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# Black v. Idaho State Police Respondent's Brief Dckt. 39822

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JEFFRY J. BLACK, )  
 )  
 Plaintiff-Appellant, )  
 )  
 vs. )  
 )  
 IDAHO STATE POLICE, an executive )  
 department of the State of Idaho; and )  
 COLONEL G. JERRY RUSSELL, Colonel )  
 Director of the Idaho State Police, an )  
 individual, )  
 )  
 Defendants-Respondents. )  
 )

Supreme Court  
Docket No. 39822

COPY

RESPONDENTS' BRIEF

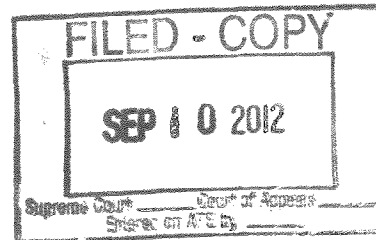
Appeal from the District Court of the Fourth Judicial District  
of the State of Idaho, in and for the County of Ada

\* \* \* \* \*

Honorable Lynn G. Norton, District Judge, Presiding

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## STATEMENT OF THE CASE

**Nature of the case.** While Jeffry Black was the Executive Director of the Peace Officer Standards and Training Council, POST, as it is known, suffered significant budgetary mismanagement. As the Director of the Idaho State Police, within which POST exists, Col. G. Jerry Russell sought to correct the situation. But Jeffry Black repeatedly and deliberately refused to follow Col. Russell's lawful and proper instructions aimed at remedying the financial mess that Black's decisions created. He told Col. Russell that he did not have to follow Col. Russell's instructions because Col. Russell had no authority to give them. So Col. Russell fired him for general incompetence and insubordination.

Black made the same argument to the Idaho Personnel Commission, which rejected his appeal. He did not appeal that decision to district court, and filed this Whistleblower Act case. Black now understands that Col. Russell did have the authority to give the directions at issue. Nevertheless, he seeks protection under the Whistleblower Act because he says his articulation of his beliefs about Col. Russell's authority and his refusal to follow instructions was reasonable. The theory goes that because Black *thought* Col. Russell lacked the authority to give the directions at issue, he *thought* the directions were illegal, and so he could not be fired for failing to follow them. The district court rejected this argument, and now Black asks this Court to hold that the Whistleblower Act should protect this sort of activity.

**Course of proceedings.** The defendants-respondents generally agree with Black's statement of the course of trial court proceedings (Appellant's Opening Brief, p. 2).

**The facts.** POST is a division of the Idaho State Police. Idaho Code § 19-5102. It has a limited role in law enforcement, which can generally be described as providing training, education, and certification for Idaho law enforcement officers. Idaho Code § 19-5117. At the time relevant to this case, its Executive Director was selected by the POST Council subject to approval by the Director of the Idaho State Police.<sup>1</sup> R., p. 112. The POST Executive Director is, by rule, a State Police employee and serves at the direction of the POST Council for carrying out the POST Council's duties. IDAPA 11.01.031.02. For administrative purposes, the POST Executive Director and his staff are governed by the policies and rules of the State and the State Police, concerning, but not limited to, fiscal, purchasing, and personnel matters. IDAPA 11.11.01.031.04.

Colonel Dan Charboneau, then the Director of the Idaho State Police, hired Jeffry Black as POST's Executive Director in July 2006. Col. Charboneau's appointment letter makes plain that he would be Black's "direct supervisor." R., p. 135. Colonel Charboneau conducted Black's 2006 performance evaluation and, other than Black's, his is the only signature on the document. R., p. 137. Colonel G. Jerry Russell became the State Police Director in January 2007. R., p. 112. Colonel Russell conducted Black's 2007 and 2008 performance evaluations. R., pp. 145, 151. On each, the only signature other than Black's was Col. Russell's.

Marsi Woody is the State Police Financial Executive Officer. In November 2008, she alerted Col. Russell to something of a financial problem. R., p. 114. Cash-on-hand at POST was

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<sup>1</sup> The POST rules were changed in 2010. The rules in place for the relevant time periods in this case are found in the Record at pages 132 and 133. References in this brief to the rules will be to the then-effective version unless otherwise noted.

nearly gone and POST would not be able to pay its bills—including payroll—through the end of the month. R., p. 114. Concerned with this deficit, Col. Russell met with Black and another POST staffer to discuss how to fix the situation. R., p. 114. As he looked into the situation further, Col. Russell became even more concerned that Black and POST staff were not fully aware or in control of POST revenues and expenditures and that they lacked the internal controls necessary to properly manage the POST budget. R., pp. 115-16. It turns out there were numerous financial issues afoot at POST, one of which was Black's decision to purchase software called "Liquid Office." R., p. 115. Colonel Russell authorized a transfer of \$50,000 from the State Police to meet POST's immediate financial needs. R, p. 116.

The financial problems at POST caused other problems. An example: POST's primary function is to train and certify law enforcement officers. New hires needing POST certification must obtain it within a year of hire. R., pp. 116-17. It is critical, then, that POST conduct training academies on a regular basis. R., p. 117. But as POST's cash declined, Black cancelled academies to reduce operating costs. R., p. 117. This created hardships for the local and state agencies that needed their new hires to obtain POST certification in a timely manner. R., p. 117.

Colonel Russell held a meeting with Black and other State Police and POST staffers in late November 2008 to discuss his concerns regarding the lack of oversight and cost controls for the POST budget. R., p. 117. Colonel Russell directed Black and another POST staffer to take immediate control of POST's fiscal matters. R., p. 117. But Black told Col. Russell he answered only to POST. R., p. 117. Colonel Russell informed Black, though, that in fact the ultimate responsibility for the POST budget was his, not Black's, and that POST rules establish



that the POST Executive Director is governed by State Police rules and policies on fiscal, purchasing, and personnel matters. R., p. 117. Colonel Russell directed Black to provide him with a memo explaining the causes for POST's fiscal year 2009 budget deficit and proposing ways to balance the budget for the remainder of the fiscal year. R., p. 118. He explained, too, that if Black were to meet with POST Council members to discuss POST budget matters, he—as Black's direct supervisor—would be present at any such meetings. R., p. 118. Colonel Russell memorialized the directives in a letter to Black the same day. R., p. 175.

Black responded to Col. Russell the next day by email. He told Col. Russell that under Idaho Code § 19-5116 the POST budget was “clearly under the direction of the POST Council.” R., p. 188. He included a copy of the statute in his email. The same day, Black provided Colonel Russell a memorandum explaining the “convergence of events” that he thought created the financial quagmire POST was in. R., p. 190. He did not explain, though, how he intended to fix POST's budgetary problems. R., p. 118.

At POST's December 2008 council meeting, the Council held an executive session to discuss Black's performance and Col. Russell's attempts to intervene in the budget situation and supervise Black's path toward control of POST's budget. R., p. 119. The POST Council also discussed Black's resistance to Col. Russell's directions to Black about the POST budget. R., p. 119. Back in open session, the Council entertained a motion to direct Black to cooperate with Col. Russell and answer to Col. Russell with regard to the fiscal matters relating to POST. R., p. 193. It passed unanimously. R., p. 193.

Alas, POST's fiscal woes continued. In January 2009 Col. Russell expressed to Black in a letter his concerns about the continuing problems and directed Black to implement a list of changes to correct POST's situation. R., p. 199. Black had asked that a financial specialist, Lori Guthrie, be relocated on a trial basis from State Police financial offices to the POST operations building to provide support to POST's financial staff. R., p. 120. Colonel Russell approved the move.

POST had other problems, namely management and employee morale issues. When Col. Russell learned of these problems, he directed Steve Raschke, a State Police Executive Officer, to conduct a management audit of POST. R., p. 121. This audit, called the Audit Report, included interviews of all POST staffers and disclosed several concerns. R., p. 121. Colonel Russell gave Black a copy of the report on June 15, 2009 and asked for Black's response by the 29th. R., p. 122. No response came. R., p. 122. Near the end of July, Col. Russell and Black met. Among the topics of discussion was Col. Russell's decision to end Lori Guthrie's trial run at POST and bring her back to the State Police financial offices. Colonel Russell determined that her presence at POST had not helped the situation and so he directed Black to coordinate Ms. Guthrie's return with Marsi Woody, the Financial Executive Officer. R., pp. 122 & 224.

Meanwhile, Black's response to the Audit Report finally came on July 31. Black said he would not address findings he deemed outside his control or that represented less than 30 per cent of staff responses. R., p. 226. On August 3, Col. Russell sent Black a memo explaining that he did not think that Black's response demonstrated an adequate appreciation of the matters in

the Audit Report. R., pp. 123 & 229-31. He made specific requests related to the issues in the Audit Report and asked for a response by August 28. R., p. 123.

Halfway through August, Ms. Guthrie had still not been relocated to the State Police financial offices. Black sent Col. Russell a letter on August 12 saying he did not think relocating Ms. Guthrie to the State Police financial offices was a good idea and told Col. Russell that he, not Col. Russell, had supervisory authority over POST employees. R., pp. 123-24 & 233. Based on this response, Col. Russell did not think Black was getting the message. Colonel Russell stated in his affidavit submitted in support of the State Police's motion for summary judgment:

In my view, Mr. Black's plan for addressing the POST budget problems was wholly inadequate and appeared to be nothing more than a perfunctory response to my directive. It gave me no confidence that he appreciated the importance of the situation or that he had developed a plan for addressing the problems that were largely of his making.

R., p. 124.

Near the end of August, Marsi Woody sent Col. Russell a memo recapping POST's budget year and identifying other issues related to POST's continuing inability to manage its fiscal affairs. R., pp. 124 & 237-38. That prompted Col. Russell to send Black a follow-up memo explaining, again, that he, not Black, had supervisory authority over POST employees and again directed Black to accomplish Ms. Guthrie's return to the State Police financial offices as soon as possible. R., pp. 124-25 & 240-41. In response, Black sent Col. Russell a letter saying he would not respond further to the Audit Report and left the clear impression he would not be relocating Ms. Guthrie. R., pp. 243-44.

Colonel Russell regarded Black's response as insubordinate and a demonstrated refusal to cooperate. R., p. 125. So he issued a Notice of Contemplated Action proposing to fire Black, in which he identified the basis for the decision and detailed Black's failures. R., pp. 246-50. Black responded through counsel, who posited that Black answered only to the POST Council and that Black could not be disciplined for his insubordination. R., pp. 258-61. Colonel Russell dismissed Black by letter on November 5.

Black appealed that decision to the Idaho Personnel Commission. He argued that Col. Russell's directives need not be followed, but the hearing officer disagreed and concluded that the facts supported Col. Russell's decision to fire Black. R., pp. 73-84. On review, the commission agreed with the hearing officer, finding that indeed, Col. Russell had the authority Black claimed he did not and finding proper cause for Black's dismissal. Finding Black's arguments "wholly unreasonable," R., p. 101, the commission summed up its decision this way: "Black refused to follow reasonable orders and assignments from an authorized supervisor. This refusal to accept and follow reasonable and proper assignments from Colonel Russell is insubordination and is proper cause for disciplinary action pursuant to [Personnel Commission] Rule 190.01.d and e." R., p. 108-09.

Black did not appeal the decision of the Personnel Commission. The decision is final and conclusive between Black and the State Police. Idaho Code §§ 67-5317(3); 67-5318.

## ARGUMENT

### **I. BLACK FAILED TO DEMONSTRATE THAT HE ENGAGED IN ACTIVITY THAT THE WHISTLEBLOWER ACT PROTECTS**

#### **A. Statutory Framework and Legal Standards**

Commonly known as the Whistleblower Act, the Idaho Protection of Public Employees Act, Idaho Code §§ 6-2101-2109, “seeks to ‘protect the integrity of government by providing a legal cause of action for public employees who experience adverse action from their employer as a result of reporting waste and violations of a law, rule or regulation.’” *Mallonee v. State*, 139 Idaho 615, 619, 84 P.3d 551, 555 (2004). The cause of action is described thusly:

To prevail in an action brought under the authority of this section, the employee shall establish, by a preponderance of the evidence, that the employee has suffered an adverse action because the employee, or a person acting on his behalf engaged or intended to engage in activity protected under section 6-2104, Idaho Code.

Idaho Code § 6-2105(4).

Two of the provisions of section 6-2104 are at issue in this case. Black alleged that the State Police violated what will be called the communication clause (§ 6-2104(1)(a)) and the refusal clause (§ 6-2104(3)). These sections prevent an employer from taking adverse action against an employee because the employee either “communicates in good faith the existence of any waste of public funds, property or manpower, or a violation or suspected violation of a law, rule, or regulation,” or, “has objected to or refused to carry out a directive that the employee reasonably believes violates a law or a rule or regulation . . . .” Idaho Code § 6-2104(1)(a) & (3).

“Good faith,” as used in section 6-2104(1)(a), requires a “reasonable basis in fact” for the communication. *Id.*, at (1)(b).

In addition to arguing that the district court got the substance of the case wrong, Black identifies two other faults with the court’s decision that merit mention here. First, Black contends that the district court applied the wrong legal standard in analyzing whether Black engaged in any activity that the Whistleblower Act protects. *See* Appellant’s Opening Brief, p. 11. He says that the court applied the standards in the common-law public policy exception to the at-will employment rule, *see Mallonee v. State*, 139 Idaho at 621, 84 P.3d at 557, rather than the controlling statutory standards of the Whistleblower Act.

The district court did no such thing. The State Police argued at summary judgment that the undisputed facts demonstrated that Black engaged in no protected activity, and the district court understood that its task on summary judgment was to determine whether the undisputed facts demonstrated that Black engaged in protected activity. *R.*, p. 518. The court correctly recognized that protected activity, as the term is used in section 6-2105, was “only defined by reference to I.C. § 6-2104.” *R.*, p. 518. The district court’s analysis demonstrates it understood that to determine whether Black engaged in protected activity, it had to evaluate whether the undisputed facts constituted a communication in good faith about a violation of law or a refusal to carry out a directive that Black reasonably believed violated the law. *R.* pp. 519-23.

The district court recognized, too, that where the facts were not disputed, determining whether certain conduct met the statutory standard was a question of law. *R.*, p. 523 (“Determining what constitutes public policy sufficient to protect an employee from termination

for whistleblowing is a question of law pursuant to *Mallonee*”). This is the sentence Black points to, but the district court’s reference to *Mallonee* did not mean what Black thinks it meant. The question whether a plaintiff has satisfied the provisions of the Whistleblower Act involves mixed questions of law and fact. The factual questions, for example, may involve the causal requirements or whether a communication was made, or whether the communication was in good faith, or whether the employee objected to a directive. The cases demonstrate, though, that if the facts of the conduct alleged to be protected are undisputed, the question whether that conduct is protected activity within the meaning of section 6-2014 is a question of law. *See, e.g., Patterson v. Department of Health & Welfare*, 151 Idaho 310, 256 P.3d 718 (2011); *Van v. Portneuf Med. Ctr.*, 147 Idaho 52, 559, 212 P.3d 382, 989 (2009). In its decision the district court examined whether Black telling Col. Russell his orders were lacking authority and his refusal to follow them constituted protected activity. R., pp. 519-23. The district court’s decision shows that it properly viewed the issue as presenting a question of law and that the question was whether the conduct at issue was protected activity within the meaning of Idaho Code § 6-2105.

Second, Black asserts that the district court incorrectly ruled that in order to merit protection under the refusal provision, he was required to show that the refused directive was, in fact, illegal. *See* Appellant’s Opening Brief, p. 21. Again, no. Black admitted in his deposition that the thing he was directed to do was not in and of itself illegal (R., p. 584); rather, he claimed that the illegality stemmed from the fact that Col. Russell had no authority to give the directions at issue. In differentiating a protected refusal from the refusal in this case, the court simply explained that whatever Black’s belief, the sort of illegality that Black claimed was not the sort

protected by the act. R., p. 522 (“There is a critical difference between questioning legal authority to give an order and questioning the legality of what is ordered”).

**B. The Facts Do Not Support A Claim Under Either The Communication Clause Or the Refusal Clause Of The Whistleblower Act**

Black’s argument comes down to this: The Whistleblower Act should protect his insubordinate conduct because his refusal to carry out lawful, proper directions from his supervisor was based on his mistaken belief about the law. Because that belief was reasonable, he says, he is shielded from termination for failing to follow directions. The evidence in the record does not, however, support the claim that his communications or refusals implicated a violation or suspected violation of a law or rule. His conduct amounts to a personal disagreement with the Director of the State Police, and the Court should decline his invitation to apply the act to conduct it is not intended to protect. Additionally, the evidence in the record demonstrates that Black’s mistaken beliefs were not objectively reasonable.

- 1. Black did not engage in any protected activity because his mistaken belief about his supervisor’s authority and his refusal to follow lawful, proper directions based on that mistaken belief do not implicate violations of any law or rule.**

Common to both the communication clause and the refusal clause is the requirement that the employee’s communication or refusal implicate the potential or actual violation of a law or rule. *Van v. Portneuf Med. Ctr., supra*. Black says his statements to Col. Russell about Col. Russell’s authority and his refusal to follow Col. Russell’s lawful and proper directions on that basis satisfy this requirement. But Black’s mistaken belief of Col. Russell’s authority in no way implicated a potential violation of a law or rule.



Neither side disputes that Black was told to do nothing illegal. He was not ordered to commit a battery, violate anyone's civil rights, cook books, shred evidence, falsify certifications, vandalize cars, park in a no-parking area, or anything that would have required him to violate a law. Rather, Black believed the orders were illegal because they were made by someone without authority to give them. Questioning and defying authority is not the same as communicating a potential violation of law or refusing a directive that the employee reasonably believes is illegal. Even if Col. Russell did not have the authority to give the directives at issue, Black has not demonstrated that any of them would implicate a suspected violation or violation of a law or rule. In fact, he admitted nothing he was told to do would have forced him to violate the law. R., p. 584. With no violation of law or rule implicated by Col. Russell's conduct, there can be no protected activity.

Black has identified no decision from this Court, another state, or the federal system that supports his claim that questioning and defying a lawful order from a direct supervisor is protected so long as the employee believes the person giving the order had no authority to give it. This is for good reason. Indeed, Black's preferred outcome here has sweeping implications that are irreconcilable with the statutes and rules related to public employment. Refusing lawful orders and insubordination, are, of course, bases for disciplinary action of a public employee. IDAPA 15.04.01.190 d. & e. The basis for Black's termination in this case was multiple failures to follow two directives related to matters clearly within Col. Russell's authority. These were of course lawful and proper orders, and Black does not argue that they were some sort of pretext for some other reason. Thus, were Black to prevail, any employee would be free to disregard proper

orders from a direct supervisor—in this case, the director of a state agency, no less—and survive summary judgment in a Whistleblower Act case simply by articulating a belief that the supervisor in question was not authorized to give the order. This would disrupt public employers’ ability to maintain order within their organizations. As this Court has noted, “[a]lthough an employer cannot expect employees to at all times be absolutely docile or servile, it can expect employees to comply with the employer’s legitimate direct orders.” *Stark v. Assisted Living Concepts, Inc.*, 152 Idaho 506, 509, 272 P.3d 478, 481 (2012).

Black’s claims here amount to a personal disagreement between him and the director of an organization about the organizational hierarchy and the relative authorities of positions within the organizations. Such personal disputes about organizational matters are different than reports of waste or violations of law and refusals to carry out orders that violate the law. This Court should recognize a limiting principle that effectuates the Legislature’s intent to protect employees who bring to light waste or violations of law. It should not protect employees who refuse lawful orders simply on a mistaken belief about who one’s supervisor is.

**2. Even if Black’s conduct implicated a violation of law or rule, his beliefs that the orders violated a law or rule are not reasonable.**

The district court did not rule on the question whether Black’s communication was in good faith or his refusal to follow directions at issue was reasonable. And because Black’s communications and refusals did not implicate the violation or suspected violation of a law, this Court need not, either. Nevertheless, the record demonstrates the answer to either question is properly negative.

The statutes and rules establish the State Police Director's powers and duties and the relationship between POST and the State Police. The Director of the Idaho State Police is of course the head of an executive agency. He therefore has the authority to supervise, direct, account for, organize, plan, administer and execute the functions within the department, establish policy to be followed by the department employees, establish and make appointments, remove employees, transfer employees between positions, and change the duties of employees, among other things. Idaho Code § 67-2405. The Director also has the powers and duties "necessary to carry out the proper administration of the state police . . . ." Idaho Code § 67-2901.

Nothing about the POST Council statutes indicate Col. Russell lacked the authority that Black denied. The prior equivalent to today's POST Council used to be a free-standing board that had the authority to hire and fire the POST Executive Director. *See* 1969 Idaho Sess. Laws, ch. 415, § 2, p. 1151; § 13, p. 1154. In 1980, the predecessor council was absorbed into what was then the Department of Law Enforcement and became the POST Council. *See* Atty. Gen. Op. No. 90-5, Jun 28, 1990 (R. pp. 57-64) (explaining POST Council has no authority to hire and fire employees); 1980 Idaho Sess. Laws, ch. 307, §§ 1, 2, pp. 628-32. The POST Council exists *within* the State Police. Idaho Code § 19-5102. Generally speaking, the POST Council establishes requirements for training and education of peace officers, approves training schools, establishes minimum standards for peace officers, and maintains records. It can expend funds from the POST fund for certain enumerated purposes. Idaho Code § 19-5116. And the POST Council may promulgate rules to carry out its duties. Idaho Code § 19-5107.

The POST-related statutes do not authorize the creation of POST employees or the creation of an Executive Director. The POST Council created the Executive Director position through its rules. *See* IDAPA 11.11.01.031. Those rules establish that the POST Council selects the Executive Director subject to the approval of the Director of the Idaho State Police. IDAPA 11.11.01.031.b. The POST Executive Director is a State Police employee and serves at the direction of the POST Council for carrying out the POST Council's duties. IDAPA 11.01.031.02. For administrative purposes, the POST Executive Director and his staff are governed by the policies and rules of the State and the State Police, concerning, but not limited to, fiscal, purchasing, and personnel matters. IDAPA 11.11.01.031.04. It should not have been a surprise, then, that Col. Russell, the Director of the State Police, had the authority to direct Black's activities *at least* with respect to fiscal, purchasing, and personnel matters. *See, e.g., Zirkle v. District of Columbia*, 830 A.2d 1250, 1260 (D.C. Ct. App. 2003) (noting that where D.C. Office of Tax & Revenue policy was clearly a proper exercise of discretion, "someone with [the employee's] background and expertise could not reasonably believe that [the employee's supervisor] Mr. Branham's order, made pursuant to that policy, was illegal").

Other facts, too, demonstrate the unreasonableness of Black's claim that he did not think Col. Russell had the authority to give the directions at issue. Black was notified in his appointment letter that the State Police Director was his "direct supervisor." Col. Russell provided Black numerous verbal and written notifications that he did, in fact, have the authority to give the directions at issue. His annual performance evaluations conducted by the Director of the State Police should have told him that he was under the supervision of the State Police

Director. And finally, the POST Council—the very entity Black said he *did* answer to— instructed him to follow Col. Russell’s directions with respect to fiscal matters.

Black identifies a handful of items in the record he says demonstrate the reasonableness of his belief. He points out that in his prior experience with what was then the Idaho Department of Law Enforcement (from 1981 through 1996) he “developed the understanding” that the POST Executive Director answered to the POST Council and that during that time he “saw organizational charts” indicating the Executive Director of POST was on an “equal level” with the State Police Director. R., p. 317. He claims that the organizational chart at the time of his hire substantiates this. R., pp. 311 & 318. It is odd, then, that the exhibit he attached to that very affidavit shows the POST Executive Director squarely underneath the State Police Director. R., p. 359.

He also points to his affidavit where he recounts ten years of personal interaction with the POST Executive Director during his previous stint with the Department of Law Enforcement, discussions with those previous Executive Directors, discussions with previous State Police Directors, his personal review of chapter 51, title 19, and IDAPA 11.11.01, and his discussions with the then-POST Council chairman. His generalized statements about his impressions of conversations he had illustrate his subjective belief and do not make his beliefs any more reasonable in light of objective facts showing that Col. Russell had the authority to give the directives in question.

Black attempts to demonstrate the reasonableness of his refusal by pointing to his own deposition testimony, where he explains his view of the IDAPA rules. Appellant’s Opening

Brief, pp. 28, 29. This testimony simply reflects a mistaken belief about the organizational structure of the State Police. But the statutes and rules are clear, and the directives given fall easily within the purview of the Director of the Idaho State Police. Even if the POST rules did not quite square with state statutes, the Executive Director of POST ought to know that statutes trump rules. *Druffel v. Dep't. of Transp.*, 136 Idaho 853, 41 P.3d 739 (2002).

Black claims also that the June 7, 2007 minutes of a POST Council meeting “establish a history of disputes between POST Council and [the State Police] regarding the role of the entity?” Appellant’s Opening Brief, p. 30. The minutes speak for themselves, but it is plain that they do not establish the sort of conflict Black thinks. The cited pages, in the record at pages 397-400, indicate that the conversation started when Black presented a potential request by a local sheriff to make POST a self-governing state agency. R., p. 397.

Black also argues that Richard Juengling—then the Standards, Certifications and Support Manager at POST—concluded that the POST Executive Director reports to the POST Council. Appellant’s Opening Brief, p. 30. A lower-level employee’s legal conclusion about the organizational structure of the State Police in no way supplies objective evidence that Black’s belief was reasonable.

Black asks the Court, too, to consider “the unique position held by Black,” who, after all, held “a unique function: policing the police, including [the State Police]?” Appellant’s Opening Brief, p. 31. The Executive Director of POST does not “polic[e] the police.” He carries out the limited duties of the POST Council, which deal with training and certifying law enforcement

officers. And besides, there is no “unique employee” exception to the requirements of the Whistleblower Act. Black has to demonstrate he engaged in protected activity, and he has not.

Black’s conduct should also be viewed in light of what he did not do. One would think that an employee being directed to do something by someone who lacked the authority to do it would take the matter to the person or body whose authority he thought was being invaded. Black can point to nothing in the record that shows he ever took what he viewed as an improper assertion of authority to the body he argues had the authority to direct him. He cannot show anything to indicate the POST Council adopted his view. He cannot point to any act he was requested to do that conflicted with a directive of the POST Council or violated a law or rule. He states that he wanted to “force the issue” with Col. Russell and get a resolution to Black’s disagreement. R., pp. 611-12. But he is not entitled to defy lawful and proper directives until he is satisfied that they are lawful.

The statutes and rules plainly establish that the Executive Director of POST is a State Police employee. He carries out the limited and specific duties of the POST Council. The POST Council rules themselves demonstrate that the Executive Director and his staff are governed by the policies and rules of the State and the State Police, “concerning but not limited to fiscal, purchasing and personnel matters.” IDAPA 11.11.01.031.04. The directions Black refused to follow were lawful and proper and Black cannot demonstrate his communications or refusals implicated a violation or suspected violation of law.

**II. BLACK IS NOT ENTITLED TO ATTORNEY FEES**

On the assumption that he will prevail in this appeal, Black seeks attorney fees pursuant to Idaho Code § 6-2106. That section states that a court “may” award attorney fees in issuing a judgment. The use of “may” indicates the decision whether to award fees is committed to the discretion of the court. *See Smith v. Mitton*, 140 Idaho 893, 902, 104 P.3d 367, 376 (2004). Other than the assumption of a victory, Black has not provided this Court with a basis for the Court to exercise its discretion and award him attorney fees—even if he should prevail here. He has not pointed to any fact or decision of this Court to guide it in considering the claim. With no basis for an award of attorney fees, this Court should deny the request.

**CONCLUSION**

The district court’s judgment should be affirmed.

\* \* \*

Dated September 10, 2012.

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

By:



Carl J. Withroe  
Deputy Attorney General  
Attorneys for Respondents



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10th day of September, 2012, I caused to be served a true and correct copy of the foregoing by the following method to:

Eric S. Rossman  
Chad M. Nicholson  
Rossman Law Group, PLLC  
737 N. 7th Street  
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- U.S. Mail
- Hand Delivery
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CARL J. WITHROE