capable of doing the job, but Lindquist told him to do anything he could to make her "passable." Lindquist said that Lewis described the candidate as a very good colleague and a good emissary for the office, but needed work as a trial attorney. Lindquist commented that a person can learn trial skills, but not the ability to be a good colleague and emissary.

Lewis said that the allegations were "all correct": he had concerns about the candidate's capabilities; she was not at par with her counterparts; Lindquist said he wanted Lewis to work with her in an effort to improve her proficiency as a DPA. Lewis further stated that Lindquist

[36] Conlee's resume indicates that she "Designed and drafted content for the website and for advertising brochures" for the law firm that employed her immediately prior to her job at the PCPAO.

asked whether she got along with her colleagues, to which Lewis replied, "She represents the office well, but I am not sure if she can become a good trial attorney." By way of context, Lewis added that two other applicants graduated in the top 5% of their class and presented well in front of a jury; he said the successful applicant did not have those skills and did not compare well with them. Finally, Hilligoss recalled giving the candidate (who was "cute") a rating of 2 out of 5, which placed her at the bottom of the group. She said she was disappointed but not surprised when Lindquist selected the candidate – he wanted her name to come forward, so she obviously had an edge. Hilligoss also commented that the hire meant that the office was unable to hire another male temporary, who both she and Lewis said was a very good lawyer.

This allegation and hiring process presents an opportunity to explain more fully the "trifecta," the criteria Lindquist uses to assess the performance of his staff. As noted, Lindquist implemented a new performance evaluation form that emphasized a set of "core values," which have come to be known as the "trifecta:"

- Good Worker - Consistently carries out duties of the job, meets expectations, and performs professionally.

- Good Colleague - Consistently promotes good will, supports co-workers, and treats them respectfully and professionally.

- Good Emissary for the Office – Consistently represents the office well with members of the justice system and the community at large, advances goals of the office, and acts professionally.

Note that only one of these three values focuses on good work; two of them instead focus on relationships, both within and outside the office. In the case of the Misdemeanor hiring process, Lindquist emphasized the fact that the successful candidate was a good colleague, *i.e.*, she got along well with her coworkers. I find that the candidate's "cute" appearance for Lindquist was a plus factor when considering whether she would make a "good emissary," that is, represent the office well in the public and the community. These two values apparently overwhelmed the undisputed fact that the successful candidate was not a capable trial lawyer, either before or after she was hired. The situation underscores Lindquist's stated belief that a person can learn trial skills, but not the ability to be a good colleague and a good emissary.[37]

[37] Notably, being a good trial attorney does not appear to be a factor in Lindquist's assessment of whether a DPA is a good emissary of the PCPAO.

H. Violation of Whistleblower Act

1. Steve Merrival.

Allegation: Penner's Complaint alleged that after Merrival filed his Complaint, Lindquist directed Farina to appear on camera and Asst. Team Chief of the Civil Division, Denise Greer, to issue a written statement that Merrival was a disgruntled employee because he had been passed over for leadership positions. Penner said that Merrival was the drug trial team negotiator, enjoyed his position and never sought a leadership position. Penner's Complaint further alleged that Lindquist stated at leadership meetings that Merrival had a "meltdown" and was not acting "adult or mature." Penner and Greer advised Lindquist to stop criticizing Merrival publicly.

Summary of the Factual Findings: The PCPAO issued statements to the press after Merrival filed his Complaint that he was disgruntled and unhappy because he was passed over for leadership positions; the PCPAO's statements were inaccurate and intentionally misleading; Lindquist intended that the description of Merrival as a disgruntled employee would place him in a negative light and thereby minimize the impact of the Complaint on himself and the PCPAO.

Summary of the Evidence: Greer said that leadership gathered to respond to the TNT's request for a comment about the Merrival Complaint, which was the office's first notice of it. She said that the two statements were based on the group's knowledge of Merrival's employment history, *i.e.*, no one reviewed his employee file. Lindquist asked her to issue the written statement because the Chief of the Civil Division was not available.[38]

All leadership witnesses said that the characterization of Merrival as being "disgruntled" for being passed over was based on two things: (1) a statement by Merrival in the Complaint ("Younger or inexperienced staff, who are reputed to be in favor with Lindquist, are appointed to leadership roles and given administrative tasks associated with increased earnings such as Erika Nohavec, Team Leader; Michelle Hyer, Team Chief; Scott Peters, Team Chief; Jared Ausserer, Homicide Chief vis a vis Jim Schacht, Steve Merrival, etc."); and, (2) Merrival's resentment when Maureen Goodman was appointed his Team Chief.

Goodman stated in a declaration submitted in support of Lindquist's and Farina's opposition to a WSBA Bar Complaint against them: "In May, 2012, I was appointed Team Chief of the Drug Unit and returned to that unit. I heard from a co-worker at that time that Mr. Merrival said he was not happy I was appointed because I had less experience than he had." Goodman said that Merrival told her that she was not as experienced as others, but seemed to accept that she was a hard worker and doing a good job.

Merrival denied being disgruntled and the TNT article that reported his Complaint included the following quote from him: "I'm not a disgruntled employee. I'm a person who's

[38] Greer pointed out that her written statement did not use the word, "disgruntled;" the TNT article quoted her as saying Merrival was "unhappy that he has been passed over for leadership positions." "Staffer Files Whistleblower Complaint Against Pierce County Prosecutor Mark Lindquist," Tacoma News Tribune, May 13, 2015.

committed to justice here." Merrival said that he never sought appointment to Mark Lindquist's administration – he did not want "any part of Mr. Lindquist's administration."

HR Manager Lisa Hilligoss could not recall leadership referring to Merrival negatively until his complaint. She said that leadership has said that Merrival "retired on the job," but indicated he was doing a "decent enough job." Hilligoss further stated that she sits at the table when promotions discussed and was not aware that Merrival was ever upset for not being promoted. Another DPA said that Lindquist always praised Merrival for the number of cases that he processed in the drug unit and said that labeling him "disgruntled" was "embarrassing." One senior leader said that the label was Lindquist's "sound bite" for Merrival.

Multiple witnesses also confirmed that Lindquist said in a leadership meeting that Merrival had a "meltdown." This statement is similar to what Lindquist was reported to have said when Robnett went on leave of absence and then quit her position as Chief Criminal Deputy, *i.e.*, that she had a "breakdown."

I find that the PCPAO's statements to the press in response to Merrival's complaint were inaccurate and intentionally misleading. At most, Merrival's Complaint and his statement to Goodman indicate a frustration that the Lindquist administration did not place a high value on seniority in the PCPAO, or experience generally. Importantly, leadership viewed Merrival in a rather benign way before his Complaint – he was no "star" but he played a useful role. It wasn't until after he filed the Complaint did he become "disgruntled" about being passed up for leadership. Furthermore, by describing his behavior as a "meltdown," Lindquist suggested that Merrival's complaint was the product of a disorder, rather than a response to perceived grievances and injustices. I conclude that Lindquist used the "sound bite" of Merrival as a disgruntled employee to place him in a negative light and thereby minimize the impact of the Complaint on himself and the PCPAO.

2. Steve Penner.

Allegation: The Penner Complaint alleged that Penner suggested to Lindquist that he stop criticizing Merrival publicly, and that Lindquist's comments could be the basis of a retaliation claim. Afterwards, Lindquist admonished Penner for not "being present" or showing leadership regarding Merrival and Farina criticized him for a comment supportive of Merrival posted by his fiancé on a TNT site.

Summary of the Factual Findings: Penner told Lindquist that he should stop criticizing Merrival publicly; Penner's resistance to labeling Merrival and Penner fiancé's support of him precipitated Lindquist to confront Penner about whether Penner should remain a senior leader in the office.

Summary of the Evidence: Penner said he commented in a senior leadership meeting that they needed to stop criticizing Merrival publicly and shouldn't use the word "meltdown." During the meeting, Penner said that Farina chastised him about his fiancé's statement in the

comment section of the TNT when she "agreed" that Merrival was a good guy After the meeting, Lindquist told Penner that he is not "showing enough" on the issue of Merrival's complaint and he didn't appear to be "present." The next morning Lindquist asked Penner to take a walk with him and mentioned again that Penner was not showing leadership. Finally, that afternoon Lindquist told Penner that the Chief of the Criminal Division might not be the best position for him. Lindquist asked Penner how many hours he worked and Penner responded that he worked 35-40 hours a week. Lindquist replied that it was not enough – he should be working 50-60 hours a week.[39]

Lindquist said that after the Merrival Complaint he told Penner that "now is the time for the Chief Criminal Deputy to step up and keep the staff focused on the mission at hand and avoid the distractions." He further stated that the job cannot be done in 30-35 hours a week; we need people who are passionate about the office. When Penner said he cared about justice, Lindquist said he responded, "If you don't put the time in, then use of the word "justice" is just a platitude." Lindquist said that he expected Penner to offer to step up and work harder, but he did not hear that from him. Finally, Lindquist said that he had similar conversations with Penner previously.

Farina said there had been a concern among the senior leaders about Penner's hours of work – he came in late and left early and always went out at lunch.[40] She had also been involved in conversations with Penner specifically about the Chief Criminal Deputy position. Farina and Ausserer described a conversation with Penner in September 2014 about unprofessional conduct at a TPCBA event with his fiancé (now wife), a criminal defense attorney. Penner apparently responded that his relationship would continue and maybe the Chief Criminal Deputy position might not be the best fit under the circumstances. Farina also said that she noted concerns regarding Penner's performance in an evaluation in December 2014 and said that Penner admitted he needed to improve in the areas noted.[41] Lastly, Farina admitted telling Penner in a meeting that it was inappropriate for Penner's then fiancé to post an on-line comment in support of Merrival. She felt that this was an example of Penner failing to communicate with others.

I find that Lindquist's motives in admonishing Penner after Merrival filed his Complaint were mixed: he and Farina were not satisfied with Penner's work ethic and communication style, among other concerns; and, Lindquist perceived that Penner's loyalties were divided and his support of the office was insufficient to warrant him retaining the highest position in the Criminal Division. The evidence indicates that Lindquist, Farina, Penner and others all wondered at times whether he was suited for the position of Chief Criminal Deputy. I find, however, that Penner's resistance to labeling Merrival and his fiancé's support of him precipitated Lindquist to confront Penner about whether Penner should remain a senior leader in the office.

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[39] The PCPAO is on a 35-hour workweek.
[40] Farina also acknowledged that Penner's personal situation had affected his hours of work.
[41] *See* "Preliminary Response to Grievance by Michael Ames, John Cain, and Steven Merrival against Pierce County Prosecutor Mark Lindquist and Pierce County Prosecutor's Office Chief of Staff Dawn Farina," pp. 17-18.

II. Abuse of Authority

A. Media Statements Conveying Guilt

Allegation: The Merrival Complaint alleged that Lindquist made statements to the media that conveyed the guilt of criminal defendants (citing examples).

Summary of the Factual Conclusions: Interpreting and applying the Rules of Professional Conduct ("RPC") is beyond the scope of this investigation.

Summary of the Evidence: The allegation requires a legal analysis under the Rules of Professional Conduct. For example, RPC 3.6 Trial Publicity, subsection (a), provides:

> "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

RPC 3.8(f) also provides, in part, that a prosecutor shall "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused...."

Lindquist said that he is acquainted with the RPCs and that public statements by him should be limited to the public record, including the affidavit of probable cause that accompanies any criminal charges. Before making a statement, Lindquist said that he reads the affidavit and uses only information in it that is admissible. Heather Songer, the office's Communications Assistant, confirmed that Lindquist restated facts contained in the affidavit. Penner said that Lindquist told him that he should put information about the defendant's criminal history in the probable cause summary so that Lindquist could tell the media about it.

In any event, interpreting and applying the RPCs is beyond the scope of this investigation, so I will refrain from addressing the allegation. However, I requested copies all of the PCPAO's public statements, which Songer provided to me on the disk attached as Exhibit 5. I understand that this allegation is a subject of a complaint to the Washington State Bar Association ("WSBA"), which has the jurisdiction and expertise to adjudicate it.[42]

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[42] *See also*, Karen Peterson: "Prosecutors, Not TNT, Doing the Misleading," Tacoma News Tribune, August 15, 2015:

B. Exercising Undue Influence Over Media Coverage

Allegation: The Merrival Complaint alleged that Lindquist "expends inordinate public resources" to secure favorable media coverage "that best promotes Lindquist or his version of events, and disparages his adversaries."

Summary of the Factual Findings: Lindquist has not exercised "undue influence over media coverage;" however, Lindquist spends a substantial amount of time attempting to shape the media's coverage of himself and the PCPAO; and, the amount of time and effort Lindquist expends to secure favorable media coverage is greater than previous Pierce County Prosecutors and more than any other elected official who interacts with the TNT.

Summary of the Evidence: Lindquist said that he wants the public to know what the PCPAO is doing and why, which is the reason that he and the DPAs often appear in the media. He further stated that the office is very seldom misrepresented in the media, but when DPAs say that media coverage is inaccurate, he will give them a chance to set the record straight.

Clearly, however, Lindquist's media activity is a departure from the past. One PCPAO staff person, who has worked for multiple Prosecutors, observed that the PCPAO was "more political" under Lindquist. The staff person noted that former Prosecutor Gerald Horne seldom put out a press release (generally pertaining only to officer-involved incidents). In contrast, Lindquist took the position "from day one" that the office was going to communicate actively with the public. Each member of Lindquist's senior leadership recalled making trips with him to the TNT's offices, either to review stories that were slated for publication or, more frequently, to respond to stories, usually involving the *Dalsing* or *Nissen* cases.

I contacted Karen Peterson, Executive Editor of the TNT, to get her response to this allegation, but she declined to speak with me. However, the TNT ran a column she wrote on August 15, 2015 in response to a Facebook post by Ausserer. Ms. Peterson noted, "Since he took office in 2009, Lindquist has been far quicker than any public official we deal with to pick up the phone and complain about a story." In particular, she recounted numerous meetings with Lindquist about the *Dalsing* matter, "with hour-long phone calls to the reporter and editors, sometimes during work hours, sometimes late at night." Lindquist generally recalled the meetings Ms. Peterson described in her column and said he "may have called the TNT between 7:00 a.m. and 8:00 p.m." Lindquist's "pattern" led Ms. Peterson to conclude, "This was no longer about correcting the record, but shaping it." Finally, in response to this specific allegation in the Merrival Complaint, Ms. Peterson wrote:

We published this quote from Lindquist in a June 20 story: "The Prosecutor's Office refiled charges against Lynn Dalsing when it learned she knew her husband was sexually abusing their daughter, and she facilitated this abuse by continuing to leave her daughter alone with him."

As with quotes made by deputy prosecutors in other stories, it was an allegation stated as a fact. And this one came after charges against Dalsing were dismissed.

> His continued pressing to influence our coverage might not violate the law, and anyone who is the subject of contentious coverage is welcome to be heard by editors before or after publication. But the degree and persistence of his time spent on his image may concern the citizens who pay his salary. Prosecutors are spending a lot of time doing this on the clock.[43]

Mary Robnett, Lindquist's former Chief Criminal Deputy, observed "A lot of stuff he does is political; before he took over, the office was business; now it is 'how is this going to play; how is this going to look?'" She said that Prosecutors Ladenburg and Horne told her to go ahead and do the right thing for the right reasons and they could always explain what happened if the decision turned out to be unpopular. In contrast, she said that Lindquist cared a great deal about public perception and made decisions about allocation of resources and running of the office based, in part, on how much publicity (positive and negative) it was going to generate. For example, Robnett recalled a comment made by Lindquist after the murders of the four Lakewood police officers. She said that Lindquist spent significant time at the crime scene. Later, he commented that he was going to have to run for re-election and would get $100K of free publicity from the murders. Lindquist's comment was confirmed by other witnesses.

In sum, I do not find that Lindquist has exercised "undue influence over media coverage." As Judge Sorenson observed, "Lindquist is an elected official; he has as much access to the media as they will allow him; and, if it gives him the opportunity to speak to them about their focus, then why wouldn't he take advantage of it?" However, I do find the following: Lindquist spends a substantial amount of time focused on attempting to shape the media's coverage of himself and the PCPAO; and, the amount of time and effort Lindquist expends "to secure favorable media coverage" is greater than previous Pierce County Prosecutors and more than any other elected official the TNT deals with.

C. Disregard of Apparent Conflicts of Interest

Allegation: The Merrival Complaint alleged that Lindquist intervened individually as a party in the *Nissen* case (involving work texts on Lindquist's personal phone), represented by attorney Stewart Estes of the Keating, Bucklin & McCormack, Inc. law firm. The Complaint claimed that Estes argued on Lindquist's behalf against the County's interests in fulfilling its PRA obligations, while representing the County in other matters for which his firm has been paid hundreds of thousands of dollars.

Findings of Fact: Estes represents Lindquist in the *Nissen* PRA litigation on a pro bono basis;[44] he has represented Lindquist in the *Nissen* case at the same time he has represented the County in other matters;[45] neither Estes nor his firm represented the County during Lindquist's administration prior to Estes' appearance on behalf of Lindquist in December 2011; since that

[43] "Karen Peterson: Prosecutors, Not TNT, Doing the Misleading," Tacoma News Tribune, August 15, 2015.
[44] Representing a client without charge.
[45] Estes' alleged conflict of interest is a question of law, which I do not address in this report.

time, the County has paid Estes' firm $587,268.63 for legal work on behalf of the County and Estes has represented the County in *Dalsing v. Pierce County*, *Ames v. Pierce County*, *Wright v. Pierce County*, and matters concerning the marijuana initiative.

Summary of the Evidence: Lindquist said that when Nissen requested his personal cell phone records, the PCPAO's Civil Division advised him not to turn them over. He wanted to be transparent and turn over more records than the Civil Division advised him to release, but when Nissen later modified the request to include "all telephone records," he agreed to oppose the request. Lindquist said that the PCPAO represented the PCPAO and the County in the subsequent litigation.[46] He believed that the Civil Division discussed the litigation and the PCPAO's representation of Pierce County with the County's Risk Management Department.

Lindquist said that the Civil Division's Litigation Team Lead, Dan Hamilton, wanted Lindquist to intervene in the action to assert his constitutional rights, which he ultimately agreed to do. The Civil Division recommended that he retain Stewart Estes to represent him. Lindquist insisted that the County "has not paid a dime" to Estes and his firm because Estes has worked for him on a pro bono basis. Lindquist believed that Estes first appeared on his behalf in the litigation in December 2011.

Farina said that she was present when Hamilton insisted that Lindquist intervene in the *Nissen* litigation. She recalled that Lindquist did not want to be a party but finally agreed. Regarding representation of the County, Farina stated that the Civil Division would not normally go to the County (*e.g.*, the Risk Management Department) to get approval to appear on the County's behalf in litigation.

Hamilton said that he "worked over" Lindquist to convince him to intervene in the litigation. Hamilton was concerned about an earlier PRA case[47] and believed that Lindquist needed to be a party to assert various federal constitutional law claims. Hamilton said that Lindquist originally was willing to give up all of his private cell phone records ("as a politician, he didn't seem to mind"), so the only reason Lindquist would get involved in the case was to help the County. He pitched the idea to Lindquist of him intervening with Estes as his counsel, so long as Estes was willing to do it on a pro bono basis. Hamilton thought it would be a difficult sell if Lindquist had to pay Estes personally. Hamilton said that he had worked on cases with Estes previously, so he contacted him, asked him to represent Lindquist and told him the County could not pay him. Estes indicated that he was interested and agreed to represent Lindquist. Hamilton recalled that Estes first appeared in the litigation in November or early December 2011. He said that there was no quid pro quo offered to Estes to represent Lindquist because the County had no cases in the pipeline to offer him.

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[46] The defendants in the *Nissen* litigation included Pierce County, the PCPAO and Lindquist.
[47] *O'Neill v. City of Shoreline*, 170 Wn.2d 138 (2010) (an electronic version of a document stored on a personal computer, including its embedded metadata, is a public record subject to disclosure).

Hamilton also noted that the County's and Lindquist's interests were "cheek to jowl." He said it was in the County's interest to protect the private records of all County employees, whether it was Lindquist or another County employee, so it never dawned on him or others that there may be a conflict between them. Hamilton went on to say that their interests could diverge if the County wanted to give up Lindquist's phone records, but it was the Prosecutor's decision whether the County continued to oppose the record request.

Hamilton explained that, unless a particular department is a named party, then the Prosecutor makes the decisions regarding the defense of the County, *e.g.*, a tort claim against the County alone. If an individual employee is alleged to have committed the tort, then his/her department is involved in making decisions about litigation strategy, but not litigation tactics. Also, if money is involved, then the Risk Management Department must be consulted because it is responsible for making payments. Hamilton explained that in the *Nissen* litigation, Lindquist was the individual personally involved as a named defendant in the litigation, but he was also the head of the affected department, so he was the Civil Division's "client."

Pierce County Risk Manager Mark Maenhout said he asked Hamilton who represented the County in *Nissen* and Hamilton responded that the PCPAO was responsible for making decisions about the case. Consequently, Maenhout said the Civil Division has kept him at an arms-length regarding *Nissen* matters and all decisions about defense of the case. For example, he has had no discussions with the Civil Division about settlement of the *Nissen* litigation because "they manage the litigation." He noted that the County Code states that the Prosecutor or his/her designee and the Risk Management Department must both sign an agreement to settle a civil case, so the County could not settle *Nissen* without the Prosecutor's approval (or visa versa).

Regarding Lindquist's retention of Estes as his individual counsel, Maenhout said that he first became aware of Estes' involvement at the oral argument before the Washington Supreme Court. Maenhout said that neither Estes nor his firm had represented the County, at least during Lindquist's administration, prior to Estes' appearance on behalf of Lindquist in December 2011.[48] Since that time, the County has paid Estes' firm $587,268.63 for legal work on behalf of the County, and Estes has performed work for the County in the following matters: *Dalsing v. Pierce County*, *Ames v. Pierce County*, *Nissen v. Pierce County, Wright v. Pierce County*, and issues involving the marijuana initiative.

D. Improper Use of Public Resources

The Merrival Complaint made numerous allegations that generally portray the PCPAO as a politicized work environment. By way of context, numerous witnesses drew comparisons

[48] The County paid Estes' firm $1,348.32 during this time period for services provided by a firm lawyer as a neutral arbitrator.

between the Lindquist administration and those of his predecessors. For example, one Team Chief said that politics under Lindquist's administration is "more to the forefront" than under Prosecutors Ladenburg or Horne, who had strict policies that DPAs do their job and politics didn't matter. A long-term DPA added that during Ladenburg's two election campaigns, he told the DPAs he did not want their financial support or their volunteer work; doing good prosecution work should be their focus. He said the clear message was that politics and the work of the office were separate.

1. Political Support of Lindquist.

Allegation: Specifically, Merrival alleged that many, "if not all" employees fear not supporting Lindquist or his chosen political candidates.

Summary of the Factual Findings: The PCPAO is more politicized under Lindquist than his predecessors and DPAs, particularly newer DPAs, feel pressured to volunteer in support of his campaigns; Lindquist's refusal to act in the face of complaints by PCPAO employees that their names were added to a Lindquist recall campaign Facebook group without their consent is clear evidence of this pressure, and Lindquist's active support of campaign activities in his office; political support of Lindquist is not essential to advancement in the office because many persons in his leadership have either been neutral politically or supported other persons; however, DPAs must give Lindquist their unqualified loyalty in the office, or risk having their careers dead-ended.

Summary of the Evidence: Lindquist said that he could not speak to what employees felt, but no one should feel pressured to be involved in his political campaigns. All witnesses said that Lindquist does not accept financial contributions to his campaigns from DPAs, but does accept volunteers, or "sweat equity" as he told a couple of witnesses. One of them said that as time went by the takeaway for him was that sweat equity would be rewarded and participation could affect his job assignment. One Team Chief concurred, saying that the perception among DPAs is that people who support Lindquist get rewarded; and, if they get involved in his campaigns, they will be rewarded, too. Another Team Chief said that the perception is particularly acute in the Misdemeanor Division, where the DPAs are brand new to the office and sometimes not in permanent positions. So, if they think that participating in a Lindquist campaign event will give them an advantage, then they do it, particularly if other DPAs were participating, too.

A different Team Chief declared, "Absolutely, the office is political," and noted that all the Misdemeanor DPAs attended Lindquist's campaign kick-off wearing campaign t-shirts. He told the story of one DPA, whose girlfriend's parents were in town and all of them had plans to go out to dinner. Unfortunately, the dinner conflicted with Lindquist's campaign kickoff. The Team Chief told the DPA unequivocally that he should go to dinner with his girlfriend and family. Later, the Team Chief saw the DPA at the campaign kickoff handing out donation cards and wearing the campaign t-shirt – "I am going to meet them for dessert," he said.

A number of witnesses said that Lindquist does not solicit DPA participation in his campaign; rather, it is done by his campaign manager or treasurer (both DPAs) or others active in his campaign. For example, the Pierce County Human Resources Department recently received a complaint that DPAs who supported Lindquist added PCPAO employees to a "Support Our Prosecutor" Facebook group without their knowledge or consent.[49] A DPA reported that at least 14 employees were very upset but did not want to be identified for fear of retaliation. When the Pierce County HR Director requested that all employees added without their consent be removed, Lindquist said he cannot direct his DPA supporters to do so because they were engaging in free speech as private citizens. Lindquist said that his DPA supporters had a right to add anyone they wanted and he would not tell them otherwise, "The individuals can ask themselves to be removed." One PCPAO employee who asked to be removed has filed a complaint alleging that her job transfer shortly after she removed her name was retaliatory.

Finally, Merrival alleged that Lindquist has substituted the code-required merit system of employment with a system based on patronage, *i.e.*, unquestionable loyalty to promoting Mark Lindquist. Lindquist called the allegation is "absurd on its face;" when you look at people he has promoted, the majority of them are apolitical (to his knowledge) or even opposed to him. Farina and other senior leaders said the same thing, identifying individuals in each category. For example, Penner said he never supported Lindquist politically, but was appointed to high office. He said that some people enjoy politics and Lindquist is charismatic, so it is hard to discern the difference between volunteerism and quid pro quo. Penner said he didn't see a connection between political support and advancement.

I find that the PCPAO is more politicized under Lindquist than his predecessors, and DPAs, particularly newer DPAs, feel pressured to volunteer in support of his campaigns. Lindquist's refusal to act in the face of complaints by PCPAO employees that their names were added to a Lindquist campaign Facebook group without their consent is clear evidence of this pressure, and Lindquist's active support of campaign activities in his office. That said, it is also apparent that *political support* of Lindquist is not essential to advancement in the office because many persons in his leadership have either been neutral politically or supported other persons. However, it is important for DPAs to give Lindquist their unqualified *loyalty* in the office, or risk having their careers dead-ended. *See,* Section VI., *infra.*

2. Visible Positions in the Community.

Allegation: The Merrival Complaint alleged: "DPAs are encouraged to obtain visible positions in the community to bring favorable publicity to Lindquist's office." Merrival further stated that some DPAs were promised judicial appointments in exchange for their service.

Summary of the Factual Findings: DPAs are not required to obtain visible positions in the community to be a "good emissary" of the office; Lindquist encourages persons interested in attaining public office to be active in their community; Lindquist has attempted to create a

[49] The Facebook page apparently was created in response to the Lindquist recall campaign.

politically powerful office that can produce judges, and make DPAs interested in becoming judges beholden to him; the whistleblower complaints reflect, in part, a belief among career DPAs that the politicization of the PCPAO under Lindquist and the high value he places on loyalty to his administration interferes with the delivery of justice in Pierce County.

Summary of the Evidence: As noted, one of the PCPAO's core values is being a "good emissary." Initially, employees believed that required them to attain visible positions in the community. However, Lindquist explained to the office that "good emissary" instead meant that DPAs should engage in professional interactions with the public because the PCPAO serves the public. In contrast, he has told DPAs interested in being a judge to get involved in community service groups, regardless of the group. Farina and other leadership witnesses agreed. She said that being a "good emissary" does not mean volunteering; a DPA can be one in the courthouse doing their job professionally. She also said that DPAs are very active in the community by individual choice; she didn't run for President of the TPCBA and Team Chief Michelle Walker didn't become Mayor of Roy for Lindquist. Farina concurred that Lindquist advises DPAs interested in running for public office to be out in their community. For example, she said DPAs have chosen to run for Fire Commissioner because it is in the DPAs' interest; firefighters are active politically and their support is helpful.

Former Chief Criminal Deputy Mary Robnett said that Lindquist's interest in judgeships was more active and political than Lindquist or Farina stated. She said that Lindquist expressed the belief that PCPAO should be a place that produced judges and he set out to make that a reality. "He wanted a political machine. He said he wanted the most politically powerful office in the County, and for Superior Court judges to be concerned that he could get people to run against them." Former Team Chief Sunni Ko said that Lindquist also wanted DPAs to believe that he could make them judges and ask him for assistance so they would be beholden to him. A senior leader observed that Lindquist has always said that he could put people on the bench, so he engaged in resume-building, such as putting DPAs in the Homicide Chief position. A person who wanted to be a judge aligned themselves with Lindquist and it worked.

One of the former DPAs who received Lindquist's support and who now sits on the Pierce County Superior Court bench, Judge Phillip Sorenson, said that he felt no angst about Lindquist encouraging DPAs to be a part of the political system as judges, mayors, precinct officers and members of various committees. He said DPAs are all members of the community and more involvement is better, and it is an added benefit if the involvement reflects well on the office.

It probably comes as no surprise to many people that a politician, like Lindquist, uses his political support and energies to expand his political influence. The conflict for many long-term prosecutors appears to stem from their belief that the PCPAO's role is to "do justice" for the people of Pierce County. As Penner stated, "to do justice is a very cool responsibility and unique opportunity to try to come to the right result for the community, the defendant and the court system. Merrival gets that." The Merrival and Penner Complaints reflect, in part, a belief

that the politicization of the PCPAO under Lindquist and the high value he places on loyalty to his administration interferes with the delivery of justice in Pierce County.

3. Increased Participation Within the TPCBA.

Allegation: Lindquist, Farina and other leadership witnesses said that the PCPAO was relatively inactive in the TPCBA when Lindquist was appointed in 2009. They said that officers of the local bar requested that the PCPAO, as the largest "law firm" in Pierce County, take a more active in bar activities. The Merrival Complaint essentially alleged that Lindquist's efforts to assume a bigger presence in the TPCBA went too far. It claimed that leadership prepared work emails directing DPAs to vote in Bar elections, suggested who to vote for and then collected ballots to insure their delivery.

Summary of the Factual Findings: The PCPAO encouraged DPAs to become more active in the Bar; Farina emailed DPAs to encourage them to vote in TPCBA elections and identified who from the office was running; senior leaders offered to take ballots to the Bar office; and, the names of DPAs who voted in the SAU were listed on a white board to pressure them publicly to vote.

Summary of the Evidence: Lindquist was unapologetic about the office's efforts to encourage DPAs to become more active in the Bar; he said that building relationships in the Bar allows the PCPAO do its job better. He told Farina that leadership should email DPAs to encourage them to vote in TPCBA elections and to identify who from the office was running. And, he had "no problem" with senior leaders offering to take ballots to the Bar office.

Farina said that senior leaders instructed Team Chiefs to encourage DPAs to vote and to make sure they voted so that their voice could be heard within the Bar. In addition, Farina routinely sent out emails to DPAs when the TPCBA ballots were delivered, such as this one she sent on January 23, 2012:

> It is imperative that our office vote for those attorneys who will effectively represent our best interests and the best interests of the justice system. Please give strong consideration to voting for Stephanie Bloomfield for Vice-President, and Grant Blinn, Michelle Luna-Green and Matthew Thomas for Trustee…If anyone would like me to return your completed ballot to the bar office, I would be happy to do so."[50]

The Merrival Complaint also alleged that "One unit advertised on their whiteboard a checklist of who had voted." Farina was running for TPCBA President at the time, so the office's "get out the vote" effort was especially intense. One DPA said the unit involved was the SAU, where the Team Chief wrote every DPA's name on the white board and crossed out

[50] Blinn and Luna-Green were DPAs at the time; Thomas was a former DPA.

persons who had voted.[51] She said that Felony Division Chief John Sheeran was collecting ballots. The DPA kept telling Sheeran that she had not received a ballot, so he printed one off for her and gave it to her. At the end, only three attorneys (including her) did not have their names crossed out.

Tom Howe, another DPA who did not vote, said that he saw the list of names and asked, "What's that all about?" He was told that it was a list kept by Sheeran of people who had given him their election ballots. Howe said he was trying to keep his head down but was curious about how far the office would press the situation. He said Sheeran approached him and said that it was important that he vote because Farina is running for President and it would be important to have her represent the PCPAO. Howe recalled that he told Sheeran that he didn't know who opposed her and didn't know Farina well, so he was not going to vote. He said his decision was thoughtful, but he knew at the time that he was "committing employment suicide" and would never be included in leadership. Consequently, he took a job at the AG's office he had turned down a month earlier because of the pay cut. He said, "I left because it got to the point where there was no decision too small to politicize."

I find that the allegations in the Merrival Complaint are true and undisputed: the PCPAO encouraged DPAs to become more active in the Bar; Farina emailed DPAs to encourage them to vote in TPCBA elections and identified who from office was running; senior leaders offered to take ballots to the Bar office; and, the names of DPAs who voted in the SAU were listed on a white board to pressure them publicly to vote.

4. TPCBA Judicial Qualifications Committee.

Allegation: The Merrival Complaint alleged that Lindquist placed "his DPAs" on the TPCBA Judicial Qualifications Committee to support his judicial candidates and to disfavor those he opposed. It stated that Farina appointed "inexperienced DPA Tim Lewis as Co-Chair" for that purpose.

Summary of the Factual Findings: Lindquist has not affirmatively placed "his DPAs" on the TPCBA Judicial Evaluation Committee; Farina appointed Lewis and civil attorney Margaret Archer to co-chair the Committee because of their prior participation and to balance the leadership between civil and criminal attorneys; and, neither Lindquist nor "his DPAs" have had an inordinate or unfair influence on the Committee's deliberations.[52]

Summary of the Evidence: Lindquist said it was not true that he placed "his DPAs" on Committee; he said he wasn't even sure how he would do that. He also denied ever discussing with DPAs on the Committee who they should support. Farina explained that as TPCBA Vice President, she sat on the Committee for a year and got a chance to watch the "circus," as she

[51] A photograph of the white board is attached as Exhibit 6.
[52] DPAs regularly appear before Pierce County judges so it is both appropriate and valuable to have their input on the Committee.

called it. She said that most people on Committee were there for the right reasons, but some attended to support/object to a particular candidate. For that reason, Farina wanted to redesign the Committee to reduce its size and to increase its diversity, while maintaining an even mix of civil, criminal and family law attorneys from various practice areas. She said that Committee members would laugh at the suggestion that Lindquist controlled it; the membership includes criminal defense attorneys who have their own opinions.

Lewis said that Bar President Tom Quinlan, not Farina, suggested he volunteer for the Committee because Quinlan wanted greater participation from the Prosecutors office. When Farina was elected President of the Bar, she asked Lewis and Margaret Archer (a land use attorney from Gordon Thomas Honeywell) to serve as co-chairs. They sat down with Farina and developed a list of people who were representative and would show up and work regardless of the candidate. Lewis said that neither Lindquist nor Farina have ever suggested to him who he should support.

Archer said that she and Lewis were appointed by Stephanie Bloomfield (also from Gordon Thomas Honeywell), the TPCBA President who preceded Farina. Archer said, "If Tim was inexperienced, then so was I." She said that Lindquist did not influence Bloomfield's selection of them to serve on the Committee and Farina selected them as co-chairs for two reasons: to have one civil and one criminal attorney as co-chairs; and, their conduct on the Committee the previous year was balanced. Archer offered an anecdote to emphasize the latter point. She said that Lewis was worried about the perception of the Committee because of the publicity surrounding the PCPAO, so he supported adding two more criminal defense lawyers to make sure the Committee was perceived as balanced. Now the Committee has five defense attorneys and two DPAs. Lastly, Archer said that the Committee adopted a policy starting with its consideration of McCann that DPAs must recuse themselves if another DPA is up for evaluation. The DPAs can provide input as any other reference, but are required to leave the interview and cannot participate in the discussion or the anonymous vote afterwards. Archer said that she has never seen Lewis act in an inappropriate or unbalanced way.

Merrival's Complaint also alleged that Lindquist's DPAs helped McCann and Pierce County District Court Judge Jeanette Lineberry receive undeserved favorable ratings and underrated Mary Robnett and Karl Williams relative to Lindquist's hopefuls. With respect to Lineberry and Williams, Archer said that Lewis recused himself from participating in their evaluation, and all the candidates, including Lineberry, Williams and Sandy Allen, received the same "exceptionally well qualified rating." She also said the McCann's evaluation was not improperly influenced by Lindquist or the DPAs on the Committee – "The room was packed with criminal defense attorneys."[53] Regarding the Committee's ratings of Robnett, she and a

[53] Sarah Richardson, Team Chief of Family Support, said that Lewis was appointed co-chair the year that she started on the Committee. She said that she has not gotten any impression that Lewis has an agenda; he has been open and equal regarding his treatment of the candidates and has done a good job as co-chair. Richardson further stated that neither he nor Farina have attempted to influence her in any way. Finally, she recalled that Sorenson and Lineberry

former member of the Committee said that the rules protecting the confidentiality of the Committee's proceedings prevented them from responding to specific questions about the deliberations involving individual candidates.[54]

On the basis of this evidence, I find that Lindquist has not affirmatively placed "his DPAs" on the TPCBA Judicial Evaluation Committee, although their participation is consistent with his desire that the PCPAO be more active in Bar activities; Farina appointed Lewis and Archer to co-chair the Committee because of their prior participation and to balance the leadership between civil and criminal attorneys; and, neither Lindquist nor "his DPAs" have had an inordinate or unfair influence on the Committee's deliberations.

III. Substantial and Specific Danger to the Public Health or Safety

A. Vindictive and Overzealous Prosecution

Allegation: The Merrival Complaint alleged that Lindquist has engaged in vindictive and overzealous prosecution, citing the *Dalsing* and Hilltop Crips Gang cases as examples. The Penner Complaint alleged that after the Dalsing criminal case was dismissed for vindictive prosecution, civil DPAs were involved in discussions regarding whether to move for reconsideration or to appeal. The Penner Complaint further alleged that Penner raised concerns during the conversation with Civil Division Chief Doug Vanscoy's "initial" proposal to "appeal and seek settlement of the civil suit."

Summary of the Factual Findings: No DPAs agreed that the PCPAO engaged in overzealous prosecution; I did not engage in fact-finding regarding the *Dalsing* case in an effort to avoid second-guessing a Superior Court judge, who carefully reviewed all the evidence and determined that the PCPAO engaged in vindictive prosecution of Dalsing; Asst. Chief Criminal Deputy Greg Greer initiated the Hilltop Gang cases; the office did not file the charges for the purposes of gaining publicity for Lindquist or the PCPAO; and, the Hilltop Gang cases were not brought for racial or political reasons. I further find that Lindquist involved Civil Division employees in the conversation among senior leaders about whether to appeal or seek reconsideration of the vindictive prosecution dismissal of the *Dalsing* criminal case; civil DPAs connected an appeal of the criminal matter with settlement of the civil case, but criminal DPAs rejected the connection; I am unable to determine from the evidence whether Vanscoy was the civil DPA who made the suggestion.

Summary of the Evidence: Penner offered the opinion that there is "No real way to get underneath the claim of overzealous prosecution; the number of court filings is not a good indicator because the amount is affected by a lot of reasons." Ironically, he said that prior

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appeared before the Committee during her tenure and leadership did not seem to affect the outcome of their evaluation – "The persons on the Committee are a tenacious bunch and would not let PCPAO favoritism go by."

[54] Archer added that she could not recall the Committee's discussions of Robnett anyway because it was early in her tenure on the Committee.

Prosecutors expected DPAs to try a lot of cases and rewarded them for it – a "trial warrior" culture, as Lindquist described it. In contrast, Penner said that Lindquist emphasized resolving cases; "He is not really focused on prosecuting cases; he is a politician, so his main concern from a prosecutorial perspective involves media cases that could affect the perception of the office and him." Other DPAs, including those in leadership, agreed with Penner's assessment; one said that Lindquist was known as "Misdemeanor Mark" when he was in the SAU, *i.e.*, he would plea felonies to misdemeanor and try only the "sure wins." In sum, as a general matter, no DPAs interviewed agreed that the PCPAO engaged in overzealous prosecution.

The Merrival Complaint identified the *Dalsing* case and the Tacoma Hilltop Crips Gang Cases as examples of Lindquist's vindictive and overzealous prosecutions respectively. Regarding *Dalsing*, Pierce County Superior Court Judge Edmund Murphy, a former DPA, has already ruled that the PCPAO engaged in vindictive prosecution by re-filing charges against Dalsing without new evidence to support them. I have not engaged in additional fact-finding regarding *Dalsing* in an effort to avoid second-guessing a Superior Court judge who carefully reviewed all the evidence. However, I will offer the comments of one senior leader about the Dalsing prosecution. S/he was confident that no one in the PCPAO would file charges against anyone, including Dalsing, without probable cause. That is not to say that prosecutorial discretion was exercised wisely, the senior leader said. His/her admonition was, "If law enforcement doesn't bring the case, then you shouldn't pursue it," *i.e.*, if the PCSD doesn't believe there is enough evidence to bring the case, then the PCPAO shouldn't file charges.

Nor did any witness I interviewed agree with Merrival's claim that "In March of 2010, Lindquist initiated a gigantic criminal prosecution, with perhaps the primary purpose of obtaining publicity himself, against 32 black defendants alleged to belong to the so called Hilltop gang using a singular conspiratorial argument." Asst. Criminal Division Chief and head of the Gang Team (Team X) Greg Greer said that the theory of the prosecution was, "If you join a gang, you join an on-going conspiracy to commit a crime," which would support a conspiracy conviction without getting a conviction for an individual act. He said he heard about the novel theory at a conference and learned that it had been used in Florida and New York. Greer stated that Judge Felnagle concluded after months of procedural wrangling that the broad theory was too big and required them to charge the defendants individually with a specific conspiracy.

Greer added that once the cases were severed, the defense attorneys began looking at the underlying charges against the individual defendants. In the Raphael Justice case cited specifically by Merrival, Greer said that the defendant's conduct justified only an assault plea. Greer emphasized that from a prosecutorial standpoint the cases were very successful: 4,014 total months imposed on 36 defendants; an average sentence of 112 months; and, an average sentence of 276 months for the defendants who went to trial. He claimed that the case decimated the gang; violent gang crime in the Hilltop area is non-existent by comparison; crimes are committed by gang members acting individually, rather than as a gang; and, based on feedback from Dept. of Corrections, gang members are now terrified that membership in the gang is enough to get them convicted of a crime. Finally, Greer said that neither the theory of the case

nor his reason for bringing it were politically or racially motivated, although Lindquist has enjoyed the success of it for his and the office's advantage.

Both Judge Sorenson and DPA James Curtis echoed Greer's sentiments. Sorenson explained that most of the defendants pled guilty to a conspiracy charge (over 20); almost all of the charges were convicted; and, all defendants were charged with crimes of violence, not drug crimes. He said that he was absolutely satisfied with the conspiracy charge, which was initially charged as a global conspiracy and then "hacked up" into smaller conspiracies as the evidence developed. He added that the conspiracy charges were legally motivated, not politically motivated, and created the best legal tool to charge this investigation. In addition, all defendants were arrested at the same time, which was an effective way to marshal the resources of the PCPAO and the court.

DPA Curtis said that he was not on the Gang Team at the time the office brought the case, but he was familiar with the cases and the community. He pointed out that all of the defendants either pled guilty or were convicted; the case was not a publicity stunt - people were harmed by the defendants' crimes; and, the case was Greer's case, not Lindquist's. Curtis said that a person could disagree with the global conspiracy charge, but the allegation that it was done for publicity is "ridiculous." He added that he grew up with one of the defendants, Mike White, who pled guilty to a significant amount of time; Curtis said White's family gave him hugs afterwards.

I find that Greer initiated the Hilltop Gang cases; the office did not file the charges for the purposes of gaining publicity for Lindquist or the PCPAO; the cases were not brought for racial or political reasons.

Finally, the Penner Complaint alleged that after the Dalsing criminal case was dismissed for vindictive prosecution, civil DPAs were involved in discussions regarding whether to move for reconsideration or to appeal. The Penner Complaint further alleged that Penner raised concerns during the conversation about Civil Division Chief Doug Vanscoy's "initial" proposal to "appeal and seek settlement of the civil suit." Penner said he was uncomfortable with the recommendation because a decision about the criminal matter should not be based on its impact on the County's civil litigation with Dalsing. Penner added that his impression was that Vanscoy did not understand the ethical implications of his advice.

In a letter submitted as a part of Lindquist's and Farina's preliminary response to the WSBA's disciplinary counsel, Vanscoy said, "[T]he claim that I recommended an appeal of the criminal dismissal as leverage to settle the civil suit is totally false." When asked why the Civil Division was involved in a conversation about a criminal case, Lindquist said that Vanscoy is very smart and reasonable and Lindquist wanted him (and Proctor) at the table to contribute to the dialogue. He recalled that Vanscoy said they should appeal the dismissal of the *Dalsing* criminal case, but did not say that the office should settle her civil case.

Sheeran said that he came into the conversation about the vindictive prosecution finding after it started. He stated that he was not sure why the Civil Division participated in the conversation about the dismissal of a criminal matter, but it was not typical. Sheeran also noted that it was not typical that a criminal defendant (Dalsing) was also suing the County civilly. Importantly, he recalled that at a later meeting "some DPA connected the two cases," the civil and the criminal cases, but the criminal DPAs were adamant that they were not going to do it. The criminal DPAs' only concern was whether Dalsing was criminally culpable.

I find that Lindquist involved Civil Division employees in the conversation among senior leaders about whether to appeal or seek reconsideration of the vindictive prosecution dismissal of the *Dalsing* criminal case. I further find that civil DPAs connected appeal of the criminal matter with settlement of the civil case, but that criminal DPAs rejected the connection. I am unable to determine from the evidence whether Vanscoy was the civil DPA who made the suggestion.

B. Prosecutorial Misconduct

Allegation: The Merrival Complaint contained a table of cases brought by the PCPAO where convictions were secured in the trial court only to be reversed on appeal.[55] The Complaint suggested that the PCPAO was "Top in Prosecutorial Misconduct Reversals."

Summary of the Factual Findings: DPA witnesses uniformly believed that the reasons for the prosecutorial misconduct rulings by the appellate courts are complex and are not due to overly zealous or vindictive prosecution encouraged by Lindquist or his leadership. The best evidence of the reasons for the rulings is found in the courts' rulings.

Summary of the Evidence: Both leadership and DPA witnesses took great pains to explain that "prosecutorial misconduct" is a term of art that simply means error on a DPA's part. No one placed the blame for any increase in the number of reversals on Lindquist or his administration, pointing out that the reversals often arise out of closing arguments, which represent choices made by individual DPAs during trial. And, no witness attributed these results to a pattern of overly-aggressive or vindictive prosecution.

The explanations offered by the witnesses for the office's prosecutorial misconduct reversals included the following.

- The appellate courts are more frequently deciding prosecutorial misconduct cases now and giving more credence to misconduct allegations.

- Much of the conduct that has been reversed has been accepted for a long period of time; and, when one case is reversed, a long string of cases involving the same type of conduct or

[55] Witnesses pointed out some inaccuracies in the table of cases, *i.e.*, it included cases that preceded the Lindquist administration; and, in one instance, a listed case was out of Thurston County and not tried by the listed DPA.

form of argument are overturned, *e.g.*, cases involving the use of PowerPoint in closing argument were overturned when one ruling made new law or clarified existing law.

- According to Judge Sorenson, the four pages of prosecutorial misconduct cases attached to the Merrival Complaint indicate an office dealing with a lot of crime and serious cases. One witness said that the PCPAO prosecutes more felonies and misdemeanors than the AG's office or King County. So, many cases end up in front of Division II and the risk of a negative ruling is higher.

Witnesses said that continuing legal education classes on the appellate rulings are put on by various providers, including WAPA. In addition, the PCPAO leadership in both the Civil and Criminal Divisions emailed DPAs about the cases and their recommendations for responding to them. Tom Roberts of the Civil Division also presented two CLEs for DPAs entitled, "How to Prevent Prosecutorial Misconduct in Closing Argument," in May/June 2013. Attendance was mandatory for criminal DPAs and Farina took attendance. Roberts' opinion of the prosecutorial misconduct case law after 30 years in the PCPAO was that the courts are no longer taking a laissez faire approach to the issue. He said that the attitude of the appellate courts has changed and they are now taking a more strict approach. He noted that formerly a prosecutor would have to "go off the deep end" for a defendant to be granted a new trial; now, prosecutors are held to a very high standard. Roberts said the rules are changing, "but that is how the law develops."

I did not conduct the empirical research necessary to opine on whether the number of cases of prosecutorial misconduct cases coming out of the PCPAO is rising, or how they compare against other jurisdictions. However, I can confidently state that DPAs throughout the PCPAO believe that the reasons for the rulings are complex and are not due to overly zealous or vindictive prosecution encouraged by Lindquist or his leadership.

IV. Gross Waste of Public Funds

A. Exorbitant External and Internal Defense Expenditures Protecting Self-Interests

Allegation: The Merrival Complaint alleged that the PCPAO has spent "likely in excess of a million dollars" in DPA time and outside counsel fees related to defending Lindquist's actions. The Penner Complaint elaborated that three recent lawsuits filed against the County claimed personal misconduct by Lindquist: *Dalsing* (alleging malicious prosecution by the PCPAO); *Nissen* (public records lawsuit seeking copies of Lindquist's personal cell phone records); and, *Ames* (alleging that Lindquist wrongfully identified him as a PIE officer). The Penner Complaint alleged that the PCPAO hired Phil Talmadge to represent its interests and Stewart Estes to represent Lindquist. The Complaint further stated that "the majority of the briefing was conducted in-house, by senior DPAs during work hours." The Penner Complaint also alleged that the briefs included an amicus brief to the Washington Supreme Court in the *Nissen* case to be filed by outside parties, including various labor organizations and the Guild. The brief was intended to complement a brief filed by the County in the case.

Summary of the Factual Findings: A committee of senior leaders of the PCPAO rewrote briefs in both the *Nissen* and *Ames* matters; the value of the time spent by senior leaders, which was extensive, is unknown; the County hired Phil Talmadge and Lindquist retained Stewart Estes to represent them in the *Nissen* matter; the committee of senior leaders also reworked an amicus brief in the *Nissen* litigation that the Guild and other labor unions agreed to sign.

Summary of the Evidence: Penner said that every appellate brief in the *Nissen* litigation, including the amicus brief filed by the Guild and other unions, and all the briefing in the *Ames* litigation was done by a committee consisting at various time the following senior leaders of the PCPAO – Lindquist, Penner, Farina, Sheeran, Civil Division Chief Doug Vanscoy, Dan Hamilton, the lead Civil Division attorney on the *Nissen* case, and Mike Sommerfeld, the DPA advisor to the PCSD. He said the group drafted the briefs over a few days, with the brief displayed on the screen and everyone giving their comments. Penner said that his concerns with the process included: It was a conflict of interest for PCPAO management to draft an amicus brief for the Guild, a labor organization, to sign in order to protect Lindquist's cell phone records; it was a waste of time writing by committee and involving criminal attorneys in drafting civil briefs; and, outside firms were responsible for the litigation, so the briefing should not have been done in-house.

Hamilton explained that the first *Nissen* case ("Nissen I") went up to the Washington Supreme Court. He said that he handled the case through the Court of Appeals and the PCPAO hired outside counsel when it went to the Supreme Court. Hamilton said that the office assembled briefing sessions to rework some of his work product, as well the briefs drafted by outside counsel. He further explained that the plaintiffs filed "the same claims" later in a case that has been referred to as "Nissen II." The PCPAO also hired outside counsel to represent the County in Nissen II and the in-house briefing sessions repeated themselves in that matter, too. He said that the Civil Division and senior leaders were not satisfied with the work product they received from outside counsel and spent time re-working the briefs.

Hamilton further explained that the office had similar issues with the work product of outside counsel in *Ames* as it had in *Nissen*. So, senior leaders worked together to redraft briefs in that matter, too. Neither Penner nor Hamilton recalled "briefing by committee" in *Dalsing*, where outside counsel was brought in when it appeared that DPA Jim Richmond might become a witness.

It is undisputed that Phil Talmadge represents the County and Stewart Estes represents Lindquist in the *Nissen* matter. Finally, the County has spent the following amounts to date on the *Nissen*, *Dalsing* and *Ames* matters: *Nissen I and II* ($530,901.20); *Dalsing* ($205,418.11); and *Ames* ($240,573.73).

B. Rewarding Loyalty with Titles and Pay

Allegation: The Merrival Complaint alleged that the PCPAO has created more positions with titles and pay and given them to less experienced deputies than previous administrations.

Summary of the Factual Findings: The PCPAO has created more positions in leadership than previous administrations, as explained below. I do not have the information necessary to determine if the individuals given those positions are less experienced.

Summary of the Evidence: It is undisputed that the Lindquist administration has created leadership positions and titles that did not exist under previous Prosecutors. Generally speaking, Lindquist said that he wants people to feel responsible for their team and how it's performing so, if the Division is large, he will break it up to create that sense of responsibility within the team. Other former DPAs said Lindquist's motives were more cynical. One recalled Lindquist saying: "you give people titles; it doesn't cost anything and it makes them feel good." Another said his general philosophy was that persons in management positions were closer to him and had more allegiance to him.

I do not reach a finding regarding Lindquist's motives for establishing the new positions and titles because I have no evidence that he exceeded his authority as Prosecutor in creating them. Nor will I judge the experience and qualifications of those appointed to the positions because I think it would do them a disservice. I do find, however, that Lindquist added the positions identified below for the reasons stated.

- Homicide Division and Felony Division: Penner said that the Criminal Division of the PCPAO used to have 6 trial teams managed by a Chief Criminal Deputy and Asst. Chief Criminal Deputy. When Robnett resigned, Lindquist filled those positions and also created a Felony Division Chief. Farina noted that the PCPAO is an office of 220 employees, which became too big a load for Robnett, so Lindquist added a Felony Division Chief after she left. Then, as noted, Lindquist set up a homicide team, turned it into a Division and appointed Blinn as the Homicide Chief. As Division Chiefs, rather than Team Chiefs, the positions were not a part of the Guild bargaining unit and the incumbents lost the protection of the labor agreement.

- Gang Team and Elder Abuse Unit. Greer said that gang cases used to be included in Team 1 (Robbery and Assaults). Lindquist said that he created the Gang Team to place emphasis on those cases and to make sure someone was taking responsibility for them. Greer echoed Lindquist's rationale; he said he wanted to focus on gang cases, which became more significant when he filed the Hilltop Gang case. The unit was created when he needed help after the court severed the conspiracy cases. Lindquist said that the Elder Abuse Unit (includes both fraud and abuse) was modeled after the gang unit, which was also a one-DPA unit in the beginning. He said that separating elder-related work from the fraud unit was intended to build expertise and relationships in the elder community necessary to prosecute the cases successfully. Lindquist said he also wanted to communicate to the public that the cases were important.

- Assistant Team Chiefs. These are also new positions under Lindquist. He said that the addition of the positions in the larger teams put someone in a position of authority when the Team Chief was in trial or absent. He said that the Assistant Team Chiefs feel more responsibility for the success of the team and begin to develop leadership skills. Other DPAs were not so sanguine. One said that the incumbents get status and a reduced work load; another noted that the Assistant now is the charging DPA, giving the Team Chief complete freedom, which might be necessary because Lindquist occupies so much of their time in conferences.

V. Retaliation

The Merrival and Penner Complaints alleged that Lindquist has reassigned or threaten to reassign the following DPAs and others for criticizing him too loudly or publicly.

A. Jim Schacht

Allegation: The Merrival Complaint alleged that Lindquist assigned DPA Jim Schacht to the Appeals Division when he questioned the directive about the *Ames* declarants. The Penner Complaint alleged that he was moved to Appeals "after speaking out against Lindquist."

Summary of the Factual Findings: Schacht's candid conversation with Lindquist that was critical in some respects of his administration was a motivating factor in Lindquist's decision to transfer him to Appeals.

Summary of the Evidence: By all accounts, Schacht is a very good trial lawyer. He has worked at the PCPAO since 1990. Schacht said that he was transferred in 2012 to Team 1 (Robber/Assault) to handle pre-assigned Class A felonies after a stint in the federal prosecutor's office. He said that the position was a good assignment for him. In May 2014, the office had a number of openings, including the Chief Criminal Deputy and Homicide Chief positions. Schacht said that he and Lindquist had a couple of two-hour conversations about the openings and Lindquist asked his opinion about who should fill them. Schacht was aware that a lot of people supported his assignment to Homicide Chief, so he told Lindquist, "If you are considering me, then we have to have a conversation about how you are handling the office. I shouldn't be in the position if there are no changes." Schacht told Lindquist that the office was much too political and promotions were made on the basis of political support rather than good work, and Schacht said he was not willing to be party to it. Schacht further stated that respect for the incumbent Prosecutor among sheriffs and junior prosecutors was important and those ranks were slim. Finally, Schacht said he told Lindquist that he was perfectly happy in his current position in Team 1.

Two weeks later, Penner went to Schacht and told him that he was being moved to the Appeals unit. When Schacht asked for an explanation, Penner said that persons in the office moved from time to time. From Schacht's perspective, the reason appeared to be Schacht's deep disagreements with how Lindquist ran the PCPAO. One Team Chief said that he asked Schacht

one morning, "Appeals?" Later, Schacht said to him, "Heaven forbid you have an opinion contrary to the elected boss' opinion and you voice that opinion." Schacht said that Bryce Nelson, Lindquist's campaign Treasurer, replaced him on Team 1 doing Class A felonies. The filing period for Lindquist's election ended in early May 2014. At the end of the filing week in mid-May, no one filed against Lindquist so all election activity stopped. The office announced Nelson's new assignment soon afterwards.

Lindquist denied that Schacht said in their conversation the office was too political. He recalled speaking to Schacht about the open leadership positions and Schacht mentioned his disagreements with some transfers and promotions. Lindquist said that Schacht thought that the most important criteria in assignments was being a good trial attorney; being a good colleague and emissary was less important. Lindquist noted that Schacht had been in Team 1 awhile, Appeals was a good learning ground and the office was looking for someone to replace DPA Kawyne Lund. He said that Schacht's transfer was not in response to what Schacht said – he already knew Schacht's philosophy before the meeting. Finally, regarding Nelson, Lindquist said that Sheeran had been telling Lindquist that Nelson needed to try Class A felonies and the transfer was intended to cultivate the career of a young trial attorney and give him a chance to try big cases.

Sheeran echoed Lindquist's explanation for Schacht's move. In addition, when asked, he said that Schacht is not "warm and fuzzy;" Schacht is also not a "Lindquist fan" and has expressed a lack of appreciation for him; and, Lindquist has said something along the lines of a "bull in a china shop" when describing Schacht. Pat Cooper, Chief of Team 1, said that Schacht was doing a very good job for him. When it came to Cooper's attention that leadership was thinking of re-assigning Schacht, he told one of the senior staff that Schacht was doing a great job and there was no need to move him. Cooper said he was not involved in the decision to move Schacht, but later Lindquist told Cooper that he transferred Nelson into the position because Nelson is someone they wanted to move into a leadership position.

I find that Schacht's critical conversation with Lindquist about his administration was a motivating factor in Lindquist's decision to transfer him to Appeals. First, Schacht was uniformly praised by witnesses as a trial lawyer. He is not an appellate lawyer and DPAs, including Team Chiefs, said that his transfer to the Appeals Division did not make sense to them. Second, both Schacht and his Team Chief told Lindquist and senior leaders that Schacht liked where he was working and there was no need to move him. Granted DPA Lund wanted desperately to move out of Appeals and Lindquist wanted to give Nelson, his campaign treasurer, a position that would enable him to move into leadership. However, the timing of Schacht's transfer shortly after his candid conversation with Lindquist suggests that Schacht was the DPA Lindquist chose to address these two needs because Schacht criticized Lindquist and the way he ran the PCPAO.[56]

[56] As noted, Lindquist was aware that Schacht was not a "fan" of his and criticized him to other DPAs, which had gotten Schacht crosswise with Lindquist before. Schacht's history with Lindquist probably played a part in the decision, too.

B. Diane Clarkson

Allegation: The Merrival Complaint alleged that DP Diane Clarkson was reassigned when she spoke out in support of the Minority Bar Association and chose to associate with the *Ames* declarants. The Penner Complaint explained that Clarkson "spoke out" by opposing Lindquist's proposed change in the law intended to help support the application of DPA Kevin McCann for a vacancy on the District Court Bench.

Summary of the Factual Findings: Lindquist transferred Clarkson to Remann Hall, a known destination for persons out of favor with Lindquist, to punish her for her opposition to his proposal to the County Council to replace the Minority Bar Association with the PCPAO on an ad hoc committee to evaluate candidates for judicial appointment. In addition, Lindquist attempted to ingratiate himself with Clarkson after Merrival and Penner filed their Complaints by telling her that he made a mistake to transfer her and asking her where she saw herself in the office.

Summary of the Evidence: Lindquist recalled that the County Council was proposing to create a committee to make recommendations to them to fill a District Court seat that Kevin McCann was interested in. He explained that there had been a committee previously and the PCPAO did not have a seat on it. Lindquist said he told a Council member that he wanted to have the PCPAO at the table on the new committee. The proposal made by a Council member included the PCPAO but not the Minority Bar Association. Lindquist stated that he got calls from the community to support adding the Minority Bar Association to the committee, so later in the process he advocated adding it. He thought that Clarkson believed that only one of the two organizations could be at the table and spoke at the Council meeting advocating that the Minority Bar Association keep its seat at the expense of the PCPAO.

Clarkson said that Lindquist called her into his office around December 2013 (the Council appointed McCann in July 2013). He said he heard that Clarkson told others he did not like her. Lindquist assured her, "I want you to know that I do like you, but I don't like what you did at the Council meeting." Clarkson said Lindquist went on and on to assure her that he had nothing to do with the proposed changes to the Council's ad hoc committee. He said that all he did was speak to the Council about having the PCPAO represented on the committee; the Council must have assumed that he wanted the Minority Bar removed. Clarkson said his comments did not make any sense to her because she knew from Council members that Lindquist had told them that the Council should not give credence to the input of the Minority Bar and Lindquist was proposing a completely different makeup of the committee. Clarkson said that she took off time from work to speak to the Council as the Past President of the Minority Bar Association about the importance of keeping it on the committee.

In July 2014, Clarkson said she was transferred to the Juvenile Division at Remann Hall,[57] a few weeks after Sheeran stared at her in the pit for socializing with *Ames* declarant Bryan Hershman[58]. Sheeran went to Clarkson's office: "How do you like working with Kevin Benton?" Clarkson responded: "I love working with him; he is a great guy and we worked together in District Court." Sheeran replied: "Good, because you are going to Remann Hall." Clarkson asked if she had any say in the matter, to which Sheeran replied: "No, it is a done deal."

Clarkson's Team Chief at the time, Pat Cooper, said that Lindquist was concerned about the opinion Clarkson expressed regarding the District Court judicial endorsement process. He said that Clarkson was a pre-trial negotiator for his team and doing a great job – she was a very good attorney. Lindquist spoke to Cooper the day he transferred Clarkson to Remann Hall and said he understood Clarkson enjoyed working there and wanted to go back. Cooper knew that Clarkson liked where she was and expressed concern about the transfer, asking "have you talked to her?" Lindquist said he had not spoken to her.

Lindquist said that the decision to transfer Clarkson to Remann Hall was Sheeran's, possibly with some involvement by Farina. He said that Clarkson was the only person suggested to him by Sheeran; Clarkson had worked at Remann Hall and they thought she would be a good fit. He said that the transfer was motivated by a desire to give DPA Brian Leech a shot on a trial team, so the question was who to replace him with. Sheeran said that the decision was, in fact, Lindquist's and explained that Leech had gotten sideways years ago with Robnett, had been at Remann Hall for many years and needed a chance to rehabilitate his career.

Robnett recalled that Lindquist told her that he did not like what Clarkson did by speaking to the Council. Judge Sorenson added that Lindquist is a big supporter of dissent, so long as (1) you do it to his face; and (2) you support him once he makes a decision in the matter. He said that Clarkson violated rule #1 by addressing the Council. Lastly, Hilligoss described a conversation with Sheeran. She asked him, "Were you at the table when Diane Clarkson's move to Remann Hall was discussed?" She said Sheeran answered: "Yes, she was moved because she spoke out against Mark." He explained that Clarkson spoke out against Lindquist in support of the Minority Bar Association.

Finally, Clarkson said that on Monday, June 1, 2015, after the filing of both whistleblower complaints, Lindquist arranged a meeting with her through her Team Chief, Kevin Benton. Lindquist told Clarkson that he recalled she gave him sound advice early in his administration that he could not hear or see it at the time. When Clarkson asked Lindquist whether he was apologizing, he responded, "Yes." He admitted that his administration had

[57] Remann Hall is geographically isolated from the County/City building. As noted, it is widely known as the transfer destination of persons perceived as malcontents by Lindquist and his senior leaders. PCPAO HR Manager Lisa Hilligoss said that an attorney from the AG's office asked her: "Why do you send your derelicts out to Remann Hall? Everyone knows it."

[58] Clarkson and Hershman, an *Ames* declarant, both said that they were talking one day in the pit and they saw Sheeran glaring at them. Sheeran denied it.

treated her badly, her transfer to Remann Hall was not a wise use of her skills and the transfer was his mistake. He then asked her where Clarkson saw herself in the office. When Clarkson asked how she went from rags to riches, Lindquist responded, "Well, I am wiser; I didn't understand before." Clarkson concluded that the offer was "absolutely a bribe; Lindquist doesn't give favors for nothing."

I find that Lindquist attempted to assist McCann's appointment by changing the process for advising the County Council about judicial candidates. Lindquist admitted to Clarkson and told senior leaders that Clarkson upset him by opposing his plan to replace the Minority Bar Association with the PCPAO on the committee. I further find Lindquist transferred Clarkson to Remann Hall, a known destination of persons out of favor with Lindquist, to punish her for her opposition. Finally, Lindquist attempted to curry favor with Clarkson after Merrival and Penner filed their Complaints by telling her that he made a mistake to transfer her and asking her where she saw herself in the office.

C. Brian Leech

Allegation: The Penner Complaint alleged that Lindquist proposed moving DPA Brian Leech from the felony property crime team to Remann Hall after Leech spoke out against the proposed amicus brief in *Nissen v. Pierce County.*

Summary of the Factual Findings: Lindquist proposed moving DPA Brian Leech from Team 3 (Property Crimes/Animal Cruelty) to Remann Hall after Leech spoke out at a Guild meeting against approving the proposed *Nissen* amicus brief. In addition, on the same day that Lindquist met with Clarkson to apologize for transferring her (after the Complaints were filed), Farina met with Leech and asked him where he wanted to be in the office and whether he had any interest in being a judge.

Summary of the Evidence: The incident alluded to by Penner was discussed previously. To reiterate briefly, Leech commented at a Guild meeting that the *Nissen* amicus brief was not accurate and the Guild needed more time to consider it; DPAs who supported the brief and Lindquist became upset with Leech because of his opposition; according to Penner, the following Monday, Lindquist called him into his office and asked, "What is wrong with Brian Leech [for arguing against the brief]?" Lindquist told Penner, "Talk to Dawn about moving him back to Remann Hall."

Penner said he did not speak with Leech about Lindquist's response to Leech's opposition to the amicus brief in his capacity as a senior leader, but he told him as a friend. Leech recalled that Penner spoke to him about Lindquist's comments, including a statement by Lindquist that Leech was "not working out in Team 3."

Penner also recalled Lindquist telling him that Leech declined to greet Ausserer one time, and did not respond to a hello from DPA Ruyf when Lindquist and Ruyf were coming back from

court. Lindquist told Penner to speak to Leech, to tell him that it was unprofessional not to greet someone, and to let him know it was noticed. Penner said he spoke to Leech later and told him, "Here's what I am supposed to tell you...."[59] Afterwards, when asked, Penner told Lindquist that he spoke with Leech and told him that he failed to greet his coworkers, including Lindquist, and he should respond as a professional. Penner said Lindquist replied, "Don't bring up my name; I don't want my name involved in this." [60]

Lindquist said that he heard about a kerfuffle involving the amicus brief at a Guild meeting; he only later heard Leech's name attached to opposition to the brief; he did not discuss sending Leech back to Remann Hall; and, he recalled a conversation about Leech not greeting people, including himself, and saying he didn't want to be dragged into any conversation about it. One senior leader said that Leech's attendance at the *Dalsing* vindictive prosecution hearing came up at a leadership meeting; Ausserer said that Leech walked by him without smiling, seeming to side with Dalsing; Farina became very upset and discussed whether Leech could be fired for it. Ausserer said he shared his experience when the group discussed Leech not addressing Lindquist and Ruyf in the elevator, but said he did not hear any conversation about firing Leech.

On the basis of this evidence, I find that the allegation in the Penner Complaint is true, *i.e.*, Lindquist proposed moving DPA Brian Leech from Team 3 to Remann Hall after Leech spoke out against the proposed amicus brief. Key to this finding is Leech's recollection that Penner told him at the time that Lindquist said Leech was "not working out in Team 3." Penner contemporaneously recounting the conversation to Leech is more trustworthy than Lindquist's later denial of it. I cannot confirm, however, that senior leaders discussed firing Leech for not greeting senior leaders with a "hello" because recollection of the conversation was equivocal.

One other conversation involving Leech is worth mentioning here. On the same day that Lindquist apologized to Clarkson after the whistleblower complaints had been filed, Farina sent Leech an email "out of the blue" suggesting they have coffee and catch up. When they met, Leech said Farina told him she has always liked him and he was doing a great job. Then, Farina asked Leech, "Where do you want to be in the office?" She also asked Leech if he had any interest in being a judge, the first time Farina had discussed the subject with him. Farina said her decision to meet with Leech was her idea and not connected to Lindquist's plan to meet with Clarkson. She had read Merrival's Complaint but claimed she just wanted to catch up with Leech and check in with him about his work on animal abuse cases.

More recently, Lindquist made a call to his former Chief Criminal Deputy, Mary Robnett, that followed a similar pattern. Robnett said Lindquist called her on the day that I interviewed her, after she had not heard from him for a few years. He started by saying that she had always

[59] Leech told Penner that he didn't hear either hello and did not intend to snub anyone.
[60] Penner understood that Lindquist wanted the message to come from Penner, not from him, which Penner described as, "plausible deniability in a very unimportant situation."

been one of the most important people in his life; he valued her opinion; and, if she asked him for a favor, he would do it for her. He then told Robnett that he loved her when she left the office and still does. Lastly, he said, "I need a favor from you; I need your counsel and would like to meet you." Robnett was heading into a three week trial and told Lindquist she was not inclined to meet with him. Lindquist generally confirmed the gist of the conversation described by Robnett.

A former PCPAO colleague of Robnett's told her that Lindquist was in damage control mode and either wanted to neutralize her or enlist her help. I find that Lindquist's and Farina's outreach to Clarkson, Leech and Robnett were all attempts to neutralize them and to control the damage done by the Merrival and Penner Complaints. The finding is based on the status of Clarkson, Leech and Robnett – all persons of some influence[61] who Lindquist had ostracized in some way; the content of the outreach – both complimentary and solicitous; and, the timing of the contacts – after the Complaints.

D. Detective Glenda Nissen

Allegation: The Merrival Complaint alleged that Lindquist and the PCPAO retaliated against Nissen by interfering with her investigations, limiting her access to DPA support and limiting her case filings.

Summary of the Factual Findings: The PCPAO requested in early 2015 that the PCSD remove Nissen from her appointment as the detective assigned to the SAU; when the PCSD refused, the PCPAO attempted to place substantial limitations on the interactions between her and the SAU DPAs and interviewers; the limitations were unlike any previously placed on a police officer working with the PCPAO; and, the PCPAO placed the limitations on interactions with Nissen because she had filed numerous lawsuits and complaints against the office, which was the first time the PCPAO had to face this situation.

Summary of the Evidence: The PCSD designated Nissen as the detective assigned to work with the PCPAO's SAU in March 2015. Undersheriff Rob Masko said the Department appointed Nissen because she applied for the position with the encouragement of her supervisors. Upon learning of the appointment, Asst. Chief of the PCPAO's Civil Division, Denise Greer, called and asked Masko to reconsider Nissen's appointment. Masko told Greer that he would not "monkey around with the process": Nissen was ethical and did good work; and, his only concern was whether she could keep up with the caseload (she tended to focus on a couple of cases). Greer was very disappointed, according to Masko, and made the same request two weeks later. When Masko declined again, Greer said that the office couldn't charge her cases. His response was, "she is working the cases and you will need someone to testify."

[61] Clarkson and Leech are both active politically in minority communities and Robnett is a well-respected trial lawyer in the community.

Asst. Team Chief of SAU, Heather DeMaine, said that she was charging cases solo in early 2015 because DPA Angelica Williams was on leave. DeMaine said she attended a meeting with the unit's forensic interviewers on March 25, 2015 led by Denise Greer. DeMaine explained that the interviewers typically interview a child victim while the assigned detective watches through a two-way mirror. The detective takes notes of the interview and then meets with the interviewer at the end to discuss whether any follow-up is necessary. The interviewer provides a summary of the interview to the charging DPA, who sometimes watches a tape of the interview. DeMaine said that in 12 years in the SAU, she has never been asked to attend a forensic interview.

At the meeting, Greer told DeMaine and the interviewers that Nissen was coming into the unit as a detective and they were not to have any in-person contact with her, including by telephone. If they needed to speak with her, then they should have someone else with them. Greer said they could email Nissen, but only after Greer or Civil Division Chief Doug Vanscoy reviewed the email. Greer also told DeMaine that she was going to have to attend any forensic interview that Nissen attended to watch her interaction with the interviewers. Further, DeMaine was not to speak with Nissen, despite the fact that they would be the only two persons in the room watching the interview. Greer told them that the precautions were necessary because Nissen could not be trusted and she could put words in the interviewer's mouth. When DeMaine asked, "What if she asks why I am watching her and not other detectives, Greer responded, "Don't answer the question. We don't want her to know – we don't want you to tip her off."

Greer also told DeMaine that she was supposed to treat her cases as if Nissen's aspect of her investigation didn't happen; Nissen was on the PIE list and DeMaine had to assume that she could not call Nissen as a witness. Greer instructed the interviewers, who work hand-in-hand with the detectives, not to ride with Nissen to a school interview and not to talk to her unless DeMaine was present.

DeMaine said that she and the interviewers were very upset and concerned that the restrictions would put their cases and the child victims at risk. It seemed to DeMaine that the office was retaliating against Nissen to make her ineffective so that the Sheriff's Office would take her off SAU cases. DeMaine also said that the protocols were an unprecedented approach to a detective with PIE information. She called Sheeran that night very upset. She told him about the meeting, her concerns about treating Nissen differently, the requirement that she attend interviews for the first time and not to assist Nissen, all to the detriment of their cases. When DeMaine told Sheeran she was not going to do it, Sheeran responded, "When you are in a position of leadership, sometimes you're asked to do things that make you uncomfortable."

After two weeks of back and forth between DeMaine and senior leaders, including Sheeran and Ausserer, DeMaine and the interviewers met with Greer again on April 14, 2015. Greer told DeMaine that she didn't have to attend forensic interviews, but they were not to have one-on-one contact with Nissen without a witness; they could email her, but only with approval from Farina, Vanscoy or Greer, unless the email was about procedure only; if Nissen contacted

them by telephone, they were to document the conversation verbatim, mark it "attorney-client privilege" and route it to Denise Greer; and, finally, Greer confirmed that DeMaine and interviewers should pursue the cases with due diligence regardless of who was assigned.

The interviewers confirmed DeMaine's recollection of the meetings with Greer and the limitations placed on their interactions with Nissen. During that time period, the interviewers said that they became concerned because it appeared that a child victim's case would be handled differently because of the detective assigned.

Lindquist said that he was "out of the loop on Detective Nissen;" he only knew that the Civil Division had been giving advice, but he was not aware of the advice being given. He said that the office's civil DPAs were involved in advising the SAU "because Nissen has filed more than 10 complaints against the County." Farina explained that the Civil Division gets involved when "there is a potential for litigation to prevent problems from arising." Greer said that she, Farina and Sheeran developed the restrictions. Greer said that she, as a civil DPA, was involved because Nissen had filed a claim against the County, which had been settled, and there was a concern that she would allege retaliation. Greer acknowledged that she had been with the office 18 years and the office had never imposed similar restrictions on a police officer, but she said the office never had an officer sue it before.

I find that the PCPAO requested the PCSD to remove Nissen from her appointment as the detective assigned to the SAU; when the PCSD refused, the PCPAO attempted to place substantial limitations on the interactions between the SAU DPAs and interviewers and Nissen; the limitations were unlike any previously placed on a police officer working with the PCPAO; and, the PCPAO placed the limitations on interactions with Nissen because she had filed numerous lawsuits and complaints against the office.

VI. Disregard of Merit Based Employment

Allegation: The Merrival Complaint alleged that Lindquist's administration has substituted the merit system of employment with one based on unquestioned loyalty. Those who are loyal to him are deemed "good colleagues" and receive favorable assignments; conversely, DPAs who question him are considered "bad colleagues" and receive disfavored assignments. Further, Lindquist does not hold loyal DPAs to the same standards as DPAs who are critical or question his directives.

Summary of the Factual Findings: DPAs who are loyal to Lindquist are deemed "good colleagues," receive good assignments and are treated differently than those DPAs who fail to give him, in his opinion, their unequivocal support.

Summary of the Evidence: In many respects, this allegation goes to the core of the Merrival and Penner Complaints, as well as the great frustration of some career prosecutors with the Lindquist administration. Lindquist said that Prosecutor Horne, his predecessor, emphasized a "trial warrior" culture and rewarded DPAs who "racked up" a set number of trials in a year

with an annual recognition dinner. When Lindquist was Horne's campaign manager in 2001, he said he learned that criminal defense lawyers were upset with Horne because they believed that the PCPAO sought convictions as its primary goal. So, when he took office, Lindquist said that he attempted to move the office to a "public service culture," which is reflected in the "trifecta" used to evaluate applicants and DPAs: "good worker" (do a good job); "good colleague" (treat coworkers respectfully); and, "good emissary" (interact professionally with the public).

As noted previously, only one of these core values (good worker) involve being a good technical lawyer. The other values emphasize relationships – with coworkers (good colleague) and the general public (good emissary). Moreover, these relationship values are largely subjective, much different than an objective measure like the number of trials in a year. The evidence indicates that Lindquist's subjective evaluation of a DPA's relationships with others, including himself, turn on two principal measures: one's loyalty to him and his administration; and, their ability to get along without conflict with others, including himself. Regarding loyalty to Lindquist, Judge Sorenson, formerly Lindquist's Chief Criminal Deputy, said it best: "Lindquist is a big supporter of dissent, so long as you do it to his face and support him once he makes a decision in the matter." Denise Greer, Asst. Chief of the Civil Division, said it this way: "Mark doesn't want people around who make waves; he likes people who everyone gets along with. People who disagree with him are not sidelined [referring to Asst. Chief Criminal Deputy Greg Greer, her husband, as an example]; only those who disagree with him in an inappropriate way." Greer also said the being a good colleague is "very important to him; he does not want people who are unhappy and make others around them unhappy in leadership positions."

The Merrival Complaint cited Lindquist's treatment of DPA Brent Hyer as an example of Lindquist's disparate treatment of persons loyal to him. In fact, Lindquist's response to the conduct of both Brent Hyer and his wife, Team Chief Michelle Hyer, is a good example of the operation of Lindquist's trifecta value system. In early March 2014, Sheeran and Hilligoss met with employees (people in the 955 building) who complained that Brent and Michelle Hyer were copying library CDs using County equipment onto County CDs. They determined at the conclusion of an investigation that Brent Hyer used County equipment to copy recipes from a cookbook and an HBO series, Game of Thrones, using his own discs.[62] They further found that Michelle Hyer was not involved in the copying, but she delegated approval of a legal assistant's work hours to her husband when she was out of the office. He used her password to log onto her computer to approve the time, which gave him access to confidential personnel information.

The investigative interviews revealed serious concerns regarding the conduct of both Brent and Michelle Hyer. Employees said Michelle Hyer had no "off switch" or "boundaries;" she sought advice from her husband regularly and often yelled down the hall to get it; she instilled fear in her staff, who "walk on eggshells;" and, a couple of times a week spent time at her son's school in the morning and arrived at the office between 11:00 a.m. and noon. Employees reported that Brent Hyer regularly assisted his wife with cases and spent hours a day socializing and on his cell phone.

[62] Brent Hyer told Sheeran and Hilligoss that he copied 26 out of the series' 29 disks.

Sheeran said that Brent Hyer claimed his copying was legal and directed Sheeran to the Fair Use doctrine and *Sony Corp. of America v. Universal City Studios, Inc.*, which Sheeran read to say that Hyer could make copies of copyrighted material for his own use. So, Sheeran told Hyer "don't do it again" and said that Hyer "got it." Afterwards, Hyer was transferred to the Appeals Division and was promoted to Team Chief of the Fugitive unit (a leadership position but not a full time one).

Sheeran also said he was involved in the decision to make Michelle Hyer a Team Chief. She had expressed a strong desire to be a Team leader and had a wealth of experience, but he said she could be abrasive. So, he "couldn't put her in charge of 15 people" and instead put her in a small unit to see how she worked out. After the investigation, Sheeran said that he counseled her how to improve, required her to attend management training classes, and followed up with team later, who told Sheeran that she was trying to do better but still had issues.

Finally, Farina said that senior leadership gave Michelle Hyer the Team Chief position "because she really wanted to be a supervisor" and they wanted to give her the opportunity. Farina heard that Hyer has been confrontational and "prickly" and Sheeran had counseled her about those concerns. Notwithstanding those concerns, Farina described Hyer as a good trial lawyer and a good colleague.

This evidence indicates that Farina and Sheeran gave Michelle Hyer an opportunity to enter leadership, notwithstanding her known abrasiveness, and addressed the Hyers' performance issues and misconduct with verbal counseling and performance management. Contrast the experience of the Hyers, Lindquist loyalists, with that of Rosie Martinelli, who is perceived as a Lindquist detractor.[63] It is a "tale of two colleagues." Martinelli explained that she needed some relief from a long, regular diet of trial work, so a few years ago she took a position in the Family Support unit. She said that the work provided her a nice break, but after two years she was ready to go back to trying cases. She talked to Sheeran in June 2014 about returning to the criminal division; he seemed positive at first but then appeared to make excuses about why she could not transfer. Consequently, she emailed Farina about status of her request, who responded that her supervisor, Team Chief Sarah Richardson, would speak with her. According to Martinelli, Richardson said that Farina told her to tell Martinelli that she was not a good colleague or good emissary; when asked, Farina told Richardson to tell Martinelli that she was "prickly."

Richardson said that Farina spoke with her about Martinelli's request. Farina said that she didn't want to move Martinelli because of Martinelli's attitude and demeanor while she was in the criminal division. Richardson said that she had heard Martinelli had a negative attitude toward Lindquist and the office and Farina did not want the attitude spread to other parts of the office. Richardson said that she had not experienced any poor attitude on Martinelli's part and

[63] Martinelli said that she supported Bertha Fitzer, who ran against Lindquist, and voiced some criticism of her experience trying a case with Lindquist. She said that she has been ostracized by Lindquist and his "cohort" ever since.

told Farina that Martinelli had been doing good work in Family Support. Nonetheless, Farina told Richardsom that she did not intend to move Martinelli into the criminal division because of the "good colleague" prong of the trifecta. Farina said many people still had that concern, even though it had not been documented in her recent evaluations. As an aside, Richardson said that Family Support can be the "stepchild of the office."

I find that the different treatment of the Hyers and Martinelli indicates that being a "good worker" is the lesser of the three prongs of the trifecta. After all, a "solid" trial lawyer (Farina's words) like Martinelli cannot get back to the criminal division, while Michelle Hyer remains a Team Chief after her struggles as a leader and despite giving her husband access to a confidential database, and Brent Hyer gets a promotion to Team Chief after using County equipment to copy a copyright protected HBO series.

I further find that being a good colleague can't simply mean that must treat your coworkers with respect, as leadership claims. After all, Martinelli is told that she is "prickly," fails the "good colleague" prong of the trifecta and can't secure a transfer to the criminal division, despite her "solid" trial skills, her repeated requests, and her good work and good attitude in Family Support. In contrast, Michelle Hyer is "prickly," but she is given a Team Chief role, albeit in a smaller team, because she wants to be a supervisor and the leadership wants to give her a chance. And, she retained her Team Chief position after her subordinates identify concerns about her management style.[64] Under these circumstances, I conclude that the leadership's tolerance of the Hyers' performance and conduct, and its intolerance of Martinelli, can only be explained by the difference in the loyalty Lindquist perceives the Hyers and Martinelli show him.

Ginny, I appreciate the opportunity to serve Pierce County.

[64] I do not mean to suggest that the office's response to Ms. Hyer's performance issues was inappropriate. The office's response is relevant only as it compares to the PCPAO's treatment of Ms. Martinelli and others considered to be disloyal or "malcontents."