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Clackamas County tagged over firing

An arbitrator cites “willful violations” of state laws in the termination of an employee whistleblower

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Clackamas County must pay \$322,236 in damages for the wrongful dismissal of a high-level employee who accused his boss of mismanaging contracts and wasting public funds, an arbitrator has ruled.

To win the award, the arbitrator

required Daniel Henninger only to show that he believed Mike Kuenzi, Water Environment Services director, acted improperly and that Henninger was fired for blowing the whistle.

The arbitrator, however took it a step further.

In a 31-page order, attorney Susan Eggum found “the evidence indicated not merely that claimant had an objectively reasonable belief that Kuenzi’s conduct was not in the public’s best interest. The preponderance of evidence demonstrated that Kuenzi’s actions and conduct were will-



See videos of the Mike Kuenzi deposition, read the arbitrator’s order and check out related stories that take a closer look at Dan Henninger’s allegations, online at ORnews/daniel-henninger.

ful violations of not only county rules but also state laws.”

Though the arbitration is handled outside the justice system, the order is legally binding. It followed months of investigation that produced hundreds of pages of documents, sworn

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Fired in 2012 from Water Environment Services of Clackamas County after blowing the whistle on the director of the department, Dan Henninger is still out of work. He recently saw an arbitration victory that cited retaliation as the cause of his dismissal.

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Firing

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testimony and hours of depositions. The county paid \$178,000 for outside counsel to defend Kuenzi's actions, and also must pay Henninger's attorneys fees, initially estimated at \$344,000.

County officials declined to comment on the case. Spokesman Tim Heider said the county will respond after the arbitrator rules on two requests, one by the county to reduce the award for attorneys fees and one by Henninger for reinstatement.

Kuenzi, who earns \$141,037 a year, has been placed on paid administrative leave while the county investigates allegations and findings from the arbitrator's ruling. Kuenzi did not respond to emails and phone calls requesting comment.

Kuenzi fired Henninger, former technical services manager, on July 26, 2012. In depositions, Kuenzi contended Henninger took too much time investigating whether a Water Environment Services employee viewed pornography on county computers. An Oregon City police investigation of the same employee was inconclusive, and the employee remains on the county payroll. Kuenzi said in a deposition he learned the results of the investigation the day before he fired Henninger.

Henninger, 54, contended he was fired in retaliation for raising concerns that Kuenzi awarded contracts without competitive bidding, split contracts to avoid board oversight and misrepresented a \$300,000 expenditure in seeking approval from county commissioners.

Eggum, a Lane Powell attorney who specializes in corporate and employment law, found that though Henninger could be faulted for taking months to investigate the employee's computer use, he was discharged "in substantial part" for exposing contract issues. Under Oregon law and county policy, Henninger had an obligation to report suspected misuse of public money, Eggum found, and it is unlawful to fire an employee for performing an important public duty.

Oregon statutes

The arbitration order raises several legal issues. Here are the relevant Oregon statutes.

Wrongful discharge (ORS 659A.203): It is an unlawful employment practice for any public employer to prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the disclosure of any information that the employee reasonably believes is evidence of (a) a violation of any federal or state law, rule or regulation by the state, agency or political subdivision; or (b) mismanagement, gross waste of funds or abuse of authority.

Sole-course procurements (ORS 279B.075): A contracting agency may award a contract for goods or services without competition when the agency determines in writing ... that the goods or services, or class of goods or services, are available from only one source.

Fragmented procurements (ORS 279B.070): Any procurement of goods or services exceeding \$5,000 but not exceeding \$150,000 may be awarded in accordance with intermediate procurement procedures. ... A procurement may not be artificially divided or fragmented so as to constitute an intermediate procurement under this section.

Official misconduct (ORS 162.415): A public servant commits the crime of official misconduct in the first degree if with intent to obtain a benefit or to harm another: (a) the public servant knowingly fails to perform a duty imposed upon the public servant by law or one clearly inherent in the nature of office; or (b) the public servant knowingly performs an act constituting an unauthorized exercise in official duties.

Relationship sours

Kuenzi, 59, hired Henninger five years ago. They had worked together for the city of Klamath Falls, and got along well.

The two sometimes skied together and hung out socially. Henninger attended Kuenzi's wedding. Both wrote recommendations for the other for workshops and conferences during those five years.

Their relationship soured, though, starting in 2011, according to Henninger.

In March of that year, The Oregonian published several stories about how the Portland Water Bureau misused funds to pay for Rose Festival Foundation office space. Kuenzi called a meeting of his top staff, and asked, in light of the articles, whether Water Environment Services had any skeletons in the closet. Henninger said he thought Kuenzi could get into trouble for awarding four contracts to public relations firm Conklin Fiskum & McCormick without competitive bidding, according to depositions from both Henninger and Kuenzi.

Sole-source contracts are legal, but only in special circumstances, and even then state law requires written

justification.

As a department director, Kuenzi can award contracts on his own authority up to \$150,000. Anything more must be approved by the Clackamas County Board of Commissioners. In July 2011, Kuenzi approved a new CFM contract, placing CFM partner Norm Eder on a retainer contract of \$144,000 annually for general public outreach and messaging services.

A month later, Kuenzi wrote Eder a new contract for \$150,000 for public relations on the proposed acquisition of the bankrupt Blue Heron Paper Co.'s lagoon in West Linn. The property came with valuable permits Water Environment Services needed to discharge treated wastewater into the Willamette River.

Henninger contended that Kuenzi was splitting contracts to avoid board oversight, an illegal practice under Oregon law. He expressed concerns about the lack of oversight of Kuenzi's contracting practices and the work Eder was doing to Chris Storey, an attorney in the county counsel's office who handles Water Environment Services legal issues.

Storey said in an interview that Henninger did not make allegations

of illegal activity.

"I took this to be complaining about decisions the boss was making because Mr. Eder had a somewhat independent role that was outside Dan's control," Storey said.

Though county policy calls for contracts to be reviewed by county counsel, Kuenzi testified that he told Storey not to get involved.

Storey said in a deposition that the meeting made him "nervous" about Kuenzi's contracting practices but that he took no further action and did not inform his boss, County Counsel Stephen Madkour.

In late 2011, Kuenzi and Henninger clashed again over another contract.

Henninger questioned Kuenzi's decision to make an additional payment of \$300,000 to the design engineering firm HDR and accused Kuenzi of misrepresenting the payment in a report to county commissioners.

On March 22, 2012, Henninger sent an email, copied to county attorney Storey, contending that the \$300,000 payment duplicated previous compensation and could not be justified. Kuenzi subsequently signed an April 2012 contract amendment and won board approval of the \$300,000 payment.

Firing Henninger

In a deposition, former County Administrator Steve Wheeler said Kuenzi first questioned Henninger's handling of an employee investigation in March 2012, the same month Kuenzi and Henninger clashed over the HDR contract. In June 2012, the employee investigation remained unresolved and Wheeler gave Kuenzi permission to fire Henninger. Wheeler subsequently left the county and recently was hired as Hood River county administrator.

Kuenzi followed through on the dismissal on July 26, 2012.

In a deposition, Kuenzi said he didn't consider firing Henninger until July 25, a month after Wheeler said he signed off on the dismissal. The arbitrator noted the discrepancies and found Wheeler credible "as to the number, timing and subject of his meetings with Kuenzi."

The day before Kuenzi fired Henninger, Oregon City police told Kuenzi that there was no clear proof that any Water Environment Services employees looked at pornography on work

computers. The finding was inconclusive in part because an audit of the two computers the employee used generated 37,000 pages of data that were difficult to interpret.

Frank Berry, the county's systems administrator, testified that the report was "much more confusing and cumbersome" because of a recent software change.

Nevertheless, Kuenzi asked Nancy Drury, the employee relations director, to approve Henninger's termination, claiming he couldn't trust Henninger anymore. Drury and Wheeler approved the termination, and Kuenzi confronted Henninger with a separation agreement Kuenzi drafted without review by county attorneys.

Henninger declined to sign the separation agreement, and Kuenzi fired him without cause, which was permissible under Henninger's contract with the county.

Kuenzi investigation

Current County Administrator Don Krupp placed Kuenzi on paid administrative leave Feb. 19, nine days after the arbitrator found evidence of unlawful actions and conduct. Liz Garcia, whom Kuenzi promoted to Henninger's job when he was fired, is serving as interim Water Environment Services director.

County spokesman Tim Heider said the county hired an outside contractor, Darren Goodding of Portland, to investigate Henninger's allegations.

Henninger and his attorney, Mick Sedil, note that the county already conducted an extensive investigation of Kuenzi's actions in preparing for binding arbitration. The arbitration process follows accepted rules of evidence, uses sworn testimony and results in findings by an independent legal expert.

"My case has been decided, and I am glad to put this behind me and move on," Henninger said in a statement. "However, I am concerned that the county has not learned from the arbitration hearing or the findings and that they will not make any real changes, brushing this situation under the rug and going back to business as usual. If this is the case, the employees at Clackamas County will have learned that they have no place to turn, should they recognize wrongdoing and speak up in the public's best interest."