U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 19 August 2005

Case No.: 2004-WPC-0004

In the Matter of:

CARL E. HAGER,
Complainant

v.

NOVEON HILTON-DAVIS, INC.,
Respondent

APPEARANCES:

Richard R. Renner, Esq.
For the Complainant

Keith L. Pryatel, Esq.
Cecil Marlowe, Esq.
For the Respondent

Before: Robert L. Hillyard
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under § 507(a) of the Federal Water and Pollution Control Act ("WPCA" or "Act"), 33 U.S.C. § 1367, *et seq*. (1988), and the implementing regulations found at 29 C.F.R. Part 24. These federal employee protection provisions are the result of congressional concern for the protection of whistleblower employees from discriminatory actions by their employers. *Pullman v. Worthington Service Corp*., 81-WPC-1 (ALJ May 15, 1981).

Statement of the Case

On November 25, 2003, the Complainant, Carl E. Hager ("Hager" or "Complainant"), filed a complaint with the U.S. Department of Labor alleging retaliatory termination by his Employer, Noveon Hilton-Davis, Inc. ("Noveon" or "Respondent") (ALJ 1).[1] The Respondent terminated the Complainant on

[1] In this Decision and Order, "ALJ" refers to the Administrative Law Judge Exhibits, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "JS" refers to the agreed stipulations submitted by the parties, and "Tr." refers to the transcript of the hearing.

November 7, 2003, and Hager contends that the termination resulted from his performance of union duties, which included protected activities associated with his membership on the Safety and Health Committee.

On September 8, 2004, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region V, found reasonable cause to believe that the Respondent violated the Complainant's rights under the WPCA (ALJ 1). On September 17, 2004, the Respondent objected to the Secretary's findings and requested a *de novo* hearing before an Administrative Law Judge (ALJ 2). On September 17, 2004, the Complainant, through counsel, also requested a hearing on the issue of damages (ALJ 3).

The case was transferred to the undersigned and a Notice of Hearing and Prehearing Order was issued on October 29, 2004 (ALJ 5). On April 4, 2005, the Complainant filed a Motion for Leave to File Amended Complaint Instanter, seeking to expand the issues in this case to include claims under the Clean Air Act, the Safe Drinking Water Act, the Toxic Substances Control Act, and other environmental Acts (ALJ 25). The Respondent filed objections to the Complainant's Motion to expand the issues on April 5, 2005 (ALJ 28). The Complainant's Motion was denied by Order dated April 7, 2005 (ALJ 29).

A hearing was held on April 11-14, 2005, in Cincinnati, Ohio. The parties were instructed to file a Statement of Facts of uncontested matters on or before May 5, 2005 (Tr. 860). The Complainant's closing brief was due by June 6, 2005, and a response brief from Noveon was due by July 6, 2005 (Tr. 860). The Complainant was granted an additional 10 days after the Respondent's brief to file a rebuttal brief (Tr. 860). All documents have been timely filed and considered.

Evidentiary Issue

On May 13, 2005, the Complainant filed a Motion to supplement the record under 29 C.F.R. § 18.54(c), requesting to admit the Respondent's answer to Revised Interrogatory No. 7 and an attached Declaration of Mike Henson. The Complainant argues that the Respondent's answer to Revised Interrogatory No. 7 was not received until two weeks after the hearing and that Mike Henson's declaration described events that occurred subsequent to the hearing. As such, both pieces of evidence were newly available and relevant to the issues in this claim.

On May 17, 2005, the Respondent filed its opposition to the Complainant's Motion. The Respondent argues that its response to Revised Interrogatory No. 7 was timely, and asserts that had the Complainant submitted a proper interrogatory within the discovery deadline, he would have had a response well before the hearing. The Respondent argues that Hensen's Declaration involves events that took place after the hearing, and that no Court has ever permitted supplementation of the record where the evidence was not in existence at the time of the hearing.

Granting leave to reopen the record is committed to the sound discretion of the trial judge. *Zenith Radio Corp. v. Hazeltine Res.*, 401 U.S. 321, 330-331 (1971) (equating discretion to reopen record with discretion to permit amendment of pleadings). According to the rules that govern practice and procedure before Administrative Law Judges, "[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record." Twenty-nine C.F.R. § 18.54(c) (2004). Evidence is material when it is of sufficient weight to warrant a different outcome. *See Wright v. U.S. Postal Service*, 183 F.3d 1328 (Fed. Cir. 1999); *see also, Simmons v. Mattingly Testing Services*, Case No. 95-ERA-40, Dec. and Ord. of Rem., June 21, 1996 (material evidence justifying reopening must be outcome-determinative).

While the Complainant has successfully demonstrated that the evidence produced is new and he argues that the evidence is relevant, he has not asserted nor has he demonstrated that the Interrogatory answer or the Declaration are outcome-determinative. The proffered answer to Interrogatory No. 7 lists a series of Respondent's Exhibits which are already part of the hearing record. The Declaration of Mike Henson involves a discussion with Doug Jackson over attendance issues and discipline. As discussed below, the Complainant has failed to establish the existence of protected activity covered under the Act. Henson's Declaration does not discuss potential protected activity and, as such, it cannot alter the outcome of this claim. I find that the evidence produced does not meet the requirements of § 18.54(c), and I deny the Complainant's Motion to Supplement the Record.

Issue Presented

The primary issue is whether the Complainant's activity, which consisted of a call to the Hamilton County Department of Environmental Services, is protected activity under the whistleblower provisions of the Water Pollution Control Act and,

if so, whether the Respondent took adverse employment action against the Complainant in violation of these provisions.

Applicable Law

Section 507(a) of the WPCA provides that:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee … by reason of the fact that such employee … has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of this chapter.

33 U.S.C. § 1367(a).

The Secretary of Labor has repeatedly articulated the legal framework under which parties litigate in retaliation cases. Under the burdens of persuasion and production in environmental whistleblower proceedings, the complainant must first present a *prima facie* case of retaliation by showing:

1) that the respondent is governed by the WPCA;

2) that the complainant engaged in protected activity as defined by the WPCA;

3) that the respondent had actual or constructive knowledge of the protected activity and took some adverse action against the complainant; and,

4) that an inference is raised that the protected activity of the complainant was the likely reason for the adverse action.

See Hoffman v. Bossert, Case No. 94-CAA-4 at 3-4 (Sec'y Sept. 19, 1995); *Macktal v. U.S. Dept. of Labor*, 171 F.3d 323, 327 (5th Cir. 1999); *Bechtel Construction Co. v. Secretary of Labor*, 50 F.3d 926, 933 (11th Cir. 1995); *Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 480-81 (3rd Cir. 1993); and, *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995).

If the complainant presents a *prima facie* case showing that protected activity motivated the respondent to take an adverse employment action, the respondent then has a burden to produce evidence that the adverse action was motivated by a legitimate,

nondiscriminatory reason. In other words, the respondent must show that it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. United States Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989).

Where the respondent presents evidence of a legitimate purpose, the final step in the adjudication process is to determine whether the complainant, by a preponderance of the evidence, can establish that the respondent's proffered reason is not the true reason for the adverse action. In this final step, the complainant has the ultimate burden of persuasion as to the existence of retaliatory discrimination. The complainant may meet this burden by showing that the unlawful reason more likely motivated the respondent to take the adverse action or the complainant may show that the respondent's proffered explanation is not credible. *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 86-ERA-32 (Sec'y Jun. 28, 1991); *Darty v. Zack Co.*, 80-ERA-2 (Sec'y Apr. 25, 1983).

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based on the testimony of the witnesses at the hearing and an analysis of the entire record in this case, with due consideration given to the arguments of the parties, applicable statutory provisions and regulations, and relevant case law.

Background

Noveon Hilton-Davis, Inc., is a chemical manufacturing company that has made colorants, dyes, and dispersions since the 1920's in Cincinnati, Ohio (JS 1; Tr. 564-65, 742). Noveon's Manufacturing Manager and on-site Human Resources Manager is Doug Jackson ("Jackson") (Tr. 329, 565), the Plant Manager is Dr. Paul Schmidt ("Schmidt") (Tr. 73), the Senior Manager of Health Safety and Environment is Tom Eickhoff ("Eickhoff") (Tr. 741), the Senior Business Director is James Donnelly ("Donnelly") (CX 11 at 7), and the Supervisor of the wastewater treatment plant is Tracy Wright ("Wright") (Tr. 412). Noveon utilized the advice of off-site Corporate Human Resources Representative Cliff Labbe ("Labbe") (Tr. 413, 578, 611).

In recent years, the Respondent has been purchased and resold by B.F. Goodrich, Noveon, and Lubrizol (which now owns Noveon) (JS 2). In 2001, the B.F. Goodrich Company spun off Noveon, Inc. (JS 3). The Respondent's Human Resources Manager, Cliff Labbe, has his office in Akron, Ohio (JS 4). Noveon

headquarters are in Brecksville, Ohio (JS5). Lubrizol is based in Wickliffe, Ohio (JS 6).

Hourly compensated chemical operators, wastewater treatment operators, utility operators, and maintenance employees are represented for collective bargaining purposes by the International Chemical Workers Union, Local 342-C (Tr. 298; RX 5). Until October 2003, the Union was represented in labor negotiations by an Executive Board ("E Board") comprised of Union Recorder Brand Washburn ("Washburn"), Union President Mike Henson ("Henson"), Union Secretary Steve Robinson ("Robinson"), Union Vice-President Ron Ernst, Union Treasurer Terry Armes, and Health Safety and Environmental Chairman Ivan "Ike" Towner ("Towner") (Tr. 111-112).

Washburn worked at Noveon from 1977-2004 as a wastewater operator, the same position held by the Complainant (Tr. 51-52). Robinson was a chemical operator and a 34-year employee of Noveon (Tr. 164). Towner was a 35-year maintenance mechanic with Noveon (Tr. 200). Henson was a 32½-year chemical operator at Noveon and Union President since 1996 (Tr. 243).

The Complainant, Carl Edward "Ed" Hager began his employment at Noveon on or about March 5, 1973 (JS 7). Hager worked at Noveon for over 30 years, through several changes in ownership (JS 11). He was a past Union President for six years, a six-time member of the grievance committee, and was a member of the negotiating committee for five of the Union/Company contracts (Tr. 366). Hager served the Company in developing safety programs, making suggestions, and assisting in training (JS 12). Hager was a strong supporter of the Union, serving on the Union's safety committee for 18 years, including 2003 (JS 15; Tr. 366). Hager received numerous commendations from Noveon for his training, performance, and suggestions (JS 13). Hager had a reputation as a good operator (Tr. 200, 248, 788), and was known for being safety conscious and honest (Tr. 165, 200, Jackson Dep. at 10). He was always a top performer in training classes, and he was known for being conscientious and thorough in his job (Tr. 63). Hager would raise safety issues, including environmental compliance issues, when they had merit (Tr. 91-92, 141). Some in the Company saw Hager as a troublemaker (Tr. 792). During his employment, Hager never contacted the Metropolitan Sewer District for any reason (RX 2 at 3).

During the Complainant's employment, Noveon operated a wastewater pre-treatment plant ("WWPT") (JS 8). The WWPT is located at the lowest part of the plant site so that wastewater generated throughout the facility will flow by gravity to the

WWPT for treatment (Tr. 369). As part of the operation of this plant, Noveon staffed the WWPT control room with operators 24 hours a day, seven days a week, to monitor wastewater discharge and to monitor the Company's thermal oxidizer (Tr. 52, 257; CX 1 at 4.5.1). Before 2001, when its colorformers business line was operational, Noveon used a host of environmentally unfriendly raw materials in its products (Tr. 456, 458, 742, 743). The Noveon WWPT plant treated wastewater containing these unfriendly raw materials for temperature and pH levels before discharging it into the Metropolitan Sewer District ("MSD") (JS 9; Tr. 100, 744, 746). The Metropolitan Sewer District is a municipal agency (JS 10).

At the final series of WWPT treatment holding cells were mixers that forced air through the wastewater, causing volatile organic compounds ("VOC")[2] to rise to the surface of domes, which covered the cells (Tr. 744-45). Once captured in the cell's headspace, the Respondent operated a thermal oxidizer that incinerated the VOC's at 1400 degrees before emitting any remnants into the atmosphere (Tr. 745-46). The thermal oxidizer was an air-contaminant controlling device licensed by the Hamilton County Department of Environmental Services ("HCDES"), and more specifically by Greg Howard ("Howard"), an Environmental Compliance Specialist Grade II in the Air Quality Management Division (Tr. 815-16; RX 8 at 30-33). The thermal oxidizer operated under a federal Title V permit. A shutdown of the oxidizer due to a flame out or other malfunction did not, alone, constitute a violation of the permit (Tr. 749-50). Nothing in the permit specifies how fast you have to respond to a thermal oxidizer alarm (Tr. 103). Title V permits up to 1% thermal oxidizer down time to remain in compliance (Tr. 749). The thermal oxidizer went online in 1988 and never exceeded the 1% permitted downtime during its operation (Tr. 750). In the event of an oxidizer flame out or other malfunction, VOC's were vented directly into the atmosphere through the oxidizer's dump valve, and thus, water being streamed into the MSD was not detrimentally affected in the event of a thermal oxidizer malfunction (Tr. 747-48).

The Title V permit stated that "[t]he permittee shall operate and maintain an audible or visible alarm in the control room to alert plant personnel as to a 'flame out' condition or a combustion temperature within the thermal oxidizer below 1400 [degrees] Fahrenheit" (RX 8 at 30). The permit also required ongoing testing and reporting requirements to be completed by an

[2] Under the Ohio Administrative Code, a "volatile organic compound" is "any organic compound which participates in atmospheric photochemical reactions." Ohio Adm. Code § 3745-21-01(B)(6).

outside contractor (Tr. 758). The WWPT control room had a series of alarms for the oxidizer and additional alarms to monitor wastewater pH and water temperature at the wastewater plant (Tr. 100-101). There was an exterior alarm for the thermal oxidizer at the oxidizer control panel (Tr. 53). The sooner an operator attended to a problem, the easier it would be to correct the problem (Tr. 54, 56). If the thermal oxidizer was to shut down and then began to cool, there is a significant ramp up time required to reheat the unit to operating temperature (Tr. 54). WWPT operators were not allowed to leave the plant during their shift (Tr. 52, 59). Breaks were taken on-site and Noveon paid operators for breaks to allow continual monitoring of alarms (Tr. 56, 257).

Noveon also operates under a permit from the MSD (Tr. 770). Under that permit, the Company exceeded its permitted release of Pyrene in 2002, self-reported the incident, and was fined for its violation (Tr. 771).

Notwithstanding the requirements of the permits, WWPT operators made hourly rounds to log readings of instruments outside the control room that took 5-10 minutes each hour (Tr. 99, 101). Most of the WWPT control room alarms could not be seen or heard while making these rounds (Tr. 57, 99-106). At no time did either the Union or the operators assert that departure from the control room for these rounds constituted a permit violation. Washburn also occasionally left the control room building to make copies of Union-related documents at a nearby building (Tr. 101).

In June 2001 Noveon elected to discontinue all product lines except water-based food colors, cosmetic colors, and pigment dispersions (JS 14). This change substantially reduced the load of volatile organic compounds going into the wastewater treatment plant. Prior to discontinuing the environmentally unfriendly product lines, Noveon was feeding 105 lbs./hr. of VOC's into the thermal oxidizer for treatment and release. The Title V permit allowed Noveon to emit 7.6 lbs./hr. of VOC's directly into the environment after treatment through the thermal oxidizer (Tr. 856, 751; RX 8 at 30). Noveon hired an independent environmental consultant to conduct an engineering study on February 6, 2002, to quantify the VOC's being loaded at the thermal oxidizer inlet after discontinuation of the colorformers product line (Tr. 757-59, 819; RX 6, 7). Noveon invited representatives from HCDES to attend the voluntary engineering study (Tr. 758; RX 6). Lee Gruber of HCDES attended, witnessed, and evaluated the February 6, 2002, thermal oxidizer engineering study (Tr. 759, 821; RX 11). The independent consultant's results demonstrated that an average of

only 2.1 lbs./hr. of VOC's were being directed towards the oxidizer unit for treatment (Tr. 762, 820, 838-39; RX 11; RX 7 at 4). As a result of discontinuing the colorformers product line, therefore, Noveon was front-loading less VOC's into the oxidizer for treatment than it was allowed to emit post-treatment under the Title V permit. Because the thermal oxidizer was no longer needed in order to remain in compliance, Noveon submitted a petition to HCDES on May 31, 2002, to decommission the thermal oxidizer (RX 13; Tr. 574).

Noveon was not legally required to solicit HCDES's approval for decommissioning the thermal oxidizer since, under Ohio law, a "modification" to an Ohio permit-to-install license only applies where there is a potential "increase in the allowable emissions" of an air control device. *See* Ohio Admin. Code § 3745-31-01(VV).

In July 2003, while the petition to decommission the thermal oxidizer was under review, Noveon received a bid to hook up the thermal oxidizer alarm to the guardhouse, which was also manned 24 hours a day, seven days a week (Tr. 569-70; RX 16). Noveon was looking for ways to remain compliant while freeing up wastewater operators from 24-hour monitoring to perform other duties.

In early August 2003 Noveon management approached the E Board to propose having WWPT operators perform tasks outside the control room to make them more productive (Tr. 112-120, 176-182, 567, 569-570). Hager was not involved in these meetings (Tr. 217). Under the collective bargaining agreement, the E Board's approval was required to implement the contemplated changes (Tr. 111). Noveon proposals included having WWPT operators perform a twice per shift, 10-minute observation run to the ball mills and to have the operators perform periodic food dye packing tasks (Tr. 112-120, 176-182). The E Board responded negatively, stating that the thermal oxidizer's Title V permit, with its attendant alarm requirements, prohibited operators from assuming additional tasks (Tr. 114-116, 178). The E Board was also concerned that overtime earnings for other union work classifications would suffer under the Noveon proposals (Tr. 114). On September 10, 2003, Noveon informed the E Board that it had arranged to have the oxidizer's alarm ring in the guardhouse, which was staffed 24 hours a day, seven days a week. The E Board continued to reject Noveon's proposal to have operators perform additional duties (Tr. 733-36; RX 16). As Noveon could not obtain E Board consent to alter the operators' duties, none of the company proposals came to fruition (Tr. 115, 133-34, 631-33).

The Respondent decommissioned the thermal oxidizer during March 2004 (Tr. 575). On or about March 15, 2004, Noveon contracted the staffing of the WWPT plant to independent contractors and retained its former WWPT plant operators as chemical operators who suffered no loss of wage rate or seniority as a result of this change in classification (JS 34).

Noveon Discipline

Noveon groups discipline offenses into two categories, Group I and Group II offenses (RX 1S; Tr. 86, 276). Group I offenses are very serious in nature, and Group II offenses are considered less serious (RX 1S; Tr. 86, 276). Stealing is considered a Group I offense (RX 1S). Personal use of company telephones is listed as #8 in the Group II offenses (RX 1S). Robinson testified that Noveon was considerate in its discipline of employees, stating that the Company often gave employees a second chance even when not required to do so by the collective bargaining agreement or by the Company handbook (Tr. 173). Henson testified that the Company worked well with the Union to resolve discipline issues in the least harsh manner appropriate (Tr. 247).

When the Union and the Company disagree about discipline, the collective bargaining agreement provides a procedure to resolve the dispute. The Company will call a fact-finding hearing, where it will collect facts about a perceived violation of company policy. In two to three days, the Company issues findings as to whether they believe a violation has occurred. The Union then has five days to file a Step 1 grievance disputing the Company's findings. The Company responds to the Step 1 grievance with an answer. If the Union is not satisfied with the resolution, it can file a Step 2 grievance. The Company responds to the Step 2 grievance, further explaining its actions and reasoning. If the Union remains unsatisfied with the Company's response, then the Union files a Step 3 grievance. At that point, the Company's Human Resources Department is actively involved and, after further discussions, the Company responds to the Step 3 grievance. If the Union is still not satisfied with the resolution, then the matter is brought before the Union body at a Union meeting. The Union body then votes either to accept the Company's resolution or to send the matter to arbitration (Tr. 339).

At all times during a grievance procedure, the affected employee is permitted to be represented by Union officials, an attorney or both (Tr. 340). Hager's termination followed the normal grievance procedure (Tr. 341).

In 2002, Noveon caught a concerted effort by about 10 employees who were clocking each other in and out to cheat the Company on the number of hours worked (CX 13). The Company informed the employees at their fact-finding meetings that such conduct was a Group I offense subject to immediate termination (Tr. 668; RX 88). The Union and the Company negotiated an agreement that saved the jobs of all 10 employees. The timecard incident was resolved by the Union and the Company on a nonprecedent basis, meaning that the methods or results obtained in ending this incident would not be used in a comparative manner in other discipline situations (Tr. 198).

In 2003, the Company discovered employee use of the internet for pornography (JS 32). The Company ultimately decided to impose no discipline because their internet policy was not clear enough to take action.

Noveon Telephone Policy and Practices

From 1972 until 1999, Noveon had four pay phones located throughout the plant for employees' personal use (Tr. 58, 248). No pay phones were located near the WWPT control room (Tr. 60, 222). Operators were not permitted to leave the control room to make personal calls at one of the facility pay phones (Tr. 59). The Noveon phone policy stated that Company phones were restricted to business use only, that pay phones were provided for personal use, and that excessive personal calls were prohibited (Tr. 88, 234; RX 1S at 35). Noveon's telephone policy was not updated after the pay phones were removed in 1999, and management never raised the issue of personal phone calls by employees with the Union (Tr. 168, 209, 234). The Company had no written policy directly discussing long distance telephone calls on Company phones (Tr. 651).

After the pay phones were removed, Towner told Washburn that employees were permitted to use the Company phones for personal phone calls (Tr. 60). Towner and Henson stated that Ken Able, a Noveon Human Resources Representative, told them that since the pay phones had been removed, employees could use Company telephones to make their personal calls (Tr. 207, 249). The regular practice of Noveon employees was to use Company phones for personal calls after removal of the pay phones (Tr. 88, 166-67, 208). That practice has not changed since Hager's termination (Tr. 209). The Company is aware that hourly employees who live out of state often called home to check on their family when they work second or third shift, or if their schedule changed, or when they were required to stay after to work overtime (Tr. 88, 250, 304, 714). Henson testified that he made long distance calls on Company phones to conduct Union

business (Tr. 305). Washburn testified that he used a credit card to make personal long distance calls while at work, with the exception of a call to the Union in Akron, Ohio, which he believed to be business related (Tr. 123).

Washburn testified that he and all other operators made personal telephone calls as needed from the WWPT control room telephone (Tr. 59-60). Washburn testified that Wright, the immediate supervisor of the WWPT operators, was in the control room on several occasions when Washburn was making personal telephone calls, and that Wright gave no reaction or questioned the nature or duration of the calls (Tr. 61).

Noveon Plant Safety History

Union President Henson testified that Noveon takes safety seriously (Tr. 303). Noveon formed a joint Company/Union Health Safety and Environment Committee that cultivates the reporting of safety issues on a monthly basis (Tr. 212-14; RX 21). In 2003, Noveon provided OSHA training to its workers, as well as pollution prevention training and hazard communication training (Tr. 296-97). Noveon attempted to introduce internet Active Learner® to enhance employee safety training (Tr. 225-26, 580-81; RX 30). Outside consultants have been hired to conduct on-site training (Tr. 63). Workers also underwent firefighting training (Tr. 108). Washburn testified that "[w]e had so many safety talks and so many courses that, you know, I'd have to be – I'd have to have a photographic memory to be able to recall all of them." (Tr. 130). Safety was also a component of the Noveon gain-sharing program (Tr. 448).

Washburn testified that he made safety improvement suggestions to the Company and suffered no retaliation for his actions (Tr. 97). He also stated that he talked freely with Howard at HCDES and suffered no retaliation (Tr. 98).

Noveon had a spill control plan which stated that in the event of an environmental spill incident, if the employee could not reach the Company's HS&E Department, the employee was to call the MSD directly (Tr. 136; CX 1 at 4). The MSD telephone number was posted at the plant (Tr. 136). Henson testified that Union members understand that while the Company wants environmental and safety concerns expressed through the chain of command, any employee has the right to go to an outside agency at any time to report a violation (Tr. 319).

Events Surrounding Hager's Termination

In late July or early August 2003, Jackson approached Hager to ask about a management proposal to have wastewater operators monitor the ball mills[3] in another building as part of their duties (Tr. 381, 567). Assigning wastewater operators to work in other buildings would mean that the operator was not in the control room to monitor or to respond to the WWPT control room alarms on a continual basis. Hager stated that he believed the proposal would be contrary to the permits, regulations, the collective bargaining agreement, and other policies that he had always used in the control room (Tr. 381). Jackson stated that he did not believe the permits required 24/7 coverage for compliance (Tr. 382). Jackson asked Hager where in the permits it was required that wastewater operators staff the control room 24/7 (Tr. 382). Hager referred to the Title V permit regarding thermal oxidizer operation and read the applicable part to Jackson (Tr. 473). Hager stated that he asked Jackson to check with the agencies to inquire whether the proposal was consistent with the environmental permits (Tr. 382). Hager stated that he told Jackson that if Jackson did not call the agencies, then Hager would call them on his own (Tr. 383).

On August 6, 2003, Hager called Greg Howard at HCDES to inquire whether the Respondent's Title V permit required that an operator staff the wastewater control room 24 hours a day, seven days a week (JS 16; Tr. 384, 827). No inquiry was made as to wastewater treatment (Tr. 494). At the time of Hager's call, Howard was working on Respondent's application to decommission the thermal oxidizer from service (JS 17; Tr. 384). Howard did not know the answer to the staffing question, but Hager and Howard continued to discuss Noveon operations (Tr. 384). Hager reported possible irregularities surrounding the February 6, 2002, environmental study performed as part of the thermal oxidizer decommissioning process (Tr. 67, 385, 828). During the August 6, 2003, phone call, Hager gave Howard the names of fellow WWPT plant operators as possible witnesses (JS 18; RX 2 at 2).

Howard called Respondent's Environmental Manager, Tom Eickhoff, to report that someone had called regarding staffing in the wastewater control room and about possible irregularities with the February 6, 2002, engineering study (Tr. 776-77, 836-40; RX 18). Howard did not disclose the identity of the caller (Tr. 776, 839; RX 18). Eickhoff did not ask for the identity of the caller (Tr. 776, 840). Eickhoff

[3] The ball mills are also referred to as bawl mills in other submitted documents.

responded to both issues promptly and completely (Tr. 840; RX 18). Howard found no corroboration for the claim of irregularities in the engineering study (Tr. 832), and the complaint had no discernible delay on Noveon's petition to decommission the thermal oxidizer (Tr. 575, 833-34).

On August 15, 2003, Respondent's Managers Donnelly and Schmidt called an emergency meeting with the E Board to discuss Howard's telephone call to Eickhoff (Tr. 202, 572). Donnelly and Schmidt reported that someone had called HCDES about problems with the February 6, 2002, environmental study (Tr. 73). Donnelly was disappointed that the issues raised with Howard had not been brought to management first (Donnelly Dep. at 36-37). Hager's name was not mentioned at the meeting and Hager was not present (Tr. 124, 191, 219, 573). Some witnesses testified that management was red-faced and angry (Tr. 73, 75, 168-69), while others saw Donnelly as very concerned and very passionate about the situation (Tr. 641). Donnelly and Schmidt impressed on the Union officers the importance of supporting the Company plan and the importance of working as a team. They expressed their desire that any such concerns in the future be directed through the chain of command (Donnelly Dep. at 42; Tr. 645, 792). Toward the end of the meeting, Washburn announced that he did not initiate the call, but that he had returned a call and answered all questions asked of him by Howard at HCDES (Tr. 75-76, 125, 171, 203). Washburn testified that his communication with HCDES was uninhibited and that he experienced no retaliation or retribution for his discussion with Howard (Tr. 98, 120, 132-33). No one at the meeting inquired as to who made the call to the agency and no later inquires were made as to who had placed the call (Tr. 184, 229). Schmidt stated after the meeting that "we'll accept that [Greg Howard's call to Brandy Washburn] was an unsolicited call and we'll just move on" (Tr. 576).

On October 3, 2003, Hager and Jackson had a telephone discussion (JS 21). They reviewed a number of pending labor-management issues including internet usage, WWPT operator duties, permit compliance, and the "Fred Marshall" grievance. Jackson told Hager that "this was not a good time to have a bad Union/company relationship." (JS 22; RX 30). Jackson sent an email to Schmidt reporting that "[t]his was not a pleasant conversation." (JS 23; RX 30).

In September or October 2003 Schmidt approached Union Officers to express his disappointment that Hager had bypassed the chain of command (Tr. 171, 230-231). Schmidt was upset that Hager had sent a copy of a lighting safety grievance directly to Corporate HR Manager Labbe without allowing local management the

opportunity to respond to the problem (Tr. 187). Robinson recalls Schmidt saying that "we need to get on the same road" (Tr. 172).

To prepare for Noveon's proposed internet Active Learner® safety training, the Company made the plant's computers internet-accessible in the Summer of 2003 (Tr. 589). Rob Ralenkotter, the plant's Information Technology Manager, discovered that once internet access was available, some plant computers were being used for inappropriate purposes such as downloading pornography and playing internet games (Tr. 590). While investigating abuse of internet access in the plant, Ralenkotter caught WWPT operator James Chambers accessing a dating service on the WWPT control room computer (Tr. 591). While Noveon was not pleased by Chambers' actions, collective bargaining had not taken place on Noveon's newly issued internet policy, and the Union's position was that no discipline could be taken on the policy until the issue had been collectively bargained with the Union (Tr. 226; RX 30).

Schmidt wondered that if the Company-provided internet access was being abused by employees, then perhaps Company telephones were also being misused by employees (Tr. 592). Starting with Chambers' known abuse of the internet access, Schmidt asked Ralenkotter to look into telephone usage in the WWPT control room, the boiler room, and 5-10 other dedicated phone lines where the caller's identity might be determined (Tr. 592). Ralenkotter collected some telephone usage records for Schmidt (JS 24). Ralenkotter reported that there were a number of inexplicable long distance telephone calls in the telephone logs from the boiler room and the WWPT control room (Tr. 593). Schmidt and Jackson explored the boiler room phone calls and discovered that the long distance number called was to the Company's coal vendor in Kentucky (Tr. 593). Schmidt and Jackson called the Florida-based long distance calls on the WWPT telephone log, but the numbers did not reveal any useful information (Tr. 408; CX 23). At that point, Human Resources Assistant Judy Hamilton was asked to match payroll timekeeping records to the dates and times of the long distance calls that were placed from the WWPT control room (Tr. 598). Sometime after October 30, 2003, Ms. Hamilton completed her work and reported to Schmidt, Jackson, and Ralenkotter that Hager, not Chambers had been placing the long distance telephone calls (Tr. 598-99). Further investigation revealed that Hager had placed 61 long distance calls, totaling in excess of 585 minutes, to his Mother in Florida or to his Uncle in Canton, Ohio (RX 40; Tr. 417).

On October 31, 2003, Schmidt appeared at the Fred Marshall grievance hearing (JS 25). Although Schmidt did not customarily attend such meetings, Jackson had a doctor's appointment and Schmidt took Jackson's place at the hearing. Mr. Marshall's grievance had nothing to do with the environment (Tr. 510). Hager was one of the Union representatives at the Fred Marshall grievance hearing (JS 26). Schmidt and Hager exchanged remarks during the hearing, with Schmidt telling Hager that "you are not on board with what we were trying to do," "[y]ou don't get it. You are not a team player" and "[a]ll you are doing is worry about one job, I have to worry about 170 jobs" (Schmidt Dep. at 48).

On November 5, 2003, Jackson called Hager into a fact finding meeting (JS 27; Tr. 271, 600). The normal procedure in a fact finding meeting is to give same-day notice to the employee and to allow the Union member to have Union representation at the meeting (Tr. 338). The Company followed that procedure. Hager was presented with a list of personal phone calls made on Company phones (RX 39). Hager confirmed that he had made the telephone calls while on Company time and on the Company phones (JS 28; Tr. 272, 602). Jackson stated that Hager reported that he had been making personal phone calls from the control room building for the last five or six years (Tr. 608). Hager contended that he did not steal, but that he had Company permission to use the telephones (JS 29). Hager asked what specific written rule prohibited employees from placing personal long distance calls on the Noveon phones (RX 41 at 1). Hager showed no remorse for making the phone calls (JS 30; Tr. 421). He stated that he called his sick Mother once in the morning and again in the evening, and when told he was improperly using the Company telephones, Hager responded that he intended to call his Mother that night as planned, despite the fact finding hearing (Tr. 274, 420). Jackson then gave Hager his personal phone card to allow the call to Hager's Mother that evening to take place without being billed to the Company phone lines (Tr. 274, 610).

On November 6, 2003, Schmidt, Jackson, and Labbe made the decision to terminate Hager (Tr. 611). On November 7, 2003, the Respondent discharged Hager from employment (JS 31; Tr. 613). Jackson testified that the decision to terminate Hager was based on several factors including: 1) Hager acted as though he had a right to make long distance calls at the Company's expense; 2) Hager admitted to making such calls for 5-6 years; 3) the calls Noveon knew about were of frequent and long duration; 4) Hager showed no remorse for his actions; and, 5) Hager made no offer to reimburse the Company for its expense (Tr. 611). Donnelly later stated that it was not just the phone calls that

prompted Noveon's decision, but also that Hager showed no remorse for his actions (Tr. 227, 421).

Following his termination, Hager's Union filed a grievance claiming that Noveon unjustly terminated Hager (JS 33). At the Step 3 grievance meeting, Hager stated that his termination was due in part to the filing of a lighting grievance and his participation in the Fred Marshall grievance (Tr. 351, 521). Hager never mentioned his phone call to HCDES or his discussion with Howard regarding possible improprieties on the February 6, 2002, environmental study (Tr. 320, 521). The Company refused to allow Hager to return to work, and the Union body voted to arbitrate the matter. The only offer made by the Union to resolve the Hager grievance was full reinstatement of Hager with all backpay and benefits (Tr. 331). No offer was made by the Union for a second chance or last chance agreement (Tr. 331).

After a Union arbitration award, Hager was reinstated as a chemical technician on February 23, 2005, but without backpay and with lost seniority as a disciplinary measure imposed by the arbitrator (JS 35). Hager's base pay at the time of his discharge was $18.55 per hour (JS 36). Under the collective bargaining agreement, Hager was due for a pay increase to $19.00 per hour effective April 1, 2004 (JS 37). Hager received a shift differential of $0.60 per hour for working second shift (JS 38). Hager received a premium payment of about an additional $4.00 per hour for work on Saturdays (JS 39; RX 5 at 14, Section 14). Hager received a premium payment of about an additional $5.50 per hour for work on Sundays (JS 40). From November 7, 2003, to February 23, 2005, Hager's lost straight-time wages amounted to $53,771.64 (JS 41). Hager paid for his insurance through COBRA during his absence from work (JS 42). The Respondent normally pays 75% of the insurance for its employees (JS 43). The Respondent paid an annual bonus to its employees through its Gainshare program (JS 44). During his absence from work, Hager missed the 2003 and 2004 Gainshare payments (JS 45).

Prima Facie Case

Protected Activity

The whistleblower provision was enacted for the broad remedial purpose of shielding employees from retaliatory actions taken against them by management to discourage or to punish employee efforts to bring the corporation into compliance with the Clean Water Act's safety and quality standards. *Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993). The complainant need not prove that an actual

violation of the Clean Water Act occurred. Rather, he must prove only that his complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Ilgenfritz v. United States Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

The objective of the WPCA, also known as the Clean Water Act, is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, with the goal of eliminating the discharge of pollutants by industry into the navigable waters, waters of the contiguous zone, and the oceans. Thirty-three U.S.C.A. § 1251(a).

Internal complaints are specifically recognized as protected activity because the employee is encouraged to first take environmental concerns to the employer to allow the perceived violation to be corrected without governmental intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Apr. 27, 1987) (Ord. of Rem.). Such complaints also afford the employer an opportunity to justify or clarify its policies where the perceived violations are a matter of employee misunderstanding. *Ilgenfritz*, 1999-WPC-3, at 479.

Although broadly defined, protected activity has been limited to the assertion of violations that involve a safety issue or an issue that impacts the environment. *Odom v. Anchor Lithkemko/International Paper*, 96-WPC-1 (ARB Oct. 10, 1997). "The provisions do not apply to [a claimant's] occupational, racial, and other nonenvironmental concerns." *Id.* at 5. *See also, Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kesterson v. Y-12 Nuclear Weapons Plant*, 95-CAA-12 (ARB April 8, 1997); *Deveraux v. Wyoming Assoc. of Rural Water*, 93-ERA-18 (Sec'y Oct. 1, 1993); and, *Basset v. Niagara Mohawk Power Co.*, 85-ERA-34 (Sec'y Sept. 28, 1993).

Hager asserts that he engaged in protected activity when he called Howard and discussed: 1) management's proposal to remove operators from the WWPT control room; and, 2) concerns about the representative nature of the February 6, 2002, environmental test (Comp. Br. at 22). Beyond the call to Howard, however, there are other instances of internal communication that require review and comment.

July/August 2003 Discussion with Jackson

In late July or early August 2003, Jackson asked Hager's opinion regarding a management proposal to have wastewater operators perform additional duties outside the WWPT control room. Hager responded that the proposal would violate the

environmental permits requiring 24/7 manning of the WWPT control room. When Jackson asked Hager where in the permits it was required to staff the control room 24/7, Hager pulled out a portion of the Title V permit covering thermal oxidizer operations and read the applicable part to Jackson.

Hager's informal discussion with Jackson regarding the Noveon staffing proposal and Title V permit compliance could be construed as an informally raised environmental concern. An informal complaint to a supervisor may constitute protected activity. *See, e.g., Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992), *appeal dismissed,* No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.*, 86-ERA-39 (Sec'y Oct. 30, 1991).

Hager's informal conversation with Jackson is easily distinguished from the cases on point, however. In *Nichols*, the complainant questioned the current safety procedure used by his foreman to survey and tag contaminated tools. *Nichols*, 87-ERA-44 *2 (Sec'y Oct. 26, 1992). The Secretary found that the informal discussion was protected activity, holding that the "[c]omplainant's questioning of the safety procedure [his foreman] used was tantamount to a complaint that the correct procedure was not being observed." *Id.* at 5. In *Dysert*, the Secretary similarly held that the employee's complaint to his team leader about procedures currently being used to test instruments was protected activity. *Dysert*, 86-ERA-39, Final Dec. and Ord., Oct. 30, 1991, slip op. at 1-3.

Unlike issues raised by the complainants in *Nichols* and *Dysert,* the concern raised by Hager to Jackson regarding a *possible* future staffing *proposal* by Noveon management did not voice a concern over current safety procedures or current permit compliance covered under any of the Environmental Acts.

Moreover, when Jackson asked Hager what permits would be violated under the Noveon proposal, Hager responded by reading relevant portions of the Title V permit, which covers thermal oxidizer operations. As the thermal oxidizer and the accompanying Title V operating permit are air pollution control mechanisms, they do not implicate the Water Pollution Control Act or the Clean Water Act. This conversation is not protected activity under the WPCA or any of the Environmental Acts.

Plan to Remove Operators from the WWPT Control Room

In response to Hager's conversation with Jackson, Hager called Howard on August 6, 2003, to inquire whether the Respondent's Title V operating permit required that a wastewater

operator staff the WWPT control room 24 hours a day, seven days a week. Howard's role at HCDES is limited to air pollution and he has no authority over water-related environmental regulations. Hager raised no water-related environmental concern during this call.

The focus of the Complainant's inquiry, the thermal oxidizer (covered under the Title V permit), is an air pollution control device, not a water pollution control device. In the event of a thermal oxidizer malfunction, VOC's collected during wastewater treatment would be vented directly into the atmosphere through the oxidizer's dump valve, and therefore, water being streamed into the MSD would not be detrimentally affected in the event of a thermal oxidizer alarm, malfunction, or shut down. Hager's call to Howard regarding monitoring of the thermal oxidizer alarm, therefore, did not involve the chemical, physical, and biological integrity of the Nation's waters in any manner. As such, it is not protected activity covered under the Water Pollution Control Act.

Moreover, Hager, as in his internal conversation with Jackson, did not assert that any actual or impending violation of an Environmental Act occurred. Hager inquired only as to whether one staffing proposal under consideration by Noveon management, that had not been negotiated with the Union, to redistribute wastewater operator duties, could put the operators and the Company, if finally adopted, *at future risk* of committing a violation (under the Title V air pollution permit). Hager's call regarding Noveon's staffing proposal never asserted a violation (reasonably perceived or otherwise) of an Environmental Act. As such, it is not protected activity covered under the whistleblower provisions of the Environmental Acts.

Additionally, Hager cannot demonstrate that he had a reasonable belief that the additional duties proposed would violate the Title V permit. The complainant must "have a reasonable perception that [the respondent] was violating or about to violate the environmental acts.… The issue is one of the reasonableness of the employee's belief." *Stephenson v. NASA*, ARB No. 98-025, ALJ No. 1994-TSC-5 (ARB July 18, 2000). Wastewater operators routinely made 5-10 minute rounds each hour outside the control room to record instrument readings at other parts of the plant. Many of the control room alarms could not be seen or heard during these rounds. Neither the operators nor their Union has asserted to Noveon that these routine rounds were violations of *any* of the Environmental Acts or the various operating permits. Hager fails to distinguish how making current hourly rounds away from the control room alarms would

reasonably be different than performing additional duties under the Noveon proposal. Accordingly, Hager fails to demonstrate a reasonable belief that Noveon was about to violate an Environmental Act.

Representative Nature of the 2002 Environmental Study

On August 15, 2002, Hager reported to Howard potential methodology irregularities in the 2002 environmental study. Noveon argues that Hager's disclosure regarding a voluntary environmental test that was not required under the Title V operating permit cannot serve as the basis for alleged whistleblower conduct (Resp. Br. at 23-27).

The February 2002 environmental test was performed on the thermal oxidizer, an air pollution, not a water pollution, control device. To establish protected activity, the employee must demonstrate a reasonably perceived violation of the underlying statute or its regulations. *Crosby v. Hughes Aircraft Co.*, 85-TSC-2, Dec. and Order, Aug. 17, 1993, slip op. at 26 (emphasis added); *Johnson v. Old Dominion Security*, 86-CAA-3, *et seq.*, Sec. Dec., May 29, 1991, slip op. at 15; *Aurich v. Consolidated Edison Co.*, 86-ERA-2, Sec. Rem. Order, April 23, 19897, slip op. at 4; *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). As discussed above, no violation of the Clean Water Act or its regulations has been asserted and, therefore, no protected activity covered under the WPCA has taken place.

The Respondent makes a persuasive, though imperfectly stated, argument that the Complainant's discussion with Howard regarding the 2002 environmental study did not demonstrate a reasonably perceived violation of *any* environmental law (Resp. Br. 27-31). Reporting flawed methodology in studies submitted by a company relating to environmental permits issued under the WPCA constitutes a reasonable concern about a potential violation of the statute and, therefore, is covered as protected activity. *Abu-Hjeli v. Potomac Electric Power Co.*, 89-WPC-1, Final Dec. and Order, Sept. 24, 1993, slip. op. at 5; *Guttman v. Passaic Valley Sewerage Commissioners*, 85-WPC-2, Final Dec. and Order, Mar. 13, 1992, slip op. at 13 (holding that complaints that sampling method of monitoring industrial waste treatment system users was "meaningless and unreliable" constituted protected activity under the WPCA), *aff'd*, No. 92-3261 (3rd Cir. 1993). Noveon submitted the 2002 environmental test as part of its petition to decommission the thermal oxidizer. Hager's assertion that the 2002 environmental study might have been flawed could be a reasonable concern about a potential violation of the Title V permit governing the thermal oxidizer.

As asserted by the Respondent, however, good faith must accompany every complaint (Resp. Br. at 28-29 [*citing Conaway v. Valvoline Instant Oil Change*, 1991-SWD-4 (ALJ, Apr. 23, 1992); *Walker v. American Airlines*, 2003-AIR-17 (ALJ Nov. 16, 2004); *Barnes v. Raymond James & Assoc.*, 2004-SOX-58 (ALJ Jan. 10, 2005)]). The environmental test took place in February 2002. Hager was questioned at the hearing as to why he delayed reporting any perceived irregularities in the February 2002 environmental study until his August 2003 discussion with Howard nearly 18 months later:

> Q: Why didn't you call an environmental agency in 2002 about [what you had heard regarding the February 2002 environmental study]?
>
> A: I didn't know if it was illegal or not, what I was told that the company did. I didn't observe it. I thought it might have been improper, but I didn't know if anything was illegal. It just really wasn't a big deal to me. The company shuts down things all the time for tours, or if we have something coming through or cleans up. And I just didn't -- I thought, well, it happens all the time. So I didn't know if it was right or wrong. I thought it might have been improper, wasn't kosher, but I didn't think it was anything illegal.

(Tr. 379). (Emphasis added).

Hager attended regular meetings as part of the Union Safety Committee and never raised the environmental study integrity issue. (*See* Tr. 215-217, 463-464). Hager's testimony and actions demonstrate that he did not believe that any activity allegedly taken by Noveon regarding the environmental study was "a big deal" and he "didn't think it was anything illegal." A worker who delays airing an environmental concern until his job is later in jeopardy does not demonstrate good faith. *Conaway*, 1991-SWD-4 at 10. Hager did not believe the 2002 environmental study was an environmental concern and he did not reasonably believe that actions allegedly taken by Noveon regarding the 2002 environmental study violated an environmental statute. As such, Hager's discussion with Howard regarding possible irregularities in the 2002 environmental study cannot form the basis of protected activity covered under the environmental Acts.

October 3, 2003, Telephone Call

On October 3, 2003, Hager and Jackson had a telephone call to discuss a number of labor-management issues. These issues included the proposal for assigning extra duties to the wastewater operators and a discussion on remaining in compliance with the permits. The Complainant's closing brief does not discuss which permits were included in the conversation. Both the 24/7 staffing issue and the thermal oxidizer involved the Title V permit, an air pollution permit. No assertion has been made that Noveon was in violation of its water-related permits. As discussed above, Hager's opinion regarding one possible staffing proposal under consideration by Noveon that has not been collectively bargained or adopted, that may or may not create a potential future permit violation if implemented, is too speculative to qualify as protected activity under the Environmental Acts. As all compliance discussions centered on the thermal oxidizer, an air pollution control device, no concerns covered under the WPCA were discussed and no protected activity took place in this telephone call.

Lighting Grievance

In September or October 2003, Schmidt approached Union officers to express his disappointment that Hager had bypassed the local chain of command by sending a grievance involving lighting in and around the plant directly to Labbe. An employer may not, with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels or circumventing a superior, when the employee raises a health or safety issue…. Such restrictions on communication would seriously undermine the purpose of whistleblower laws to protect public health and safety." *Talbert v. Washington Public Power Supply System*, 93-ERA-35, slip op. at 8 (ARB Sept. 27, 1996) (citations omitted). The lighting grievance, however, while safety related, involves an occupational safety issue. Complaints that relate only to conditions at the work place and do not touch upon general public safety and health are cognizable only under the employee protection provision of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1982). *Sawyers v. Baldwin Union Free School District*, 85-TSC-1 (Sec'y Oct. 24, 1994), citing, *Aurich v. Consolidated Edison Co. of New York, Inc.*, 86-CAA-2 (Sec'y April 23, 1987), slip op. at 4. Hager's submission of the lighting grievance is not protected activity under the Environmental Acts.

Fred Marshall Grievance Hearing

Hager has asserted that part of the reason for his termination was his involvement in the Fred Marshall grievance hearing. Hager acknowledges that the grievance hearing and his participation in the hearing had nothing to do with the environment. Management/labor disputes related to the administration of the collective bargaining agreement are outside of the Environmental Acts. *Fugate v. Tennessee Valley Authority*, 95-ERA-50 (ARB Dec. 12, 1996) (ALJ correctly found that the Complainant was engaged in a labor-management dispute with the Respondent, and not an environmental safety dispute.) Hager's involvement in the Fred Marshall grievance is not protected activity covered under the Environmental Acts.

While the Complainant has raised various internal and external concerns on a variety of Union, occupational, and thermal oxidizer issues, Hager has not produced evidence that he engaged in activity implicating the Clean Water Act or the WPCA. As Hager has failed to demonstrate protected activity covered under the WPCA, his *prima facie* case must fail and his claim must be denied.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, the Complainant has not proven that he engaged in protected activity covered under the Act, and his complaint is DISMISSED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the Administrative Law Judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C., 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, N.W., Suite 400N, Washington, D.C., 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C., 20210.

If no Petition is timely filed, the Administrative Law Judge's Recommended Decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).