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: 26 August 2005

CASE No. 2003-WPC-11

JEFFREY L. BERTACCHI,
Complainant,

v.

CITY OF COLUMBUS –
DIVISION OF SEWERAGE & DRAINAGE
Respondent

APPEARANCES:

E. DENNIS MUCHNICKI, ESQ.
Dublin, Ohio
and
MICHAEL D. KOHN, ESQ.
Washington, D.C.
For the Complainant

BRAD N. SIEGEL
CHRISTOPHER R. SCHRAFF, ESQ.
Columbus, Ohio
For the Respondent

BEFORE: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under the Federal Water Pollution Control Act, also known as the Clean Water Act, Title 33 U.S.C. § 1367 and its implementing regulations 29 C.F.R. Part 24. ("WPCA" or "the Act" collectively). The regulations that govern the hearing in this matter appear at 29 C.F.R. Parts 18 and 24, as well as those in 40 C.F.R. Part 108, establish procedures for the handling of complaints of discriminatory action. The WPCA provides remedies for any employee who has been discharged or discriminated against due to his or her testimony or proceeding against their employer for violating the provisions of this Act.

A full hearing on this matter was held on April 5 – 8, 2004, in Columbus, Ohio at which the parties were represented by counsel. They presented testimony and documentary evidence, and timely filed briefs, all of which have been carefully considered in this recommended decision and order.

I. Statement of the Case

On August 25, 2003, Jeffrey L. Bertacchi, ("Complainant"), filed a complaint of discrimination against the City of Columbus –Division of Sewerage & Drainage ("Respondent" or "CDOSD") under Section 507 of the Act. The complaint was investigated and found to have merit. On September 29, 2003, Complainant requested a formal hearing.

A. Issues

1) Whether the allegations of the complaint are subject to the jurisdiction of this court under the provisions of the WPCA as alleged herein.

2) Whether Respondent is an "employer" under the WPCA;

3) Whether Complainant engaged in protected activity under the WPCA;

4) Whether Respondent knew or had knowledge that Complainant engaged in protected activity;

5) Whether respondent took adverse action against complainant;

6) Whether the actions taken against Complainant by Respondent were motivated, at least in part, by Complainant's engagement in protected activity; and

7) What damages, if any, the Complainant is entitled to from Respondent as a result of the retaliatory actions taken by Respondent.

II. Findings of Fact

This matter involves the demotion of Complainant by his employer for submitting a letter to an Advisory Board of the Ohio Environmental Protection Agency ("Ohio EPA"). The letter contested the application of another employee, Douglas Helton, for a Class IV wastewater plant operator's license, which is necessary to operate wastewater works in Ohio. Complainant alleges that his demotion was the direct result of submitting the letter, and that this action constitutes a violation of the whistle blower protective provisions of the WPCA. Unless otherwise stated herein, all references to what the witnesses testified to, or stated, are credited.

A. Stipulations

Joint Exhibits 12a and 12b consist of the Stipulation of Facts (JX 12 a) and Stipulation of Undisputed Facts (JX 12 b), prepared by the parties and renumbered by the undersigned as follows:

1. Stipulation of Facts

1.1 The Office of Administrative Law Judges, U.S. Department of Labor has jurisdiction over the parties and the subject matter of this case. Reserved: Subject matter dispute by the Employer/ Respondent.

1.2 Respondent is engaged in interstate commerce and is an employer subject to the provisions of Section of the Clean Air (sic) [Water] Act, a/k/a the Water Pollution Control Act (hereinafter CAA(sic)[WPCA]) 33 U.S.C. § 1367.

1.3 Complainant is now, and at all times material herein, a "person" as defined in § 1367 of 33 U.S.C.

1.4 Jeffrey Bertacchi was an employee of the City of Columbus during the applicable periods in that he was employed as a Pretreatment Manager, Department of Public Utilities, Division of Sewerage and Drainage.

1.5 Pursuant to § 1367 of 33 U.S.C., Mr. Bertacchi filed a complaint on or about August 25, 2003 with the Secretary of Labor alleging that the City of Columbus discriminated against him in violation of Section 1367 of 33 U.S.C. (the Clean Water Act 33 U.S.C. § 1367). (JX 7).[1]

1.6 The original complaint filed with the Secretary was timely.

1.7 Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on September 22, 2003.

1.8 Complainant received those findings by mail on or after September 24, 2003.

1.9 Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on September 29, 2003.

[1] Bracketed entries in each of these Stipulations and unbracketed changes in the numbering system of the two sets of stipulations, including both the Stipulation of Facts and the Stipulated Undisputed Facts, have been inserted by the undersigned. References to these stipulations are designated as follows: (Stip. 1.__) or (Stip 2.__). References to the other evidence of record is designated as follows: Administrative Law Judge Exhibits (ALJX __); Joint Exhibits (JX __); Complainant Exhibits (CX __); Respondent Exhibits (RX __); Complainant's Brief (C. Br. ___); Complainant's Reply Brief (C. Reply Br. ___); Respondent's Brief (R. Br. ___); Respondent's Reply Brief (R. Reply Br. ___); and Respondent's Motion for Summary Decision (R. Mot. for Summ. Dec. ___).

1.10 The appeal of the complaint satisfied the 30-day time constraints provided by 20 C.F.R. § 24 [sic – Part 24].

2. Stipulated Undisputed Facts

2.1 The City of Columbus operates two wastewater treatment plants, Jackson Pike and Southerly. The City has received from Ohio EPA a NPDES [National Pollution Discharge Elimination System] permit, as required by the Federal Clean Water Act, for each facility authorizing the discharge in compliance with the terms and conditions in each permit of wastewater into surface waters of the State of Ohio. A true and accurate copy of the Jackson Pike NPDES Permit is included in the record of this hearing as a Joint Exhibit. (JX 7).

2.2 One of the terms imposed by Ohio EPA in the NPDES permit for both Jackson Pike and Southerly is that the facilities must have a person "in responsible charge" who holds a Class IV wastewater operator certification from Ohio EPA.

2.3 Because of the retirement during the first half of 2001 of Ron Scott who held a Class IV operator certification, Columbus wanted other personnel to obtain their Class IV certifications in order to replace Ron Scott.

2.4 Under Ohio EPA regulations and procedures, there is a two phase process for obtaining Class IV certification. Part One involves completing a short application form. Part II involves preparing and submitting for approval by Ohio EPA of a written report in accordance with a guidance document dated 8/18/00 that sets forth the guidelines for preparing and submitting the Part II applications. A true and accurate copy of the guidance document setting forth the procedures for preparing the Part II report is included in the record of this hearing as a Joint Exhibit. (JX 1).

2.5 Doug Helton, the former plant manger of the Jackson Pike facility, was one of the City of Columbus, Division of Sewerage & Drainage employees who, during 2001, prepared and submitted his Part II application in order to obtain his Class IV certification. A true and accurate copy of Mr. Helton's Part II application is included in the record of this hearing as a Joint Exhibit. (JX 2). Mr. Helton's Part II application was submitted during early November, 2001, to the Ohio EPA through the Ohio Advisory Board of Examiners which reviews the Part II applications and makes recommendations to Ohio EPA for action on the applications.

2.6 The City made an arrangement with one of its technical consultants, Colleen Dunn Donahue of Malcolm Pirney, Inc., to provide assistance to Mr. Helton in the preparation of Helton's Part II application. The Parties do not agree on the type of assistance Ms. Donahue was authorized to provide or did in fact provide.

2.7 Among the three persons Mr. Helton listed in his application as a reference was Complainant Jeffery Bertacchi, who as of May, 2001, was the Industrial Pretreatment Program Manager for the City of Columbus Division of Sewerage and Drainage (CDOSD), Department of Public Utilities. Mr. Bertacchi was originally hired by the CDSOD on February 17, 1998 as a Plants Operation and Maintenance Training Coordinator.

2.8 After learning that Mr. Helton's application had been submitted, Mr. Bertacchi, on November 12, 2001, sent to the Advisory Board of Examiners in care of Julie Gillenwater, who is an Ohio EPA employee, a three page letter in which Bertacchi listed numerous concerns about Mr. Helton's application. Bertacchi's first listed concern was that Mr. Helton was not the author of his own application. A true and accurate copy of Mr. Bertacchi's November 12, 2001 letter is included in the record of this hearing as a Joint Exhibit. (JX 3). Mr. Bertacchi did not inform any of his supervisors that he was sending his November 12, 2001 letter to Ms. Gillenwater and the Board of Examiners.

2.9 Mr. Bertacchi's supervisors first learned that he had sent the letter to Ohio EPA's Advisory Board of Examiners at the beginning of April, 2003, when Assistant City Attorney Susan Ashbrook found the letter during a public records inspection of an EPA enforcement file that had also been provided to the Sierra Club, which had filed suit against the City pursuant to Citizen Suit provisions of the federal Clean Water Act. Ms. Ashbrook then immediately reported the discovery of the letter to Cheryl Roberto who was then the Acting (now permanent) Director of the Department of Public Utilities for the City of Columbus. Ms. Roberto then ordered that Mr. Bertacchi's action be investigated.

2.10 On or about May 9, 2003, Mr. Joseph Selby, a Human Resources Generalist for the Department of Public Utilities, transmitted to Doug Sarff, a Human Resources Manager, the investigative report concerning Mr. Bertacchi. A true and accurate copy of the investigative report is included in the record of the hearing of this case as a Joint Exhibit. (JX 10). The May 9 report was also transmitted to Ms. Roberto who authorized the initiation of disciplinary action against Mr. Bertacchi.

2.11 On or about May 15, 2003 a Notice of Hearing concerning potential discipline was issued to Mr. Bertacchi. A true and accurate copy of the notice is included in the record of the hearing of this case as a Joint Exhibit. [The Notice of Hearing was not included as a Joint Exhibit. Since the parties have agreed to the stipulation, it will be received as to notice, date and receipt.]

2.12 Mr. Bertacchi's disciplinary hearing was conducted on July 10, 2003 by Mr. James Lendavic, a Labor Relations Specialist/Hearing Officer employed by the City. During the hearing Mr. Bertacchi raised the issue that his November 12,

2001 letter was protected activity under the Clean Water Act whistleblower protection provisions.

2.13 On or about July 30, 2003, Mr. Lendavic issued a written report finding that Mr. Bertacchi's November 12, 2001 letter violated City work rules. Lendavic ordered Bertacchi demoted from his position as Pretreatment Program Manager to his former position of Maintenance Training Coordinator, effective July 31, 2003. A true and accurate copy of Mr. Lendavic's written decision is included in the record of this case as a Joint Exhibit. (JX 5).

2.14 On or about August 25, 2003, Mr. Bertacchi filed a complaint with the Department of Labor alleging, *inter alia,* that the disciplinary action imposed against him on July 30, 2003 violated the "whistleblower protection" provision of the Clean Water Act, 33 U.S.C. Section 1367. (JX 6).

B. Exhibits

Administrative Law Judge Exhibits 1-6 and Joint Exhibits 1-12b were offered and received into evidence without objections by the parties at the hearing.[2]

Complainant offered his Exhibits 1 – 11 at the outset of the hearing, and Exhibits 12 – 17 during the hearing. Complainant withdrew Exhibit 7; ruling was reserved on Exhibit 10; [3] and ruling on Exhibit 17 was reserved to allow briefing as to admissibility.[4]

Respondent offered Exhibits 1-12 into evidence. Exhibit 2 was subject to objection based upon its creation on May 3, 2002, after Mr. Helton had left the facility, as not being relevant to this proceeding. This exhibit, however, was received into evidence with the admonition that its weight would be considered after testimony.[5] I admit Exhibit 2 into evidence, but note that its

[2] ALJ 5 is the same document as JX 6

[3] Complainant's Exhibit 10 involves a notice of intended filing of a Sierra Club citizen suit in an unrelated proceeding under the WPCA against the City of Columbus. Respondent's objection to its admission was based on relevancy. Ruling on the document was reserved by the undersigned based upon the representation of the Complainant that there would be supporting testimony by Ms. Ashbrook. However, even though there was testimony on the existence of the lawsuit in question, the existence of the suit is not opposed by Respondent, and it was openly discussed by the witnesses as a basis for the document request in which documents produced by the City in that action provided the key letter involved in the present action, namely the letter of November 12, 2001. I find that while the existence of that lawsuit is not contested, the content of the letter has not otherwise been established to be related to matters that are relevant or material to the present proceeding. Therefore, the proposal to admit the document into evidence is denied.

[4] As discussed in detail in section III (B) *infra*, I hold CX 17A and B are admitted into evidence.

[5] Complainant's attorney contended that evidence concerning the document would be introduced through Mr. Hickman, but stated at the prehearing conference that Mr. Hickman had not been questioned on the exhibit. It was determined that Mr. Hickman's testimony would be limited to the scope of his deposition testimony or what had been testified to when he was called. Counsel stated that Mr. Hickman was not going to be called. Mr. Siegel stated that the document should be admitted since, during Mr. Hickman's deposition, he was asked specifically about whether or not the Jackson Pike Plant had experienced catastrophic failures during the period that Mr. Helton was

use is limited to showing that respondent received an award from the US EPA for being one of the best water treatment plants in the country.

With regard to Respondent's Exhibit 3, the collective bargaining agreement covering the Complainant, I admitted it into evidence with the admonition that something had to be done with the document, but that it did not serve much of a useful purpose without substantiating testimony.[6]

Respondent's Exhibit 5 is a November 6, 2003 email from Mr. Bertacchi to Ms. Poole, which was created well after the complaint was filed. When asked about it being three years later, Respondent's attorney professed that the letter related to continuing or ongoing retaliation. Mr. Bartacchi's counsel maintained that it was not being cited as an act of retaliation. While I initially admitted the letter on that basis, I reserved ruling on the document to determine whether or not it had any relevancy to the case. Upon review, I find the letter to have limited relevance and either limited or no materiality to the determinations involved with Mr. Bertacchi's motives for writing the November 12, 2001 letter. Its admission as an exhibit is, therefore, denied.[7]

Respondent's Exhibits 6 involved a document created in June, 2003, after the filing of the complaint. Complainant objected on the basis that it was self-serving public relations propaganda for the City. I ruled that I would listen to the testimony and reserve ruling. While I agree with Complainant in that Exhibit 6 appears to be a promotional piece published by Respondent, I also find some limited relevance related to an award from the US EPA. As a result, I admit Exhibit 6 into the record, but accord it limited weight based on the source and the lack of testimony to support the propositions included therein.

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plant manager. He stated that the letter supports the proposition that during the period of these alleged catastrophic failures no catastrophic failures had, in fact, occurred, as alleged in Mr. Bertacchi's letter; and that the plant received an award from the US EPA as being one of the best waste water treatment plants in the country. Complainant's counsel responded by arguing that Mr. Hickman's testimony does not establish the fact that there were not any catastrophic failures at the Jackson Street Plant, and that it had not dealt with any of the catastrophic failures that would have happened prior to that time period which would be relevant to the case. On its face, he stated, this is a letter giving an award for excellence but it does not identify whether or not there has been a failure of any portion of the plant. In ruling on the matter, I stated that it may be relevant but its materiality or weight is limited, unless otherwise supported by reasoning and documentation. I stated that I was not going to litigate the award, and would be governed by the testimony given at the proceeding. If Mr. Hickman was not going to substantiate anything beyond it, I stated the award would only be accepted for what it was worth, and that it may not be worth much. For these reasons, I admitted the Respondent's Exhibit 2 into evidence for this limited purpose.

[6] The collective bargaining agreement does explain the basis for the hearing before Mr. Lendavic as a member of management, and is material, relevant, and admitted on that basis.

[7] Respondent's Exhibit 5 dealt with Mr. Bertacchi's concern that there were people opening his mail and that he was being harassed. It was sent to his former secretary basically saying that he was going to look into this for the litigation now before us. It has not been "looked into for litigation," and it is not part of the present litigation, so according to Complainant's counsel it has no relevance. Mr. Siegel stated that it was offered for the purpose of demonstrating Mr. Bertacchi's state of mind and motivation with respect to the claims that he had made in the complaint, and to show that Ms. Roberto and others within the Department of Public Utilities were monitoring his work.

Respondent's Exhibit 12 consisted of the three volumes involving the City's plan for the Division of Sewerage & Drainage. The document was delivered to Mr. Siegel's office on March 24, who then forwarded it to Mr. Muchnicki on Friday the 26th. This exhibit relates to upgrades of the Jackson Pike Waste Water Treatment Plant being generated by catastrophic failure of pertinent operating equipment in relation to paragraph six of Mr. Bertacchi's November 12, 2001 letter. I rejected Respondent's Exhibit 12 on the basis of the prehearing instructions, finding that its production and admission were late.

In summary, CX 1-6, 8-9, and 11-17 are admitted into evidence, as are RX 1, 3-4, and 6-11. In addition, RX 2 is admitted for limited purpose. Finally, CX 7 and 10, and RX 5 and 12 are not admitted into evidence.

C. Primary Witnesses

Jeffrey Bertacchi

Mr. Bertacchi entered the wastewater treatment field in 1980, and received a B.S. in Environmental Engineering from Columbia Southern University in April 2000. At the time of the hearing, he was a candidate for an M.A. in Public Administration. Mr. Bertacchi also served as an adjunct professor at the Columbus State Community College, and at the California State University in Sacramento, where he taught environmental, wastewater, and water related correspondence courses.

Mr. Bertacchi was hired by Respondent in February 1998 as Operations and Maintenance Training Coordinator to update plant manuals for both the Southerly and Jackson Pike Plants. He also performed regulatory compliance functions under Ron Scott, with some industrial hygiene and project upgrade responsibilities. Also, Mr. Bertacchi's duties involved reviewing, updating and renewing standard operating procedures for both wastewater treatment plant operations and maintenance, training affected employees on both existing and newly purchased equipment, participating in meetings for both Jackson Pike and the Southerly Plant, and interfacing with the operators of both plants. Complainant, however, testified that he never worked for, nor was he ever directly assigned to, either of the plants.

In May 2001, Mr. Bertacchi was promoted to Industrial Waste Pretreatment Manager, where he reported to Don Linn. In this capacity he supervised 19 employees in the sampling of 112 to 120 permanent industry wastewater samples used to maintain compliance with applicable environmental regulations. He also assisted in upgrading the computer system for the plants, which included training on the equipment and interfacing data with a contractor from Malcom Pirney. This role involved dealings with the Ohio EPA.

Mr. Bertacchi holds a 1987 Class IV wastewater license in California, and another in the State of New Hampshire, and he has been accepted for a Grade IV license in Vermont. He served as a Grade IV operator in the County of Sacramento Regional Wastewater Treatment Plant in California from November of 1987 to August of 1996, when he moved back to Ohio and became the Director of the Mansfield Water and Wastewater Facilities for Richland County. In

1996, he was granted an Ohio EPA Class III license under reciprocity agreements, but has not had enough experience in Ohio to qualify for a Grade IV license.[8]

Douglas W. Helton

Douglas W. Helton testified that prior to his 2002 retirement, he had worked for CDOSD for thirty years. Over the years, he had worked as an operator, and as a Supervisor I and Supervisor II in both the Southerly and the Jackson plants. Most recently he had served for one year as an Assistant Plant Manager, and another five years as a Plant Manager at the Jackson plant.

Colleen Marie (Dunn) Donohue

Ms. (Dunn) Donahue earned a Civil Engineering degree in 1993, with a thesis in wetland hydrology. She obtained her Masters Degree in December of 1996. She is a registered Professional Engineer in the State of Ohio.

Prior to March 2004, Ms. (Dunn) Donohue worked as a Project Engineer for Malcom Pirney. Most of her eight years with Pirney were spent under contract with the City of Columbus. At CDOSD, Ms. (Dunn) Donahue's work involved solid treatment master planning, wastewater facility master planning, capitol improvement planning, regulatory support, water treatment, and sampling and modeling. In addition, she provided assistance to CDOSD employees Helton, Huff, Hoffman, and Hickman, in preparing their applications to the Ohio EPA for Class IV wastewater license certifications.

At the time of the hearing, Ms. (Dunn) Donahue had left Malcom Pirney to open her own company. Donohue Ideas, which opened in February 2004, is an Engineering and Management firm, performing civil engineering, public relations, and project management services.

William R. Tippery

Mr. Tippery was formerly Mr. Helton's Administrative Assistant at the Jackson Pike Wastewater Treatment Plant.[9] Mr. Tippery has worked for the City for a total of six years.

Susan Ashbrook, Esq.

Ms. Ashbrook was an Assistant City Attorney assigned to the Department of Public Utilities for about four years, and had been a close friend of Cheryl Roberto since they began law school together in 1984. While she had done some work for the department since 2000, in 2004 she testified that Ms. Roberto's department became her sole client.

[8] To qualify for a Class IV license in Ohio, a candidate must serve two years as the Direct Assistant of someone in charge of a Class IV facility. Mr. Bertacchi had not satisfied this requirement.

[9] The title had evolved from Administrative Assistant to Administrative Analyst, after which the Civil Service Commission changed it to Management Analyst, which was his position title at the time of the hearing.

Cheryl Roberto

Ms. Cheryl Roberto graduated from Ohio State University Law School in 1987, and immediately began work in the Attorney General's office. She held a number of positions in that office, including positions in consumer protection and environmental enforcement of WPCA, solid waste, and hazardous waste cases. After a short stint during the early 1990's in private practice, Ms. Roberto was hired by the City of Columbus as an Assistant City Attorney representing the Department of Public Utilities, and as of 2000, she was also serving as a policy advisor on environmental matters for the newly elected Mayor of Columbus, Ohio.

In 2001, Ms. Roberto, was transferred to the City's Department of Public Utilities, initially as the Deputy to Director John Dowd. When Mr. Dowd retired in early 2003, Ms. Roberto became Interim Director, and in November 2003, she was ultimately named director of the department.

Joseph D. Selby

Mr. Selby was the Human Resources Generalist for the City of Columbus who was assigned to the CDOSD for five years to handle employee relations and the disciplinary grievance process, policies and procedures. Ms. Roberto designated Mr. Selby to investigate Respondent's internal charges against Mr. Bertacchi.

James M. Lendavic

Hearing Officer James L. Lendavic was a Labor Relations Specialist in the City of Columbus' Office of Collective Bargaining Services. His duties included conducting hearings and meetings related to grievances filed by non-uniformed labor organizations, disciplinary hearings, and training secessions for supervisors and managers. Mr. Lendavic was the designated hearing officer for Mr. Bertacchi's disciplinary hearing as required under the provisions of the collective bargaining agreement.

D. Facts of the Case

1. Mr. Bertacchi's Work Performance and Evaluations

In his capacity as an Operations and Maintenance Training Coordinator, and subsequently as Respondent's Industrial Waste Pretreatment Manager, Mr. Bertacchi consistently received high performance ratings. In fact, a review of all of his performance evaluations from 1998 through April 2002 reveals that he earned "Exceeds Expectations" for approximately 30% to 50% of the rated areas, and "Fully Competent" marks for the remaining categories. (CX 11).[10] Also, except for the probationary period, Mr. Bertacchi's evaluations all resulted in merit pay increase recommendations, the accompanying comments were all

[10] Complainant's Index to his Exhibits states that these evaluations consisted of all that were performed for Mr. Bertacchi, "from his date of hire to the present," which, I conclude, was at least through the final date of the hearing. This was not contradicted by the Respondent.

praiseworthy and commensurate with the ratings, and the evaluations included no negative comments prior to Mr. Selby's 2003 investigation report.

In his capacity as Industrial Waste Pretreatment Manager, Mr. Bertacchi attended monthly "one-on-one" meetings with his supervisor, Mr. Linn. He testified that prior to the 2003 discovery of the letter to the Ohio EPA, Mr. Linn had "never expressed any problems…" with Mr. Bertacchi's work and that he "had praised him for the work that [he]…was doing in pretreatment." (T 341). In fact, during a May 2003 meeting, Mr. Linn informed Complainant that he had "exceeded" expectations in enough categories that he would be eligible for a merit increase. (T 342).

2. Mr. Bertacchi's Authority Related to Acquisition of the NPDES Permit

At the hearing, Mr. Bertacchi explained that the National Pollution Discharge Elimination System ("NPDES") permit[11] is a grant of authorization by the United States Environmental Protection Agency ("US EPA") under the WPCA, acting through the Ohio EPA[12] to CDOSD, "to discharge from the wastewater treatment works located at 2104 Jackson Pike, Columbus Ohio, Franklin County … and discharging to the Scioto River" in accordance with the schedules attached to the permit. These schedules set forth studied criteria such as the "Final Effluent Limitations and Monitoring Requirements" and other specified limitations. (JX 7, pp. 180 – 206). All wastewater treatment facilities in Ohio are required by the WPCA and federal and state regulation to secure a NPDES permit. In addition, Part 2 of the permit states:

> The wastewater treatment works must be under supervision of a Class IV State Certified operator as required by Rule 3745.702 of the Ohio Administrative Code.

(JX 3; p. 192 or p. 13 of 27 of the document. See also, T 346 -347).

Mr. Bertacchi testified that as far as he knew, Ohio has been the only state that required their Grade IV applicants to write and submit "what is essentially a thesis," while other states required a four to five hour comprehensive test for the equivalent license. (T 319). Stewart Bruney, Secretary of the Advisory Board of Examiners of the Ohio EPA, informed him that the responsibilities of the person in charge of an Ohio Plant are very broad.[13] According to Mr. Bruney, the applicants must demonstrate a comprehensive knowledge of the whole system beyond merely treatment, including collection, appurtenant equipment to the pump stations, a grasp of the budgetary process, and the ability to effectively communicate the needs of the

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[11] Full Caption: Ohio Environmental Protection Agency Authorization to Discharge Under the National Pollution Discharge Elimination System.

[12] Mr. Bertacchi testified that, under the WPCA, the US EPA has "primacy" to enforce the permit conditions under federal regulations, but may delegate "primacy" to states that comply with conditions of the federal regulations, which the Ohio EPA has done.

[13] I have accepted and credited this hearsay testimony since there was no objection to it; Mr. Bertacchi was the official contact for CDOSD with the Ohio EPA for a period of time; he had reason to know this information; it was well presented by him, and it was neither contradicted nor beyond reason to accept.

CDOSD to members of City Council and County Commissioners. Encompassed in this are planning for improvement and growth; maintaining treatment and permits for the facilities; defining those needs, and acquiring the resources necessary to fulfill those requirements. Finally, Mr. Bruney iterated to Mr. Bertacchi that the Ohio EPA felt that a comprehensive examination would best demonstrate the applicant's ability to effectively communicate and grasp those abilities.

As Industrial Waste Pretreatment Manager, Mr. Bertacchi explained that he was responsible for maintaining and renewing Respondent's NPDES permits, as well as submitting monthly reports required by the permits. The NPDES process, he explained, is lengthy and complicated, and one that requires an intimate knowledge of the WPCA, US EPA and Ohio EPA regulatory processes.

3. Events Preceding Mr. Bertacchi's 2001 Complaint Letter

In early 2000, it was known that Ron Scott, the Jackson Pike Wastewater Treatment Plant Operator, intended to retire in April 2001. At the time, Mr. Scott was Respondent's only Class IV licensed operator at the Jackson Plant. (CX 1, pp. 1-7). Also, since Mr. Helton 1997 Class IV application had been denied, in 2001 he held only a Class III license. Despite this deficiency, following Mr. Scott's retirement, Mr. Helton assumed operation of the Plant. As a result, CDOSD was out of compliance.

Ms. Roberto recognized that CDOSD was losing its Class IV operator, and saw a need to "grow" their own Class IV's from within. (T 238). Mr. Helton, as well as other qualified employees, was urged by CDOSD management to apply for a Class IV certification.[14] Since previous applicants had been rejected, Ms. Roberto felt that assistance in the form of

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[14] In a May 2, 2001 email from Mr. Linn to Mr. Helton and Mr. Smiley, Mr. Linn inquired:

> What is the status of mgt. applying for licenses? We are in violation of our permits, and I would hate to lose the Gold over this. Doug [Helton], you applied before, we need to resubmit ASAP. Get the help you need to get it done. … We will contest all disapprovals legally.

(CX 1, p. 7; T 350). In Mr. Helton's May 9, 2001 response, he stated:

> I am actively coaching members of my staff to submit applications and know that Gary Hickman is working with Susan Ashbrook to have Part 1 of his application resubmitted after the initial negative response..... Additionally, I have reenergized my efforts to update and resubmit my package. I met this morning with the support contact we discussed and have turned over a copy of my application along with contact information to set up a plan for resubmission. It looks like we are talking a 60-90 day window for getting the resubmission accomplished.

Id. Mr. Bertacchi explained that the "Gold" referred to in the email related to an annual award by the Association of Municipal Sewage Agencies (AMSA), based upon certain criteria at different plant levels. The Gold was awarded for operating a sewage plant for one year without a violation of the NPDES permit; the Silver for 1-5 violations in a year, and the Bronze for 5-10 violations in a year. If a Plant operates for 5 consecutive years without a violation, a Platinum award may be received. (T 351).

underwriting the process or giving time off may be necessary. CDOSD determined that Mr. Helton was the best internal candidate for the Class IV operator's license since he had been acting in this position for four or five years, and his plant had received the Platinum and other awards. Also, as a contingency for operating without a Class IV certified operator, Ms. Roberto planned to request that CDOSD be temporarily allowed to operate the Jackson Plant with a Class III operator.

Mr. Helton had previously completed Part I of a new Class IV license application, so in May 2001 he began work on a new Part II. Ms. (Dunn) Donohue, an employee of contractor Malcom Pirney, was assigned to assist Mr. Helton with the application. Mr. Helton's administrative assistant, Mr. Tippery, who had previously helped prepare drafts of the unsuccessful 1997 application, was also directed to assist in the development of this subsequent application.

Ms. Roberto told Ms. (Dunn) Donahue that the applicant must be the first to put "pen to paper," and that the first signature on the draft was to be that of the applicant. (T 225-226). In addition, Ms. Roberto testified that she did not expect Ms. (Dunn) Donahue to throw out the work that she had previously done on Mr. Helton's application, nor did Ms. Roberto direct a review of what had been done to that point. Ultimately, Ms. Roberto understood Ms. (Dunn) Donahue's roll to be, "[c]oaching, mentoring, poking, prodding, assisting the applicants to express their abilities as clearly as …they possibly could, kind of like a resume coach." (T 227). Based on a review of the Ohio EPA's regulations and guidance documents, and the Malcom Pirney contract, Ms. Roberto believed that these types of assistance did not violate the "in your own words" requirement, nor did they exceed the "scope of practices" under the contract. (T228-229).

Based on these directions, Ms. (Dunn) Donahue composed the August 31, 2001 document captioned CLASS IV APPLICATION ASSISTANCE, (CX 2, pp. 2-5) and submitted it to Ms. Roberto. (CX 2, p.1). Ms. (Dunn) Donahue also created a schedule for drafting and submission.

Mr. Helton testified that in agreeing to the assistance of Ms. (Dunn) Donahue, he wanted someone to "help him tell a story" about his work at CDOSD and to "take his thoughts," put them "in proper order" by asking probing questions, and help with grammar and structural problems. (T 611-612). Mr. Helton would provide her with the basic information, either that he or Mr. Tippery had written, and she would "type it up or have it typed up and give it back." They would then talk or meet on a regular basis to review the draft and make corrections and changes. (T 612).

By 2000, the 1997 application was available in hard-copy only,[15] so Mr. Tippery was required to recreate Part II from scratch. Except for Mr. Tippery's updating and transcription assistance, this initial draft, completed in May 2001, appears to have been wholly written by Mr. Helton.

[15] Mr. Tippery testified that the electronic copy of this document was in an incompatible format, and therefore, could not be accessed.

Mr. Bertacchi testified that Mr. Helton approached him to serve as a reference on the Class IV license application, and that he agreed to do so.[16] In addition, Mr. Bertacchi read the original draft, as well as various other drafts over the subsequent months. In late October 2001, Mr. Helton gave Mr. Bertacchi a three-ring binder which contained a draft for review. Mr. Bertacchi testified that he believed that this binder represented the final draft. An attached memorandum dated October 24 read:

> Thanks for agreeing to look this over for content and grammar.
>
> * * *
>
> I ask that you write any comments directly on the applicable page for ease in updating this application while staying within my timetable for submission. Additionally I do need this copy back by 3 PM Friday.[17]

Mr. Bertacchi reviewed the document, and testified that he was "shocked" at the difference between the writing on the initial draft, and that on the more current drafts. It did not appear to him to be what he had previously recognized as Mr. Helton's own writing style. Due to the "in your own words" limitation on the form, Mr. Bertacchi began to question his own wisdom in having agreed to serve as a reference. Despite these concerns, Mr. Bertacchi wrote, "No comment" on the memorandum, (CX 5), and returned it to Mr. Helton.[18]

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[16] Mr. Helton testified Mr. Bertacchi volunteered to send a reference. In fact, according to Mr. Helton, on one occasion Mr. Bertacchi said, "Listen. I'll write it for you. Let me write it for you. I know what they want, and I could fluff it up for you." While Mr. Helton explained that he initially declined this offer, he said that he later accommodated Mr. Bertacchi's request to review the drafts, and ultimately agreed to allow Mr. Bertacchi write a letter of recommendation. Mr. Helton explained that he acquiesced because he was looking for a reference familiar with his experience and qualifications, and that he also based his decision on the fact that Mr. Bertacchi had Class IV certification in California. (T 614-615).

The apparent inconsistency between Mr. Bertacchi's and Mr. Helton's statements is addressed in section IV(C), *infra*.

[17] The record does not contain a draft in a three-ring binder. At some point it appears that Mr. Bertacchi reviewed a draft dated "September XX, 2003" with hand-written, dated pages of 8/29/01, (CX 13, p. 1), through 10/12/01, (CX 13, p. 39), and ending with a page dated 9/10/01. (CX 13, p. 66). Due to the fact that there is no other draft of the application in the record, and the parties did not testify as to which draft accompanied the October 24th memorandum, the undersigned is not able to ascertain whether it was the September XX, 2001, or some subsequent rendition. At any rate, it is apparent from the testimony that the draft attached to the memorandum was not the same as Mr. Helton's November 2, 2001 final submission to the Ohio EPA. (JX 2).

[18] Mr. Helton, testified that after he received Mr. Bertacchi's response on November 2, 2001, he called Mr. Bertacchi to request more feedback. According to Mr. Helton, Mr. Bertacchi stated, "it looks pretty good, [but there are some areas I] could not comment on because … I don't know what you've done." To this Mr. Helton said, "Well, okay. No problem." and Mr. Bertacchi responded, "Yeah, no problem."

Mr. Bertacchi began to inquire into the assistance Mr. Helton had received in compiling his Class IV application. Mr. Bertacchi described a conversation with Ms. (Dunn) Donahue, in which he commented on the help she had provided Mr. Helton in preparing his application, and reiterated that there was a requirement that the application be in the applicant's "own words." Stating that he sure would like similar assistance on his own application, Mr. Bertacchi asked her who had authorized it. She responded that Mr. Linn had authorized the assistance, and that he should talk to Mr. Linn about it.

Mr. Bertacchi also questioned Mr. Roush and Mr. Miller, who had both previously made derogatory comments and jokes about Mr. Helton's writing ability, language, and grammar. According to Mr. Roush's testimony, when Ms. (Dunn) Donahue explained her involvement in the preparation of Mr. Helton's application, Mr. Roush said that he told her that she ought to be ashamed of her involvement because she knew that the applicant was responsible for preparation of the Class IV application. He also testified that her employer, Malcom Pirney, intended to market this type of assistance to other municipalities.

Based on his experience with Mr. Helton's previous writings, and his inquiries, Mr. Bertacchi concluded that not only did Mr. Helton not possess the qualifications to be a Class IV licensee, but that Ms. (Dunn) Donahue, had performed services assisting Mr. Helton with the preparation of his application in violation of the Ohio EPA's "in your own words" requirement. Thus, Mr. Bertacchi concluded that he could not, in good conscience, be a reference for Mr. Helton.

4. Mr. Bertacchi's Complaint to the Ohio EPA

Mr. Roush testified that Mr. Bertacchi had expressed concern about serving as a reference on Mr. Helton's Class IV application. Mr. Roush recommended that Mr. Bertacchi request release from this obligation. In turn, Mr. Bertacchi testified that he asked Mr. Helton to remove his name as a reference from the application, but since the application had already been filed, Mr. Helton told him that he could not do so.[19] Mr. Bertacchi then called Julie Gillenwater, Secretary for the Ohio EPA's Advisory Board of Examiners, and requested that his name be removed as a reference. She told him that since the application had already been submitted, his name could not be removed without a letter to the Board explaining his reasons for the removal. Despite his reluctance, Mr. Bertacchi ultimately sent his complaint to the Advisory Board on November 12, 2001.[20]

In the November 12th letter, Mr. Bertacchi stated that he did not question Mr. Helton's tenure, but did "take exception to his claims of knowledge and ability." He stated that he had been asked by Mr. Helton to be a reference; that he had reviewed Mr. Helton's application prior to writing the letter; and that he had not sent the requisite reference to the Advisory Board.

[19] Mr. Helton denied that Mr. Bertacchi asked him to remove his name as a reference, or ever expressed any objection or criticism about the assistance that he had received from Ms. (Dunn) Donahue. (T 616 - 617). The apparent inconsistency between Mr. Bertacchi's and Mr. Helton's statements is addressed in section IV(C), *infra*.

[20] For the full test of the letter, *see* Appendix A.

Mr. Bertacchi letter outlined six factual areas on which he based his opposition. His primary objection was a challenge to Mr. Helton's authorship of the application, alleging that a consulting firm had prepared the application and "may be responsible for at least four other applications in the process of being submitted for approval." He claimed that one of the basic requirements of a Class IV application, as set forth in the guidelines, is to "prove one's ability, to accurately and concisely communicate by the written word." He stated that Mr. Helton did not meet this requirement since someone else had written the application. Also, at the end of his letter Mr. Bertacchi reiterated this point by stating that Part 2 of the application guidelines for the Class IV license must be "in your own words."[21]

The second paragraph of Mr. Bertacchi's letter to the Advisory Board concerned Mr. Helton's administration of Jackson plant and the accuracy of position titles listed on the application. After verifying that Mr. Helton was the plant manager, Mr. Bertacchi claimed that several titles included in the organizational chart were misleading. Specifically, he challenged the existence of several of the positions on the chart, and noted that other positions were given "nebulous titles." Mr. Bertacchi explained that while Gary Hickman was in charge of the laboratory, his title was "Chemist II," not "Regulatory Compliance Process Manager," and that he had worked very close with Mr. Hickman, and knew that he had not carried that working title in all the time that they had worked together, nor had he ever heard anybody refer to Mr. Hickman as a Regulatory Compliance Process Manager. In support, Mr. Roush testified that he had not ever heard Mr. Hickman called a Regulatory Compliance Processing Manager, and that the Regulatory Compliance Processing Manager for the Jackson plant would be the plant manager.

Paragraph three of Mr. Bertacchi's letter alleged that Mr. Helton did not have the extent of working knowledge of the waste water collection system that he claimed in Section 5 of the application. Mr. Bertacchi explained that the city's collection system was comprised of several CSO/SSO[22] points, regulators, storm tanks, and large trunk sewers for storage capacity during periods of high water flows. Also, Mr. Helton did not understand the complex system controls that protect "both his facility and the public during inclement weather," nor did he have knowledge of the upstream collection system and how it was affected by certain decisions made during periods of inclement weather. He further opined that Mr. Helton viewed the collection system operation as a sewer maintenance function, and not related to the operation of the Jackson facility.

After a comparison of the October 24, 2003 draft language regarding Section 5 with the "Final" Application, (JX 2), Mr. Bertacchi confirmed that Mr. Helton had added language that did not exist in either the October 24, 2001 draft, or the September XX, 2001 draft. In the final version, Mr. Helton added, "… although I am not directly involved in the management of the collection system." According to Mr. Bertacchi, this new language corrected his objection, and

[21] Emphasis in the original.

[22] CSO - "Combined Sewer Overflows" consisting of overflow points where storm water mixes with sanitary sewer effluent that can overflow the system and is generally permitted under the NPDES. SSO -"Sanitary Sewer Overflows" that consist of sewer overflows from overflow points that are generally considered illicit under the NPDES. (T 361).

based on this addition, the final version of Section 5 was an "accurate and true" portrayal of Mr. Helton's lack of direct involvement the management of that system. (T 493).

Paragraph four of Mr. Bertacchi's letter alleged that Mr. Helton's description in Section 6, concerning involvement in the development of a safety manual was "exaggerated." Mr. Helton testified that he was involved in the Manual's authorship.[23] Mr. Bertacchi, however, contended that Mr. Helton was not the author of the current or past safety manual used by the CDOSD. Also, while Mr. Helton had managerial oversight of the safety technicians within the facility, the CDOSD Safety Office administered the program. Furthermore, Mr. Bertacchi testified that there would be only one Safety Manual for the division, and that the Safety Manager, Robert Miller, was responsible for its preparation.[24]

Paragraph five of the letter contested Section 8 of Mr. Helton's application concerning research. Mr. Bertacchi alleged that Mr. Helton "overstated" his claim that he oversaw the recent digester research at the Jackson plant. He explained that the research was actually overseen by the Assistant Administrator and the analysis and changes were performed by the Process Analyst assigned to the CDOSD technical support staff. (JX 3, p. 2). Mr. Bertacchi concluded that while the people who conducted these functions may have worked for Mr. Helton, it was improper for him to take credit for their research.[25] Furthermore, based on Mr. Bertacchi's personal involvement in many of the research projects at both the Jackson and Southerly plants, he opined that even though Mr. Helton did not discourage treatment related research, Mr. Helton considered such research to be "necessary but bothersome."

Paragraph six of Mr. Bertacchi's letter related to Section 9 of Mr. Helton's application concerning design. Mr. Bertacchi alleged that Mr. Helton had "no relevant experience designing a facility or upgrades to a facility," as stated in his application. Also, Mr. Bertacchi argued that upgrades to Mr. Helton's facility were generated by catastrophic failure of pertinent operating equipment and tankage, and that the CDOSD General Engineering Section (GES) and Technical Support Section (TS), not Mr. Helton, were charged with designing and budgeting upgrades. Mr. Bertacchi further noted that design teams were often created using GES and TS staff members as well as operators from affected areas within the facility, and that Mr. Helton merely maintained general, managerial oversight of his employees during this process, rather than hands-on involvement.

These contentions were based on Mr. Bertacchi's direct involvement with design and the budgetary process, and personal knowledge of facts concerning the catastrophic failure involving the land application sludge holding tank and the digester lids. (T 231). He explained that Respondent's General Engineering Reports[26] had shown that the sludge pumps, which were on

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[23] In Part II of Mr. Helton's Class IV license application, (JX 2, p. 83), he states:

> I was one of the authors that proactively developed the original safety manual in 1993, a majority of which remains unchanged today. (T 797)

[24] Both Mr. Roush and Mr. Miller confirmed that Mr. Miller was the author of the safety manual.

[25] Mr. Helton disagreed, but his testimony included only a description of functions performed and did not mention his specific role in the process.

the screen when he first came to work for Respondent, were still in need of repair as of the date of the hearing.[27]

5. CDOSD's Discovery of Mr. Bertacchi's November 12, 2001 Complaint and Their Response

In 2003, Ms. Ashbrook made a discovery request to the Ohio EPA in response to a Federal, citizens' suit by the Sierra Club against the City. Her request sought all of the documents that had been produced in the Sierra Club's lawsuit. Upon her review, Ms. Ashbrook discovered Mr. Bertacchi's November 12, 2001 letter to the Advisory Board. (Stip. 2.9).

Ms. Ashbrook presented the letter to Ms. Roberto. Ms. Roberto was "outraged," and said to Mr. Bertacchi's supervisor, Mr. Linn, "this is one of your people, deal with it." Ms. Roberto admitted that Mr. Linn certainly would have "understood that she was not happy with the letter," (T 209 & 236), and testified that her outrage stemmed from the face of the letter, and her belief that two of the basic allegations in the letter were "blatantly recklessly false": (1) that Mr. Helton was not the author of the application, (T 236); and (2) that upgrades to Mr. Helton's facility were generated by catastrophic failures of pertinent operating equipment and tankage. (T 245).

In May 2003, Ms. Roberto directed Mr. Selby to investigate the matter, and to determine if Mr. Bertacchi's letter constituted a violation of Respondent's work rules. Mr. Selby proceeded to gather documentation and conduct interviews with the principals, including Mr. Bertacchi, Ms. (Dunn) Donahue, Ms. Ashbrook, and other plant personnel involved in the Class IV application process. Mr. Selby acknowledged, however, that while he had followed guidelines for such investigations, he did not interview all the people named by Mr. Bertacchi. Specifically, Mr. Bertacchi maintained that Robert Roush, who was never interviewed, would have verified that Mr. Helton did not actually perform certain work as claimed in his application. Mr. Selby, reasoned that since Mr. Helton had been deposed in another case in which he affirmed that he performed the work as claimed in his Class IV application, and since there was nothing to indicate that Mr. Helton had lied in the application, Mr. Selby believed that it was not necessary to interview Mr. Roush. Also, since the charge related to alleged violations of work rules, Mr. Selby felt that Mr. Roush's statements would neither be relevant nor germane to the charges against Mr. Bertacchi.

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[26] Mr. Bertacchi testified that the General Engineering Reports docket notes to the EPA about various conditions that need attention throughout the plants, and that they involve items that go on and off the "radar screen"; that is, are "put into" the system for upgrade. Some either "fall off," or are "sidelined and forgot about until something happens to put them back on the screen." (T 434). Something eventually happens, he testified, that will bring it back onto the screen, and that could be a "catastrophic failure or near failure."

[27] Mr. Helton disagreed with Mr. Bertacchi's description of improperly performed functions that might have either constituted "catastrophic failures" or resulted in potential "catastrophic failures," and specifically asserted that there were no "catastrophic failures" or potential "catastrophic failures."

On May 9, 2003, Mr. Selby issued his investigative report finding that Mr. Bertacchi had violated CDOSD Work Rules 1 and 10, but he did not recommend any sanctions. (Stip. 2.10; JX 10). Mr. Selby concluded that Mr. Bertacchi had violated Rule 1 by "making untrue and/or false statements" about Mr. Helton in the November 12, 2001 letter. Mr. Selby, however, also found that Mr. Bertacchi was very forthcoming, he answered all questions posed, he handled himself well, and he never lied, deceived, stole, cheated or defrauded anyone. Mr. Selby ultimately found the statements in Mr. Bertacchi's letter to be "inaccurate and not factually based," and that Mr. Bertacchi's belief in their accuracy was not reasonable, nor did he use due diligence to see that they were. As a result, even though Mr. Selby found that Mr. Bertacchi's letter constituted "unintentional misrepresentations," under Section A of the Rule, he concluded that a person could be disciplined for dishonesty, even if he honestly believed it to be true.

Regarding Work Rule 10, Mr. Selby found that by writing the letter, Mr. Bertacchi "was not fulfilling his managerial responsibilities," and that those actions were "detrimental to the interests of the City." (T 44). Although Mr. Selby acknowledged that there was nothing in Work Rule 10 that imposes a specific duty to report something to superiors prior to sending a report to another public agency, he felt that Mr. Bertacchi had a duty to report the matters presented in the letter to his superiors. (T 43). Furthermore, Mr. Selby testified that during his investigation Ms. Ashbrook had told him that Mr. Bertacchi's letter had resulted in higher scrutiny of CDOSD's Class IV applications, and as a result, John Goff's application had been "held up." (T 45).

At the hearing Mr. Selby was asked why Mr. Bertacchi had reported his concerns directly to the Ohio EPA, and not presented them to his supervisor. Mr. Selby explained that Mr. Bertacchi said that it was not a conscious decision, that it did not occur to him to do so, and he assumed that Mr. Linn knew about the matter. (T 47-48). Mr. Selby also stated that Mr. Bertacchi expressed no fear of retaliation from management for raising his concerns, nor did he ever raise "any concerns about the whistleblower provisions" of the WPCA. (T 49-51).

Mr. Shelby's recommendation of disciplinary action against Mr. Bertacchi was ultimately appealed under the terms of the collective bargaining agreement. Mr. Lendavic presided over the hearing, which began on July 10, 2003.

On the day the hearing began, Mr. Lendavic received a letter prepared by the Department of Public Utilities and signed by Ms. Roberto. (CX 8). Since she would be unable to attend the hearing, this letter was to serve as the department's position statement and disciplinary recommendation.[28] Before the undersigned, however, Ms. Roberto testified that there had been

[28] No copy of this letter was served upon Mr. Bertacchi prior to that hearing, and there was no indication that Ms. Roberto intended to do so. As a result, without appearing at the hearing, Ms. Roberto was able to present her position which was not subject to cross examination. Complainant objected to introduction of Ms. Roberto's letter at the CDOSD hearing. He argued that it constituted a denial of due process in that it was an *ex parte* communication between a representative, a party and the hearing officer. Since I am not reevaluating the CDOSD hearing, and this is a *de novo* proceeding in which I am bound to make my own determinations, despite Complainant's objection, I accept the letter solely as a verification that prior to the hearing Respondent sought Mr. Bertacchi's termination. Again, I am not ruling on the due process propriety of its use in the CDOSD proceeding.

discussions about the possibility of appearing at the hearing to express the department's position, and that it was ultimately determined that the best course would be to submit a letter to "embody the Department's position and express what [her] concerns were." (T 258).

Ms. Roberto's letter cited the alleged violations of Work Rules 1 "Dishonesty" and 10 "Standards of Conduct for Supervisors, Managers, and Administrators." Her explanation of Work Rule 10 specifically emphasized the "detrimental effects" language that served as the basis for her recommendation that Mr. Bertacchi be terminated due to his complaint to the Ohio EPA. (CX 8). In pertinent part, the letter stated:

> In Mr. Bertacchi's role as Manager for the Pretreatment Section, he is responsible for representing the City in communication with the Ohio EPA and U.S. EPA through meetings, phone calls, emails and letters. He is also directly responsible for preparing the required regulatory reports for the Pretreatment Section requiring certification by the Director.
>
> Mr. Bertacchi's conduct in this matter demonstrates that he is dishonest and untruthful. His work product is therefore untrustworthy. These attributes are unacceptable in any public official serving at the level of management and with the responsibilities vested in Mr. Bertacchi. They are absolutely unacceptable to me as an individual who must place myself at risk of "fines and imprisonment."[29]
>
> Mr. Bertacchi no longer has my trust or confidence. I am therefore advising you that it is my position that Mr. Bertacchi should be terminated from employment with the City of Columbus.

(CX 8).

At the instant hearing, Ms. Roberto characterized this letter "as an expression of her concern that [Mr. Bertacchi] could no longer function in the position of pretreatment manager." (T 213). In addition, she expanded upon the reasons for her recommendation, including her opinion that Mr. Bertacchi's actions were "intentionally false or recklessly false," "inappropriate," "harmful to the Department," and such that he could "not function," or "have my trust and confidence" in his Pretreatment Manager role. (T 259).

On July 30, 2003, Mr. Lendavic issued his decision, including his disciplinary recommendations. Citing Ms. Roberto's position statement, Mr. Lendavic found that Complainant's 2001 letter had led to problems for CDOSD. In his conclusion, Mr. Lendavic

[29] Ms. Roberto's letter stated that she must sign regulatory reports to both the U.S. and Ohio EPA that were generated by Mr. Bertacchi as Manager of the Pretreatment Section. These reports include the following certification: I CERTIFY UNDER PENALTY OF LAW THAT I HAVE PERSONALLY EXAMINED AND AM FAMILIAR WITH THE INFORMATION IN THIS REPORT AND ALL ATTACHMENTS. BASED ON MY INQUIRY OF THOSE PERSONS IMMEDIATELYRESPONSIBLE FOR OBTAINING THE INFORMATION CONTAINED IN THIS REPORT, I BELIEVE THAT THE INFORMATION IS TRUE, ACCURATE , AND COMPLETE. I AM AWARE THAT THERE ARE SIGNIFICANT PENALTIES FOR SUBMITTING FALSE INFORMATION, INCLUDING THE POSSIBILITY OF FINE AND IMPRISONMENT.

wrote, "The information presented at this hearing indicates that Mr. Bertacchi's letter had influence in the decision by the Ohio EPA to deny Mr. Helton's application."[30] In addition, he stated:

> It is reasonable to assume that this letter was also considered by the Ohio EPA in its denials of other Class IV applications of other employees in the division. . . . Further, Mr. Bertacchi's letter had the effect of undermining an important objective of the Division of Sewerage and Drainage; that objective being to increase the number of Class IV managers in the Division.

Mr. Lendavic concluded that Complainant's letter constituted a violation Work Rules 1 and 10.

Turning to his disciplinary recommendations, Mr. Lendavic concluded that Complainant's conduct warranted a demotion rather than the discharge recommended by Ms. Roberto. He explained that concerning violations of work rules, under the collective bargaining agreement between the City, Local 4502, and the Communications Workers of America, there was a "range of discipline" that included anything from reprimand to termination of employment. Since Mr. Bertacchi had been cooperative in the investigation, he believed that termination was not warranted, but since the letter was detrimental to the City, he felt reprimand was not severe enough. Mr. Lendavic concluded that demotion was the proper penalty. (JX 5, p. 2).

6. Mr. Bertacchi's Alleged Damages

Mr. Bertacchi requests several remedies to make him whole. First, he is seeking to be restored to his position of Industrial Pretreatment Program Manager, and to recover his 5% wage

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[30] Ms. Ashbrook insisted that her testimony before Mr. Lendavic related to the detrimental effect Mr. Bertacchi's letter had on CDOSD's request for "special dispensation" that would allow it to temporarily run the Plant with a Class III licensed operator, and it did not, as Mr. Lendavic held, relate to the denial of Mr. Helton's Class IV license application. As a result, she explained that "detrimental effect" discussed in Ms. Roberto's May 7, 2003 letter, which was the basis for her request that he be terminated, did not relate to Class IV licensure, but the Class III special dispensation. Significantly, I note that Ms. Roberto did not connect the adverse consequences of this letter to either the denial of Mr. Helton's Class IV application or the request for the "special dispensation."

At the CDOSD disciplinary hearing, Mr. Lendavic stated, "Considering the extent and nature of the harm caused by Mr. Bertacchi's letter, this discipline should be at the high end of the discipline spectrum for an E-Level employee in the CMAGE/CWA bargaining unit . . ." Since the "extent and nature of harm" Mr. Lendavic considered related to probable denial of Class IV applications by several CDOSD employees, one is left to wonder whether he would have lessened the penalty if he accurately considered the fact that Mr. Bertacchi's letter affected only a temporary application. As a result, it could be argued that Mr. Bertacchi was denied due process at CDOSD disciplinary hearing.

As noted above, however, this is a *de novo* proceeding in which I am bound to make my own determinations, and thus, do not have to correct the evidentiary errors made by Mr. Lendavic at the CDOSD disciplinary hearing. As a result, the only impact this error has on the instant adjudication is to undermine Respondent's use of an internal disciplinary hearing to reinforce its legitimate business justifications for taking adverse action against Complainant.

reduction for that time. Second, he also wants to be paid the 4% merit increase that he was to receive based on his May 2003 evaluation. Third, he wants to return to his office at the Sewer Maintenance Operations Center. Fourth, since his drive is 15 minutes longer than it was before the demotion, he seeks to receive one half hour a day in extra compensation. Fifth, he seeks 120 hours of personal vacation time as reimbursement for the vacation time he spent in pursuit of the present litigation. (T 434-436). Sixth, Mr. Bertacchi seeks compensatory damages for harassment and embarrassment. Seventh, he seeks to enjoin any conduct that would prevent him from being hired into other positions for other employers, and appointment of a "Point-of-Contact" person to deal with at CDOSD on all such matters. Eighth, he wants all references to the present disciplinary action to be expunged from his employment records. Finally he seeks costs and attorneys fees for the litigation. (T 437-439).

III. Pending Motions

A. Introduction of Complainant's Deposition Testimony

Prior to the hearing, the undersigned imposed a deadline for submission of documentary evidence. Not until the close of Respondent's case, however, did it move for admission of Complainant's deposition transcript, at which time Complainant objected to its introduction. (T 792). In addition, during the hearing, the undersigned made clear to the parties that since the transcript had not been introduced into evidence, it would be used only to impeach Complainant's credibility. (T 456-57). Finally, at the time the undersigned explained to the parties how the transcript was to be used, Respondent made no objection, nor offered the entire transcript into evidence, but simply waited until Complainant completed his case to make the introduction.

Complainant forwards a number of arguments for why it "would be an abuse of discretion" to admit his deposition transcript. (C. Br. 35). First, the document was not submitted in compliance with the December 2, 2003 pre-hearing order. (C. Br. 33). Second, since Complainant did not have notice of the need to present testimony explaining his deposition responses, admission is "fundamentally unfair." (C. Br. 33-34). Third, introduction of the transcript violates the undersigned's instructions requiring identification of specific portions to be admitted into the record. (C. Br. 34). Fourth, Respondent failed to move for introduction of the entire transcript at the time it received the instructions from the undersigned. (C. Br. 34). Finally, Complainant argues that since Respondent was unable to successfully impeach Mr. Bertacchi using the format mandated by the undersigned, Respondent is now attempting to circumvent the rule in order to impeach without providing Complainant an opportunity to respond. (C. Reply Br. 8).

Respondent counters by stating that it would be an error for the undersigned to refuse to admit a party's deposition testimony. (R. Reply Br. 22) (citing Pursche *v. Atlas Scraper and Eng'g Co.*, 300 F.2d 467, 488 (9th Cir. 1961). In support, it argues that Mr. Bertacchi's deposition testimony is an "admission by a party opponent" which can be used "for any purpose." (R. Br. 39-40). Respondent adds that Complainant's deposition is not considered an exhibit, but is in fact "testimony-admissible in its own right for any purpose." (R. Br. 40). Next, Respondent argues that Complainant is not prejudiced by the admission of the transcript because his counsel was present at the deposition, Mr. Bertacchi had a chance to review the transcript and

make corrections after the deposition, and he had the opportunity to further explain his deposition responses in his reply brief. (R. Br. 40).

The rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges state, "The deposition of a party … may be used by any other party for any purpose." 29 C.F.R. §18.23 (a)(3). Furthermore, "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interest of justice otherwise require. This provision does not apply to admission of a party-opponent…." 29 C.F.R. §18.613(b). The procedures for the handling of discrimination complaints under the Water Pollution Control Act, however, replace these rules, giving judges discretion in making evidentiary determinations under the employee protection statutes:

> Formal rules of evidence *shall not apply*, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative law judge *may* exclude evidence which is immaterial, irrelevant, or unduly repetitious.

29 C.F.R. §24.6(e) (emphasis added). As a result, administrative law judges are not bound by the federal rules of evidence, but may use their discretion as necessary to ensure production of the most probative evidence available.

Considering the arguments for and against the inclusion of Complainant's entire deposition transcript, I am unconvinced by Complainant's "fundamental fairness" argument regarding inclusion. On the other hand, I am equally unconvinced by Respondent's contention that the transcript represents "testimony" that can simply be tacked onto that taken during the hearing. I do find, however, that much of the evidence contained in the deposition transcript is immaterial, irrelevant, or unduly repetitious, and that it was the parties' obligation to designate those portions that they deemed necessary. *Zimmerman v. Safeway Stores, Inc.,* 410 F.2d 1041 (D.C. Cir. 1969) (stating that in cases concerning the admissibility of deposition transcripts of adverse parties, even courts that are bound by the federal rules of evidence "retain[] the discretion to exclude repetitious matter and to require counsel to identify … the parts deemed relevant"). Furthermore, contrary to Respondent's contentions, the undersigned's allowance of only those portions of the transcript does not constitute a refusal to admit a party's deposition. Quite the contrary, several opportunities were afforded for Respondent to offer all of the material and relevant portions of the transcript into the record. Finally, even if the transcript was admitted, it would not change my conclusions in this case due to the fact that Respondent primarily uses it to argue Complainant's motive and the reasons why he did not report internally, which is not relevant to the ultimate determination of this claim. *Oliver v. Hydro-Vac Servs.*, Inc., Sec'y 91-SWD-1 at 8 (Nov. 1, 1995) (holding that where an employee has a reasonable belief that employer has violated an applicable environmental law, other motives for engaging in protected activity are irrelevant); *see also Scerbo v. Consol. Edison Co. of N.Y., Inc.,* Sec'y 89-CAA-2 (Nov. 13, 1992) (where a witness' testimony is offered by deposition, it is not improper for the administrative law judge to make credibility determinations that are based on evidentiary inconsistencies which did not require that the administrative law judge witness the witness'

demeanor). Therefore, I conclude that only those portions designated by the parties are admitted into the record.

B. Introduction of Complainant's Exhibit 17A

At the hearing, Complainant sought to introduce an excerpt of the testimony of Dale Hollopeter from an Ohio EPA proceeding regarding Class IV certifications by employees other than Mr. Helton. (CX 17a). This complete transcript was identified as Exhibit 17b. (T 813).

Respondent objected to the admission of Exhibit 17 on the grounds that it was hearsay, and meets none of the exceptions found in Federal Evidence Rule 803, or the unavailability exceptions of 804(a). (R. Br. 41). Furthermore, Respondent argues that Exhibit 17 cannot be used to impeach Cheryl Roberto's testimony because Ms. Roberto was never cross-examined on Mr. Hollopeter's testimony, and thus, never had "the opportunity to explain or deny any of Mr. Hollopeter's testimony." (R. Br. 42). Third, Respondent contends that the content of Exhibit 17 is ambiguous, and therefore neither impeaches nor rebuts Ms. Roberto's testimony. (C. Br. 42).

Complainant responds by arguing that Exhibit 17A is a public record that consists of sworn testimony, and that counsel for the Respondent was present at the proceeding and had the opportunity to examine Mr. Hollopeter. (C. Br. 37). As a result, the admission of the testimony presents "no question of authenticity," and its "fundamental fairness is assured." (C. Br. 37).

As stated above, an administrative law judge is not bound by the federal rules of evidence, but will use them as necessary to ensure production of the most probative evidence available. 29 C.F.R. §24.6(e). As a result, an administrative law judge may admit any documentary evidence into the record so long as it is not "irrelevant, immaterial, or unduly repetitious." *Gray v. U.S. Dep't of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994). Furthermore, concerning hearsay, the test merely requires that the evidence is probative, that it bears adequate indicia of reliability, and that it is fundamentally fair. *Id.* (internal citation omitted).

Based on *Gray*, Respondent's hearsay objections are without merit. Due to the fact that Mr. Hollopeter's testimony was sworn, and Respondent was represented at the administrative proceeding, with an opportunity to examine him, I find that the testimony bears an adequate indicia of reliability, and is fundamentally fair. Also, the evidence is not irrelevant, nor unduly repetitious, it is probative, and Respondent makes no argument to the contrary. Nor does Respondent argue that Mr. Hollopeter's testimony prejudiced its case. To the contrary, Respondent states that Mr. Hollopeter's testimony failed to impeach Ms. Roberto's. Finally, concerning the ambiguous nature of the testimony, the undersigned is capable or separating Mr. Hollopeter's direct statements from his inferences, and will weigh the evidence accordingly. Therefore, I admit Complainant's Exhibit 17a and 17b into evidence.

C. Admissibility of Ms. Marida's Hearing Testimony

Patricia Marida, a representative of the Sierra Club, was present during Cheryl Roberto's testimony as part of Respondent's case-in-chief. Ms. Mirada was never identified as a witness, but was subsequently called by Complainant as a rebuttal witness to testify to alleged false statements by Ms. Roberto. A sequestration order was in effect throughout the proceeding.

Respondent asserts that Ms. Marida's testimony should be excluded because she "remained in court with the consent, connivance, procurement, or knowledge of the party seeking testimony." (R. Reply Br. 23 (citing *U.S. v. Green,* 305 F.3d 422, 428 (6th Cir. 2002). As support, Respondent notes that Complainant notified Ms. Marida in advance of the hearing, suggesting that she attend. (R. Br. 43-44); (R. Reply Br. 23); (T 896). Furthermore, Respondent contends that while Complainant may not have initially planned to call Ms. Marida to testify, "Mr. Bertacchi's attorneys made no effort to inform the City of their plans to introduce Ms. Marida's testimony until the moment she took the stand." (R. Br. 44). Despite these arguments, Respondent concludes that Ms. Marida was not successful in her attempt to impeach Ms. Roberto's testimony. (R. Br. 43-44); (R. Reply Br. 23).

Complainant responds by arguing that it would be an abuse of discretion for the undersigned to exclude Ms. Marida's testimony. (C. Br. 36-37 (citing *Green,* 305 F.3d at 429, for the proposition that when there was no basis for calling a witness at the time they were in the court room, there is no basis to exclude their subsequent impeachment testimony)).

I find credible Complainant assertion that he manifested no intent to call Ms. Marida as a witness when he suggested that she should attend the hearing. (T 810-02). Furthermore, based on the content of Ms. Marida's testimony, I find no statements that allude to Complainant's intent to ambush Respondent. In fact, as Complainant contends, the content of Ms. Mirada's testimony was primarily based on the testimony given by Ms. Roberto. I am also persuaded by the fact that Respondent had an opportunity to cross-examine Ms. Marida, and that it concluded that her testimony "in no way impeaches that of Ms. Roberto." (R. Br. 43). Therefore, despite the existence of a sequestration order, I will not exclude the testimony of Ms. Marida.[31]

IV. Conclusions of Law

A. Jurisdiction

The threshold consideration is whether this court, under the provisions of the WPCA, has jurisdiction over Mr. Bertacchi's complaint. While Respondent does not directly contend that the undersigned lacks jurisdiction in its Motion for Summary Decision, Post-Hearing Brief, or Post-Hearing Reply Brief, it convolutes the legal standard for determining whether Complainant has participated in a protected activity with the standard for determining whether the Office of Administrative Law Judges has jurisdiction over this matter. (R. Reply Br. 10).

[31] I note that I have reviewed Ms. Marida's testimony in conjunction with Ms. Roberto's, and find it to be too vague concerning what the Sierra Club told Ms. Roberto about operating a plant without a class IV licensed operator. Furthermore, no representative of the Sierra Club is identified as the person conveying information regarding the Sierra Club.

Quoting *Santamaria v. U.S. Envtl. Protection Agency,* ALJ 04-ERA-6 (Feb. 24, 2004), Respondent contends that Complainant has not satisfied the protected activity requirement because he "'never articulated a specific safety or health concern that had or would potentially result from Respondent's alleged violations,' and since regulations at issue relate to 'administrative requirements,' not 'safety and/or health matters,'" his claim must fail. (R. Reply Br. 10). Articulation of a "specific" concern, however, is not a requirement of the *prima facie* case, but it is part of the initial jurisdictional test required to determine whether the court can even hear the claim. *Santamaria,* ALJ 04-ERA-6 at 8. Also, the context in which Respondent utilizes its synthesized standard, and the way it uses the standard to undermine Complainant's claim, grossly mischaracterizes the jurisdictional test.

There is not a great deal of case law explaining the jurisdictional component, and in many instances when judges discuss jurisdiction, they are actually considering the merits of a claim. *See e.g*. *Crosby v. Hughes Aircraft Co*., Sec'y 85-TSC-2 at 11 (Aug. 17, 1993)(the Secretary of Labor stated that the Administrative Law Judge mislabeled the required elements of a prima facie case as jurisdictional issues). In fact I have identified only two instances where an administrative law judge has determined that the DOL does not have subject matter jurisdiction over an environmental whistleblower claim. *See Santamaria,* ALJ 04-ERA-6; *Greene v. Envtl. Protection Agency Chief Judge Susan Brio et al.,* HUDALJ 02-SWD-1 (Feb. 10, 2003)(borrowing the "specificity" standard for whistleblower cases from the Merit System Protection Board because "no DOL whistleblower cases address the degree of specificity needed to establish subject matter jurisdiction").

In *Santamaria*, the complainant alluded to broad, unspecific protected activities, and neither in his complaint, nor at the deposition did he specify his complaints, to whom he made the complaints, when they were made, or what statutes were the bases for his complaints. ALJ 04-ERA-6 at 7. Judge Huddleston noted that the complainant's only reference to a specific regulation was 40 C.F.R. Parts 30, 31, and 35, which he summarized as "administrative requirements" for various grants and assistance, and did not encompass any safety or health matters. *Id.* at 8. He concluded that while a complainant does not need to cite a specific environmental statute or regulation to establish a whistleblower claim, at the preliminary stage of a proceeding, they are required "to show that a genuine issue of material fact exists as to [the] protected activity, which must be related to a safety and/or health concern resulting from the reasonably perceived violation of an environmental statute." *Id.* at 8. Finally, Judge Huddleston concluded that he did not have jurisdiction over the complaint, stating:

> The fact that Complainant is an employee of the EPA does not automatically mean that because he complained about enforcement of the MBE/WBE rules, regulations, and guidelines, [which are not part of the environmental whistleblower statutes,] and because the EPA is charged with enforcement of environmental laws, that he has complained about enforcement of environmental laws. The complaint in this case simply does not allege that he engaged in any activity protected by the statues under the jurisdiction of the U.S. Department of Labor.

Id. at 9.

Under the present facts, Complainant contends that the Ohio EPA's Class IV license requirements are a response to the NPDES permit process required under the WPCA. (C. Br. 41-42). Specifically, Complainant stated that his November 12, 2001 letter to Ohio EPA constitutes external protected activity on a matter directly pertaining to Respondent's NPDES permit for its Jackson facility. (C. Br. 46). Complainant asserts that the NPDES permit process is the cornerstone of the WPCA regulatory process. (C. Br. 41). Complainant asserts that the Jackson Pike Treatment facility, which must be under the supervision of a Class IV certified operator, lost its supervisor (Scott) who held a Class IV license, thus falling out of compliance with the NPDES permit requirement. (C. Br. 43-44). As a result, Complainant alleges that his November 12, 2001 letter to the Ohio EPA Advisory Board of Examiners blew the whistle on a perceived improper attempt by Respondent to come into compliance with the NPDES permit based on an attempt to fraudulently obtain a Class IV operator license by an employee of Respondent. (C. Br. 46-47).[32]

Based on this overview, I find that Complainant has clearly alleged with sufficient specificity that he engaged in an activity that may be protected by the whistleblower provisions of the WPCA, and that there is a genuine issue of material fact as to whether his activity related to a safety or health concern resulting from a reasonably perceived violation of that Act. Therefore, I find that this claim arises under the subject matter jurisdiction of the U.S. Department of Labor, Office of Administrative Law Judges.

B. Applicable Legal Standards

The initial burden in an environmental whistle blowers case rests with the Complainant to present a *prima facie* case. To that end, the Complainant must show: (1) the Complainant was an employee of the party charged with discrimination; (2) the Complainant was engaged in protected activity under the WPCA; (3) the Employer took an adverse action against him; and (4) the evidence is sufficient to raise a reasonable inference that the protected activity was the likely reason for the adverse action. *Passaic Valley Sewerage Comm'rs v. Dept. of Labor*, 992 F.2d 474, 480-81 (3rd Cir. 1993)(citing *De Ford v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983)).

If the complainant demonstrates his *prima facie* case, the burden shifts to the respondent to produce evidence of a legitimate, nondiscriminatory reason for its adverse employment action. In other words, the respondent must produce evidence that it would have taken the adverse action even if the complainant had not engaged in the protected activity. *Lockert v. U.S. Dept. of Labor*, 867 F.2d 513 (9th Cir. 1989). This burden, however, is simply one of production, requiring the respondent to "merely articulate a legitimate reason." *Jones v. U.S. Enrichment Corp.*, ARB 02-093 and 03-010 at 5 (Apr. 30, 2004).

After the respondent presents evidence of a legitimate purpose, the final step is to determine whether the complainant, by a preponderance of the evidence, can prove that the respondent's proffered reason is merely a pretext for the adverse action. As a result, the complainant has the ultimate burden, and may meet this burden by proving that the unlawful

[32] There is no definite internal procedure governing Respondent's part in the application process for a Class IV license that would provide an avenue for any employee to object to such an applicant's claimed qualifications.

reason was the more likely motivator for the respondent's adverse action, or that the respondent's proffered explanation is not credible. *See Zinn v. Univ. of Mo.*, Sec'y 93-ERA-34 and 36 (Jan. 18, 1996)*; Shusterman v. Ebasco Servs., Inc.*, Sec'y 87-ERA-27 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, Sec'y 86-ERA- 32 (Jun. 28, 1991); and, *Darty v. Zack Co.,* Sec'y 80-ERA-2 (Apr. 25, 1983).

C. Credibility Determination

There are three points of significant conflict between the testimony of Mr. Helton, and that of Mr. Bertacchi: 1) whether Mr. Bertacchi volunteered to be a reference for Mr. Helton, or was responding to Mr. Helton's request; 2) whether Mr. Bertacchi asked Mr. Helton to withdraw his name as a reference; and 3) whether Mr. Bertacchi volunteered to write Mr. Helton's application, or simply agreed to review it.[33]

I have observed the testimony of the witnesses, and find that neither Mr. Bertacchi nor Mr. Helton contradicted themselves. On the first two points, however, I credit Mr. Bertacchi's testimony over that of Mr. Helton. First, I find that the hearing testimony does not support Mr. Helton's claim that Mr. Bertacchi offered to write his application for him. In addition to Mr. Bertacchi's direct, unqualified denial of Mr. Helton's allegation, Douglas Wise, Assistant Plant Manager of the Jackson plant, testified that while Mr. Bertacchi offered him assistance on an application, he did not believe that Mr. Bertacchi ever offered to write his application for him. Furthermore, I find no other support in the record for Mr. Helton's accusation, nor does it make sense that Mr. Bertacchi would ask to write Mr. Helton's application when he was so vocal about the purpose of the "in your own words" requirement.

Second, I find Mr. Bertacchi's allegation that he requested Mr. Helton to remove his name as a reference to be more credible than Mr. Helton's contradictory testimony. Mr. Bertacchi's discussions with Ms. Gillenwater provided credible background for his testimony. Also, it simply does not make sense that he would call the Ohio EPA prior to finding out whether the application had been submitted. Mr. Bertacchi's contention is further bolstered by the supporting testimony of Mr. Roush, who recommended that Mr. Bertacchi request removal of his name as a reference.

Third, concerning demeanor, Mr. Bertacchi appeared more calm and visibly comfortable during his testimony, while Mr. Helton was more consistently and visibly uncomfortable. Furthermore, Mr. Helton's anger toward Mr. Bertacchi was apparent to the undersigned and obviously affected how he expressed himself.

Turning to the final point of conflict between Mr. Helton and Mr. Bertacchi's testimony, I find that it is not necessary to resolve the issue of whether Mr. Helton asked Mr. Bertacchi to be a reference, or whether Mr. Bertacchi volunteered. In either event, Mr. Bertacchi initially agreed to be a witness, so who asked whom is irrelevant.

[33] *See* note 16 and 19, s*upra*.

Finally, I note that none of these credibility findings are particularly necessary for the purpose of determining whether Respondent violated the WPCA whistleblower provisions by demoting Mr. Bertacchi for partaking in a protected activity. The determination of whether the complaint was "grounded in conditions constituting reasonably perceived violations of the Act," is an objective standard. *Thakur*, ALJ 98-WPC-5 at 5. As a result, while Mr. Helton's contentions, if they had been determined to be credible, might have demonstrated Mr. Bertacchi's subjective beliefs that there was no violation of the Act, or at least his willingness to violate it, they do not impact any elements of the underlying whistleblower claim. On the other hand, these findings do tend to indirectly undermine Respondent's contention that Mr. Bertacchi knew the allegations listed in his complaint to the Ohio EPA were false, and reinforce Mr. Bertacchi's statements about his firmly held belief, under the Guidelines, that the application was to be in the applicant's "own words" and not to be written by someone else.

D. Prima Facie Case

1. Protected Class: Respondent's Employee

Respondent admits that it hired Mr. Bertacchi in 1998 as a Plant Operations and Maintenance Training Coordinator. (Stip 1.4; R. Br. 5-6).

2. Protected Activity

Section 507 (a) of the WPCA states:

> No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative 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 the provisions of this chapter.

33 U.S.C. § 1367.

Likewise, the regulations state:

> Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidated, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee because the employee has:
> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in §24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
> (2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

29 C.F.R. §24.2 (b)

a. Proceeding

An initial determination must be made whether the action resulting from Complainant's complaint qualifies as a "proceeding" as defined by the Act. *Wedderspoon v. City of Cedar Rapids, Iowa,* Sec'y 80-WPC-1 at 11 (May 6, 1977). As used in the WPCA, the word "proceeding" has been defined to include federal or state, and judicial or administrative proceedings. *Id.* at 14 (citing *N.Y. Gas Light Club, Inc v. Carey,* 477 U.S. 54 (1980). In addition, the term "any" is broad and applies to "administrative as well as court proceedings, [as] well as appropriate state action, investigation and advice, … [and] the exaction of penalties. *Id.*

Section 6111.46 of the Ohio Revised Code authorizes the Ohio Environmental Protection Agency ("Ohio EPA") to supervise the treatment and disposal of sewage and industrial wastes and the operation and maintenance of works. Further, subsection (B)(1) requires the agency to adopt rules to direct the "operation and maintenance of the works or means of treatment and disposal of such sewage and industrial wastes." In response, the Ohio EPA has promulgated a number of rules for the operation and maintenance of "works," including specific rules establishing the requirements for Wastewater Works Personnel. OHIO ADMIN. CODE §§ 3745-7-01 to 17. Under these rules, a wastewater works serving a population over 250 must employ a full-time Class IV licensed operator, or a Class III operator who has applied to take a class IV examination, upon approval by the Director of the Ohio EPA, for the technical operation and maintenance of the works. § 3745-7-02. An Advisory Board of Examiners, appointed by the Director, reviews all applications for examination and certification, and makes recommendations concerning which applicants meet the Class IV requirements. §§ 3745-7-10 and 11. This Board is also responsible for recommending suspensions or revocations of certifications to the Director in cases where operators have "fraudulently obtained or attempted to obtain any certification," or "knowingly or negligently submitted misleading, inaccurate, or false reports to the Ohio EPA." §§ 3745-7-11 and 12.[34] The Advisory Board reviews all information and allegations and may interview the operator, informant, or others in the preparation of its recommendations. § 3745-7-12. The Director will then notify the operator, and possibly their employer, of the Advisory Board's recommendation, also the procedure for appealing an action. *Id.* Finally, the Director is not foreclosed from pursuing additional civil or criminal enforcement. *Id.*

Based on § 3745-7-01 through § 3745-7-17, the Class IV licensing procedure, and the steps required for suspensions or revocations of certification, includes elements that clearly constitute administrative actions, investigations, advise, and the exaction of penalties. Therefore, as defined by *Wedderspoon*, I find that the Class IV licensing process is a "proceeding."

[34] I conclude that there is an implied connection between the provisions of §§ 3745-7-10, 11, and 12 that would empower the Board of Examiners to consider and deny a pending application for a Class IV license certification "frequently" sought, or where the applicant knowingly or negligently submitted misleading, inaccurate or false reports to the Ohio EPA.

b. Instituted a Proceeding

33 U.S.C. § 1367 (a) established two specific scenarios where an employer may not discriminate against an employee. Under the first scenario, the Act states that an employer may not discriminate in any way against an employee who has "filed, instituted, or caused to be filed or instituted any proceeding" under the Act. It is clear from the facts of this case, however, that Claimant did not "file" any type of judicial or administrative proceeding. As a result, it must be determined whether Complainant's actions ultimately caused a proceeding under the Act. *Wedderspoon,* Sec'y 80-WPC-1 at 11.

Respondent contends that Complainant's actions did not institute a proceeding because "the term 'instituted' connotes a formality." (R. Mot for Summ. Dec. 3) (quoting *Ball v. Memphis Bar-B-Q Co., Inc.,* 228 F.3d 360, 364 (4th Cir. 2000). Respondent also argues that Complainant's "unsworn" letter was solely for the purposes of providing information in response to Mr. Helton's application for a Class IV operator's license. (R. Mot. for Summ. Dec. 4).

I find that Respondent's assertions must fail. First, distinguishing the holding in *Ball* from the instant claim, the Court had previously determined that since the complainant had not made the initial complaint, but had merely communicated another employee's complaint, he was not relying on the "complaint clause" of the Fair Labor Standards Act, but instead was invoking the "testimony clause." *Ball,* 228 F.3d at 363 n.*. Also, the Court concluded that an internal, oral statement to a supervisor was not sufficient to constitute either a "judicial or administrative tribunal" as required for the "testimony clause" to be invoked. *Id.* at 364. In the instant claim, I have already determined that the Class IV operator license process constitutes a proceeding by an administrative tribunal. Also, Complainant in this case did not make an oral statement to an internal source, but submitted a letter to the Ohio EPA. As a result, the 4th Circuit's analysis under *Ball* is not applicable.

Second, I find that based on the language in the letter, Complainant was attempting to do more than simply "provide information." (R. Mot. for 4). In his November 12, 2002 letter to the Ohio EPA, Mr. Bertacchi states, "I have chosen to contest Mr. Helton's application with the following facts: …" (Exhibit A, p. 1). His use of the word "contest" implicates more than an intention to inform the Ohio EPA of the alleged violations. In fact, his plain language makes it clear that he desired some action to result from his correspondence.

Finally, Respondent emphasizes the fact that Complainant's letter was "unsworn." (R. Mot. for Summ. Dec. 4). This distinction is irrelevant for the purposes of determining whether Complainant "instituted" or "caused to be instituted" a proceeding under §507, but goes to the determination of whether Complainant has "testified or is about to testify in any proceeding." 33 U.S.C. § 1367(a). Therefore, I find that Complainant's letter contesting Mr. Helton's application "caused [a proceeding] to be instituted."

c. Testified at a proceeding

The Act also protects an employee who has "testified or is about to testify in any proceeding" under the Act. 33 U.S.C. § 1367 (a). The Supreme Court has limited the term

"testimony" to include "oral statements made under oath." *Beltran-Resendez v. Immigration and Naturalization Services*, 207 F.3d 284, 287 (5th Cir. 2000) (citing *Kungys v. U.S.,* 485 U.S. 759, 780 (1988)). In addition, Blacks Law Dictionary defines testimony as,

> Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is a particular kind of evidence that comes to tribunal through live witnesses speaking under oath or affirmation in presence of tribunal, judicial or quasi-judicial.… Testimony properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or deposition.

BLACKS LAW DICTIONARY 1476 (6th ed. 1990).

In this analysis, Respondent's contention that Complainant's letter was "unsworn," has merit. (R. Mot. for Summ. Dec. 4, 8). Therefore, I find that Complainant's letter contesting Mr. Helton's application is not testimony, nor is there any evidence that he was about to testify at a proceeding.

d. Assisted in any manner in a proceeding or any other action.

The Regulations, as authorized by the WPCA, add a third scenario where an employer may not discriminate against an employee. Employers may not retaliate against any employee who "assisted or participated …, in any manner in … a proceeding [under the Act] or in any other action to carry out the purposes of [the Act]." 29 C.F.R. §24.2(b)(3).

The language of §24.2(b)(3) is sufficiently broad to encompass Complainant's activity in this case and the implied offer to testify would be included in this third scenario. At any rate, it is clear that Mr. Bertacchi's letter "assisted" the Board of Advisors in their deliberations concerning Mr. Helton's Class IV license application. Also, it is even more obvious that sending a letter qualifies as "any action." Therefore, I find that through Complainant's actions, he "assisted and participated in a proceeding," and that even if the Class IV licensing process is not a proceeding, it would certainly be considered an "action."

In summary, I have determined that the application, revocation, and suspension process for a Class IV operator's license constitutes a "proceeding"; and while Complainant's letter does not constitute testimony in a proceeding, nor was he about to testify at a proceeding, it was either submitted for the purpose of instituting a proceeding under the Act, or to assist in a proceeding under the Act. Furthermore, even if the Class IV licensing procedure does not qualify as a "proceeding," it certainly qualifies as "any other action" under 29 C.F.R. §24.2(b)(3). As a result, the undersigned will now consider whether Complainant's actions arose under the act.

e. Arose under the Act

Next, I must determine whether the complaint was a protected act related to "the administration or enforcement of the provisions of [the Act]." 33 U.S.C. § 1367 (a). Respondent

forwards three arguments to support its contention that Complainant has not partaken in a protected activity.

i. Respondent's Argument 1: The Class IV license is an Ohio requirement and is not necessary under the WPCA.

Respondent contends that the Class IV certification is a state requirement, and nothing under the WPCA requires this license. (R. Mot. for Summ. Dec. 6). In support Respondent states that the Ohio EPA adopted this requirement in 1964, which was eight years prior to the passage of the whistleblower provisions in the Federal Pollution Control Act Amendments of 1972. (R. Mot. for Summ. Dec. 6-7). Also, Respondent suggests that since the Ohio EPA is authorized by the "reservation of power clause" of 33 U.S.C §510 to impose more stringent requirements than required by the Act, but is not required to, that these more stringent state requirements do not count as a requirement under the Act. (R. Mot. for Summ. Dec. 7).

On the other hand, Complainant argues that the Ohio EPA's Class IV license requirements are a response to the NPDES permit process. (C. Br. 41-42). Complainant further asserts that the NPDES permit process is the cornerstone of the WPCA regulatory process. (C. Br. 41). For the reasons stated below, the undersigned agrees with Complainant's contentions.

40 CFR §§122-124 establish the NPDES permit process required by the US EPA. An NPDES permit is required for the discharge of "pollutants" from any "point source" into "waters of the United States," and applies to owners or operators of any works treating domestic sewage. §122.1 (B)(1-2). The extensive and detailed requirements of this permit are established in §122.21. Additionally, Part 123 details the steps States must take to obtain approval to operate their own permit programs in place of the Federal program and minimum requirements for administering the approved State program. §122.1(a)(2). Finally, the regulations state, "Nothing in this part and parts 123, or 124 of this chapter precludes more stringent State regulation of any activity covered by the regulations in 40 CFR parts 122, 123, and 124, whether or not under an approved State program." 40 CFR §122.21(a)(5)

The Ohio EPA administers the NPDES program for the state of Ohio. As authorized under 40 CFR §122.21(a)(5), the Ohio EPA requires wastewater works operators in facilities serving more than 250 people to possess a class IV certification. OHIO ADMIN. CODE § 3745-7-02. The Ohio EPA responded to the EPA's 1999 adoption of §123.35 which required NPDES permits for small MS4s who do not qualify for a waiver. On September 30, 1999, the Ohio EPA issued a policy statement entitled "Wastewater Treatment Plant Certified Operator," which was for the stated purpose of placing technical operations of semi-public wastewater disposal systems serving less than 250 under the responsible charge of a certified operator. DSW-0100.013. The policy statement provides as follows:

> Pursuant to OAC 3745-7-02, a wastewater works serving a population of more than 250 is required to place the technical operations under the responsible charge of a certified operator having a [class IV] certificate…. The Agency has the discretion to require systems serving less than 250 people be placed under *similar*

technical oversight of a certified operator when a serious sanitary hazard exists….

Id. (emphasis added).[35]

In, *Wedderspoon,* the Administrative Law Judge determined that an investigation by Iowa's Department of Environmental Quality ("DEQ"), was a proceeding under the WPCA. Sec'y 80-WPC-1 at 13-14. The judge reasoned that even though the DEQ was a state agency charged with carrying out local regulations, these regulations were "undertaken in the administration of the federal statute and in aid of the enforcement of its provisions." *Id.* at 13. I adopt this reasoning and find that the Class IV certification requirement is an integral part of Ohio's process for administering the requirements of the NPDES program, and aids in the enforcement of federal provisions.

I reject Respondent's argument that Ohio EPA adoption of the certification requirements in 1964, eight years prior to the passage of the Federal Pollution Control Act Amendments of 1972, is dispositive. In fact, while the Ohio EPA's Class IV certification requirement predates the whistleblower provisions of the WPCA, the amended Act anticipates some qualification requirement for facility operators. For instance, under the NPDES permit guidelines, it is the facility operator's duty to obtain the permit, and not the owner. 40 CFR §122.21(a)(2)(iv)(b). Considering the extensive requirements to obtain a permit under §122.21, such a certification program must have necessarily been envisioned.

Furthermore, while the facts in the instant case do not involve a small operator serving less than 250 people, the Ohio EPA's 1999 policy statement makes clear its belief that the existing operator certification program is an integral aspect of complying with the NPDES program. Therefore, while the Ohio EPA's Class IV certification requirements may predate applicable provisions of the WPCA, I find that these requirements fall squarely under the parameters of the Act.

Finally, I reject Respondent's argument that states have the authority to require more stringent standards, and that those requirements that exceed the Act do not count as "required under the Act." While both 33 U.S.C §510 and 40 CFR §122.21(a)(5) of the Act authorize states to pass more stringent requirements than those mandated by the NPDES program, I am not of the opinion that Ohio EPA's Class IV certification requirements are, in fact, more stringent than what is required by the ACT. Quite the contrary, as discussed above, these requirements are simply the Ohio EPA's approach to implementing the requirements of the WPCA. Therefore, Respondent's argument concerning the "reservation of power clause" of 33 U.S.C §510 is not applicable to the facts of this case.

[35] Complainant's testimony regarding the NPDES process as stated in section II (D) (2), *supra*, is not inconsistent with the regulations.

ii. Respondent's Argument 2: Complainant's letter does not constitute a reasonably perceived violation of the WPCA.

The reporting of a violation is a protected activity if the employee "reasonably believes" that the employer has violated an environmental act. *Thakur v. State of N.M. Envtl. Constr. Programs Bureau,* ALJ 98-WPC-5 at 5 (October 21, 1999). "Courts have construed employee protection provisions broadly in order to give effect to the remedial purposes of the provisions." *Crosier v. Westinghouse Hanford*, Sec'y 92-CAA-3 at 4 (Jan. 12, 1994). The complainant is not required to prove an actual violation of an act, but merely that his complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Thakur*, ALJ 98-WPC-5 at *5*. On the other hand, "protected activity has been limited to the assertion of violations that involve a safety issue or an issue which impacts the environment. The provisions do not apply to [a complainant's] occupational, racial, and other nonenvironmental concerns." *Id. at* 6. A complaint may be considered a protected activity even if the hazard has already been corrected or if the employer had previously discovered the problem. *McCafferty v. Centerior Energy*, ARB 96-ERA-6 at 3-4 (Oct. 16, 1996). "The primary consideration is not the outcome of the underlying grievance hearing, but whether the proceeding is based upon possible safety violations." *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992). "An employee's reasonable belief that his employer is violating the [Act's] requirements is sufficient, irrespective of after-the-fact determinations regarding the correctness of the employee's belief." *Keene v. Houston Lighting & Power Co.,* ARB 95-ERA-4 at 7 (Feb. 19, 1997). "[W]here the complainant has a reasonable belief that the respondent is violating the law, other motives he may have for engaging in protected activity are irrelevant. The purpose of the whistleblower statutes is to encourage employees to come forward with complaints of health hazards so the remedial action may be taken, and if such a course of action furthers the employee's own selfish agenda, so be it." *Oliver*, Sec'y 91-SWD-1 at 8 (internal quotes and citations omitted).

In the instant claim, Complainant contends that his letter qualifies as a protected activity on two grounds. First, he argues that in the sixth numbered paragraph of his letter he notified the Ohio EPA that upgrades to the Jackson Pike facility were generated by catastrophic failure of pertinent operating equipment and tankage. (C. Br. 46). In *Odom v. Anchor Lithkemko/Int'l Paper*, ARB 96-189 at 2 (Oct. 10, 1997), the Administrative Law Judge found that a complainant's letter to respondent's president complaining that his supervisor was "unfairly criticizing his performance because of incidents related to environmental compliance issues he had raised," constituted protected activity because it raised several environmental concerns. *Odom v. Anchor Lithkemko/International Paper*, ALJ 96-WPC-1 at 4 (Aug. 29, 1996). The Board did not disturb the Administrative Law Judge's conclusion. *Id.* at 5.

While the present Complainant's letter did not appear to be for the purpose of notifying the Ohio EPA of environmental concerns related to the Jackson Pike upgrades, similar to the letter in *Odom*, it included information that could directly implicate environmental safety. Therefore, I find that the sixth numbered paragraph (catastrophic failures) of his letter to the Ohio EPA constitutes a protected activity.

Second, Complainant argues that the letter contesting Mr. Helton's application for a Class IV operator's license constitutes a reasonably perceived violation of the WPCA. (C. Br. 41-46). This contention presents a much closer call. Facially, many of the component parts of Mr. Bertacchi's letter do not seem to implicate an environmental safety issue, but relate to failure to follow the instructions of the application process, inflation of titles, and exaggeration of experience. (JX 1). As stated above, however, Complainant relates the requirements of the Class IV application process to the requirements imposed on the State of Ohio by the EPA to administer the NPDES permit program, and as a result, he argues that the requirements of the Class IV application process directly implicate environmental safety.[36]

Respondent postulates a narrow view of what constitutes a protected activity, contending that Mr. Bertacchi's letter does not constitute any "reasonably perceived violations" of the WPCA. (R. Br. 26). In support, respondent argues that "many" of the points raised in Complainant's letter have "absolutely nothing to do with safety or the environment," but are merely related to personnel or administrative concerns. (R. Br. 27). Furthermore, Respondent counters Complainant's argument that Part II of the Class IV application requires that a report be drafted in "Strict Compliance with the attached guidance, and in your own words…," (C. Br. 44), by stating that these guidance instructions do not have force of law. (R. Reply Br. 10). Finally, Respondent argues that since Complainant does not identify a statutory violation, there is no environmental safety issue, there is no act of pollution, and there are no other illegal environmental acts. (R. Mot. For Summ. Decision 5).

Respondent cites a number of cases to support its narrow view of the WPCA whistleblower protections.[37] First, Respondent states that the whistleblower provisions do not

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[36] For example, a wastewater treatment plant operating under control of an unqualified plant operator could result in substantial environmental harm to the public.

[37] Before comparing how various courts have dealt with facts similar to those before the undersigned, I need to address four misstatements and misapplications of the law argued in the various briefs by the Respondent. First, Respondent cites *Santamaria* for the proposition that Complainant must "articulate a specific safety or health concern that had or would potentially result from Respondent's alleged violations," and if the regulations at issue relate to "administrative requirements," and "not a safety and/or health matters," the claim must fail. (R. Reply Br. 10). This statement of law mischaracterizes Administrative Law Judge Huddleston's analysis. When Judge Huddleston concluded that Complainant's allegations related to administrative requirements, and not health or safety matters, it was in the context of determining whether the OALJ had jurisdiction of the claim, and not whether the activity was protected. *Santamaria* ALJ 04-ERA-6 at 8. The distinction is critical. I determined above that Complainant has articulated with specificity that his letter falls under the WPCA, which was sufficient to establish the jurisdiction of this office. In *Santamaria*, however, the complainant alluded to broad, unspecific protected activities and neither in his complaint, nor at the deposition did he specify his complaints, to whom he made the complaints, when they were made, or what statute was the basis for his complaints. *Id.* at 7. The "administrative requirement" that Judge Huddleston noted was a reference to the fact that the only specific regulation Mr. Santamaria ever cited was 40 C.F.R. Parts 30, 31, and 35, which he summarized as "administrative requirements" for various grants and assistance. *Id.* at 8. Unlike Santamaria, Complainant specified that he reported Respondent's violation of the WPCA when it did not adhere to OHIO EPA regulations concerning an application for a Class IV license to operate a public wastewater works as required for Respondent to receive its required NPDES permit, and committed other safety violations. Complainant points to the letter dated November 12, 2001, which he sent to the Board of Advisors to the Director of the OHIO EPA. Therefore, I find that Respondent's reliance on *Santamaria* is misplaced because that case relates to the jurisdictional requirements and not whether the complaint constitutes a protected activity.

cover every "incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *Am. Nuclear Resources v. U.S. Dept of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998) (citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1586, 1574 (11th Cir. 1997)); *Thakur,* ALJ 98-WPC-5 at 7. In *Am. Nuclear Resources*, the employee never claimed that the respondent was ignoring safety procedures, but that respondent had merely refused to give the employee a requested document that he had no right to receive. 134 F.3d at 1296. While the employee argued that his complaint "had larger safety implications," the court looked at the respondent's response to the complaint, and held that the employee's complaint was not a protected activity. *Id.*

In *Thakur*, the Administrative Law Judge determined that the complainant's reports concerning integrity of soil-cement were protected activities because the employee reasonably believed there was a violation of the Act that touched on the environment. ALJ 98-WPC-5 at 7. The Judge, however, went on to conclude that the complainant's recommendations to withhold payments or loans for failure to submit required reports under the WPCA did not concern safety issues or have an impact on the environment. *Id.* at 8-9.

Second, Respondent contends that linking the Class IV operator's permit process to environmental safety requires a chain of assumptions that are both "too numerous and too speculative for him reasonably to have perceived that [the employer] was about to violate one of the environmental acts." *See Crosby,* Sec'y 85-TSC-2 at 15; *Ketterson v. Y-12 Nuclear Weapons*

Second, Respondent contends that there is a subjective "good faith" component to Complainant's alleged protected activity, and that Mr. Bertacchi's "serious misrepresentations" were based on "numerous" and "speculative" assumptions. (R. Br. 26-27); (R. Reply Br. 12). The standard, however, is an objective one, requiring a "reasonable" perception of a violation, and not a subjective one. *Ketterson* v. Y-12 Nuclear Weapons Plant, et. al., ARB 96-173 at 3 (April 8, 1997). And while this does not mean that an employee is protected from accusations known to be false, it also does not require that the employee know that the allegations in their complaint are true, or have been proven to be true.

Third, in association with the purported "good faith" requirement, Respondent would have the undersigned believe that an employee's experience is a consideration in determining whether the complaint was made in "good faith." (R. Br. 27) (citing *Crosby*, Sec'y 85-TSC-2 at 15). This reliance on *Crosby*, however, is misguided. While Crosby does state that "finding a protected activity often illustrate[s] an experiential basis for the employee's belief that an employer is violating an environmental act," and later that the employee's assumptions were made in "good faith," the two points were unconnected. *Id.* at 14. The Secretary's reference to the effect of experience related to the fact that an employee may have specialized knowledge of a system or circumstance within a system that could impact the environment, and this particularized knowledge enables the employee's complaint to overcome the "too numerous and too speculative" threshold by demonstrating a "reasonably perceived violation." *Id.* at 14-15. In other words, this "experiential basis" is a method for supporting an employee's contention that their action objectively related to a violation of an environmental act, and not, as Respondent contends, a means for requiring a higher subjective nexus for employees who occupy more senior positions.

Finally, Respondent argues that "occupational concerns [like the one made by Complainant] fall outside [the] scope of federal environmental statutes." (R. Mot. for Summ. Dec. 4) (citing *Tucker v. Morrison & Knudson,* ARB 96-043 (Feb. 28, 1997); *Odom*, ARB 96-189). *Odom* and *Tucker*, however, were distinguishing between internal occupational safety concerns and environmental safety. *Tucker,* ARB 96-043 at 4; *Odom,* ARB 96-189 at 5. In the instant case, Complainant is arguing that the Class IV application process implicates environmental safety. He is not arguing that a fraudulent application puts employees of the plant at risk. As a result, *Odom* and *Tucker* are not applicable to the current discussion.

Plant, et al., ARB 96-173 at 4 (April 8, 1997). In *Crosby*, the employee was instructed by his employer to upgrade a computer program. Sec'y 85-TSC-2 at 5. The employer explained that the program was not part of a military contract, but was internally funded so that military specifications were not necessary and would be too expensive and time consuming. *Id.* at 6. The employee disagreed, contending that military specifications were necessary to avoid potential bugs in the system that could result in a toxic gas release. *Id.* The employee, however, admitted that he was never told that the program was going to be used for gas detection, nor did he explain his environmental concerns to his employer. *Id.* When the employee refused to perform the assignment, he was terminated for insubordination. *Id.*

The Secretary described the extent of the speculation required to get to a violation in *Crosby* this way:

> The ultimate risk at issue is that if some damaging chemical gas were emitted into the atmosphere, a bug in the … software used in a deployed gas detection device might fail to analyze the emitted gas, with the resultant failure to warn the human population to take precautions against the gas, such as wearing gas masks or avoiding the area. This scenario assumes first, the emission of a harmful gas, second, the use of the … program in a detection device deployed at the vicinity of the emitted gas, third, a bug in the … program, fourth, a nearby human populace, fifth, a means to warn the populace, and sixth, a potential means to counteract the effects of the emitted chemical gas agent.

Id.

In *Ketterson*, the complainant contended that his protected activities included complaining about abusive supervisors, answering truthfully concerning another employee who purchased illegal surveillance equipment, objecting to orders to destroy evidence to be used in a criminal case, being a friend to a whistle-blower, refusing to help overload a co-worker in hopes that they would quit, and participating in an interview concerning another employee's whistleblower claim. *Ketterson,* ARB 96-173 at 3. While the Administrative Law Judge found that most of these alleged protected activities were too speculative or had no relation to any action to carry out the purposes of the environmental Act, he also concluded that complainant's participation in an interview with attorneys concerning an investigation into another whistleblower's complaint, would be protected. *Id.* at 4.

In contrast to the cases cited by Respondent, there are a number of cases that arguably require a more liberal view of the types of complaints that qualify as protected activities under the whistleblower provisions of the WPCA. First, in *Abu-Hjeli v. Potomac Electric Power Co.*, ALJ 89-WPC-1 at 3 (Mar. 12, 1991), the complainant's protected activity related to the accuracy of three reports which he believed were to be submitted by his employer to state and federal agencies. His first complaint concerned statistical errors with a voluntary study of thermal discharges that was not required by any permitting authority, but was undertaken for the purpose of possible future licensing and variances relating to permit renewal and expanded activities. *Id.* at 4. The second complaint referred to a pilot study that was never submitted to any governmental agency. *Id.* The third complaint related to statistical errors with a voluntary

research study that was a response to state concerns over the use of less than the best available technology. *Id.* This study was eventually submitted, and while the state found errors in the data, it deemed the information acceptable. *Id.* at 5. On appeal, the Secretary held that protected activity had occurred since the complainant identified reasonably perceived statistical problems with studies that the respondent would submit to the state because the studies related to power plants for which the power plant had NPDES permits issued under the WPCA. *Abu-Hjeli v. Potomac Electric Power Co.*, Sec'y 89-WPC-1 at 7 (Sept. 24, 1993).

Next *Tyndall v. U.S. Envtl. Protection Agency*, ARB 93-CAA-6 and 95-CAA-5 at 1, 3 (June 14, 1996), the complainant alleged that his supervisors told him to ignore evidence in his investigation of another EPA employee who had awarded a contract to an outside firm. That firm was tasked with creating computer modeling and a study to determine the environmental effects of acid rain. *Id.* at 1. Complainant believed that his supervisors' directions would result in an unethical distortion of the facts, so he notified the EPA's Inspector General and recused himself from the investigation. *Id.* at 3. His request was disregarded and he was required to lead the investigation. *Id.* The Administrative Law Judge initially determined that the complainant's actions were not "grounded in conditions constituting reasonably perceived violations of the environmental acts" since they were not related to environmental safety of violations of the Clean Air Act ("CAA"). *Id.* The ARB, however, disagreed, finding that it was "possible" that his "complaints about interference were in furtherance of the statutory objectives of the CAA, and they may constitute protected activity." *Id.* at 4. In support of this conclusion, the Board adopted complainant's theory that due to interference with the investigation, the EPA would erroneously rely on deficient studies in the development of regulations, loosening emissions requirements and causing more acid rain. *Id.*

Finally, in *Hobby v. Georgia Power Co*. Sec'y 90-ERA-30 at 4 (Aug. 4, 1995), the complainant alleged in a memo that respondent could be in violation of the Nuclear Regulatory Commission's ("NRC") license because the Executive Vice-President of Nuclear Operations at Alabama Power "was taking management direction" from someone other than the respondent's president. Complainant's memo stated that if the power company could not demonstrate that it was in control of its own plants, repercussions from the NRC could include the placement of a resident inspector or even revocation of its license. *Id.* at 8. The Board concluded that the complainant's concern about the control of the nuclear power plant, as required by the NRC license, implicates the safe operation of the plant. *Id.* They noted that despite the possibility that the complainant's perception of the reporting structure may have been wrong, or was later proven to be wrong, his reasonable belief that respondent was violating the Act was sufficient to constitute a protected activity. *Id.* at 9.

I find that Complainant's letter contesting Mr. Helton's Class IV operator's license constitutes the raising of a "reasonably perceived violation" of the WPCA. Furthermore, I find that Mr. Bertacchi's letter relates to more than personnel or administrative concerns, but involves safety issues which could impact the environment. This conclusion is based, in part, upon the uniform insistence by the Ohio EPA that the application for a Class IV license be "in your own words" as set forth on the face of the application, just above the signature line, and as required in by the guidance document. This conclusion is further supported by the statements of Stewart

Bruney, Secretary of the Advisory Board of Examiners of the Ohio EPA, to Mr. Bertacchi;[38] wherein Mr. Bertacchi explained that the applicant requirements were designed to identify potential operators who have comprehensive knowledge of the whole water works system, can grasp the budgetary process, are able to define system needs, are able to articulately communicate system needs with policy makers which will enable the acquisition of resources to fulfill those needs, are capable of planning for improvements and growth, and have the ability to maintain the required facility permits. (T 320).

Next, I find the facts surrounding Complainant's protected activity in this case are more similar to those found in *Abu-Hjeli*, *Tyndall*, *Hobby,* and the protected activities in *Ketterson* than those found not to be protected in *Am. Nuclear Resources* and *Thakur*. Also, there are far fewer assumptions required in the instant case than were necessary in *Crosby* and activities found to be unprotected in *Ketterson*. In this case, the assumptions necessary to link Complainant's letter to environmental safety could include:

a) If the Ohio EPA Advisory Board recommends Mr. Helton for a Class IV operator's license based on the allegedly fraudulent application,
b) and his application is in fact approved,
c) then the Jackson Pike facility would be assigned to the care of a potentially unqualified operator
d) who lacks the communication skills to secure necessary resources to maintain a safe works, or permits required to keep the facility open.

Compared to the chain of assumptions detailed in *Crosby*, I find that these to be neither "too numerous" nor "too speculative" for Mr. Bertacchi to manifest a reasonable belief that Respondent had violated the WPCA. *Crosby*, Sec'y 85-TSC-2 at 15; *Ketterson,* ARB 96-173 at 4. In fact, I do not think it is a stretch to make the assumption that having a qualified works operator directly implicates safety. Either way, I find that Complainant's letter to be more than an "incidental inquiry" or a "superficial suggestion" that possibly relates to environmental safety. *Am. Nuclear Resources,* 134 F.3d at 1295 (6th Cir. 1998). I further find that having a qualified works operator clearly implicates safety and the health of the public at large.

Finally, I reject Respondent's arguments that there were no acts of pollution, and there were no other illegal environmental acts, because such considerations are not relevant to the "protected activity" analysis. *Keene*, ARB 95-ERA-4 at 7. I also reject Respondent's contention that since the guidance instructions for Part II of the application do not have the force of law, Complainant failed to identify a statutory violation. I find that while the Ohio EPA's guidance instructions do not have the force of law, they were implemented for the furtherance of the

[38] Mr. Bertacchi's uncontested testimony concerning Mr. Bruney's statements was discussed in detail in section II(D)(2), *supra*. I have accepted and credited this hearsay testimony since there was no objection to it; Mr. Bertacchi was the official contact for CDOSD with the Ohio EPA for a period of time; he had reason to know this information; it was well presented by him; and it was neither contradicted nor beyond reason to accept. I further find these statements to be credible due to the fact that they expand upon the reasoning presented in Ohio EPA's September 30, 1999 policy statement discussed above, and they also reflect the operator's duty to obtain the facility's NPDES permit under 40 C.F.R. §122.21(a)(2)(iv)(b).

applicable provisions of the Ohio Administrative Code, which, as explained above, aid in the enforcement of the provisions of the WPCA.

In conclusion, I find that Complainant's letter contesting Mr. Helton's Class IV application constitutes a reasonably perceived violation of the WPCA, and relates to safety issues which impact the environment. However, even if I had not found the letter to constitute a protected activity, I would still find that Complainant engaged in a protected activity based on the sixth numbered paragraph of his letter which unequivocally implicates environmental safety. Therefore, I find that Complainant's letter constitutes two distinguishable instances of protected activity under the whistleblower provisions of the WPCA. [39]

iii. Complainant directed the potential safety violations to a non-enforcing Ohio EPA subdivision.

I agree with Complainant's contention that his November 12, 2001 letter, which notified the Ohio EPA's Advisory Board of Examiners that upgrades to the Jackson Pike facility were generated by catastrophic failure of pertinent operating equipment and tankage, constitutes a separate act of protected activity, because it relates to Respondent's compliance with the WPCA regulations set forth at 40 C.F.R. § 122.2. (C. Br. 46).

Respondent, however, argues that while Complainant attempted to link some of his complaints to the WPCA, he directed the letter detailing these potential safety violations toward a non-enforcing Ohio EPA subdivision. (R. Br. 28-29). Also, this subdivision's sole responsibility is to review applications for Class IV licenses, and it has no power to investigate violations of pollution code. (R. Mot. for Summ. Dec. 7). Furthermore, Respondent emphasized Complainant's admission that despite his knowledge of the Ohio EPA's structure, he did not raise these safety complaints with an enforcement arm, and made no additional effort to report equipment failures. (R. Br. 29).

Considering the remedial nature of the whistleblower protections, however, I find it unrealistic that Congress would have intended an employee to direct a complaint to a specific division within an agency in order to receive the protections of the Act, if that is what happened. Since Respondent has failed to provide any legal support for its contention, I find that Complainant's failure to submit his allegations of potential violations of the WPCA to the

[39] The actual untruthfulness of a complaint is not a valid defense to a whistleblowers claim under the WPCA. Despite this, at Respondent's in-house disciplinary hearing, and at the instant hearing, a great deal of the evidence centered on whether Mr. Bertacchi's accusations were, in fact, truthful. As is evident from the fact that Mr. Roush was never interviewed, Mr. Selby does not appear to have ever considered Complainant's reasonable belief in the accuracy of his claims, but instead looked to facts beyond Mr. Bertacchi's perception to determine whether his claims were a violation of Work Rule 1. Respondent's disregard for the WPCA protections is further exemplified by the fact that Mr. Selby found Mr. Bertacchi's statements to be "unintentional misrepresentations" that he "honestly believed" were accurate, but since Mr. Bertacchi had not used due diligence to verify the accuracy of each statement, Mr. Selby determined that belief in their accuracy was not reasonable. As *Keene* states, after-the-fact determinations regarding the correctness of the employee's belief are irrelevant in whistleblower cases under the WPCA. ARB 95-ERA-4 at 7. Therefore, Respondent's attempts to prove the falsity of each of Complainant's accusations, based on facts beyond his perception, are irrelevant to the matter before the undersigned. For a full discussion of Respondent's "Failure to Practice Due Diligence Defense," *see* Appendix B.

enforcement arm of the Ohio EPA is not a detriment to securing the intended protections afforded by the Act.

However, even if Complainant's submission to a non-enforcing arm were fatal to his claim, as determined above, his contest of the Class IV license constituted a distinct protected activity, and the Ohio EPA's Advisory Board of Examiners was the proper recipient for such a complaint.

3. Adverse Employment Action

Complainant was 1) demoted to his prior position; 2) his pay was reduced 5%; 3) he received no merit increase for 2003; 4) his daily commute was lengthened; 5) he was carefully monitored; 6) he was removed from various committees within the division; and 7) he no longer held a management position that required the personal faith and trust of senior management. (R. Br. 25); (C. Br. 31). I find that if these actions were the result of Mr. Bertacchi's protected activity, then they all constitute adverse employment actions within the meaning of the WPCA.

4. Inference that Protected Activity was the Likely Reason for Adverse Action

Respondent admitted that finding the letter led to the internal investigation of Complainant and the resultant disciplinary hearing. (R. Br. 23-24). Respondent found that by sending the letter, Complainant violated work rules, and demoted him. (R. Br. 23-25). Therefore, since I found that sending the letter was a protected activity, and this letter was also the catalyst for the disciplinary hearing and demotion, I conclude that Complainant has raised an inference that his protected activity was the likely reason for the adverse employment action.

According to the above analysis, I have concluded that Complainant has satisfied all of the elements of his *prima facie* case. As a result, the burden now lies with the employer to produce a legitimate, non-discriminatory reason for demoting Complainant.

E. Respondent's Non-discriminatory Reason

Respondent alleges that it demoted Complainant after it found that his letter to the Ohio EPA violated City Work Rule No. 1, which prohibits employees from"[m]aking false or untrue statements regarding work-related matters to management, fellow employees or a member of the public." (R. Br. 23). Furthermore, Respondent determined that since he "could not have reasonably believed in the accuracy of his allegations," Complainant "failed to exercise the due diligence expected of a City Manager." (R. Br. 23-24). As a result, Respondent concluded that Complainant also violated City Work Rule No. 10, requiring "employees who hold positions of responsibility and trust at all levels of supervisor, manager, or administrator must be held to a higher standard than the employees they supervise [and therefore] must always conduct themselves with diligence and in a manner above reproach." (R. Br. 24). This rule also states that managers "shall not …[f]ail to administer and support the policies, directives, or other requirements of the city, or otherwise engage in conduct which undermines the mission or reputation of the City." (R. Br. 24)(emphasis in original). Stated another way, Respondent

asserts that if Complainant, as a manager, knew of violations of environmental rules or regulations, then "he had a duty to the City to make sure the proper City officials knew about it." (R. Br. 34).

Based on this presentation, I find that Respondent has satisfied its burden of production by presenting Complainant's violation of Work Rule No. 1 and 10 as its legitimate, non-discriminatory reason for Mr. Bertacchi's demotion. *Thakur*, ALJ 98-WPC-5 at 3; *Jones*, ARB 02-093 and 03-010 at 5.

F. Pretext/Dual Motive

In a typical whistleblower's claim, the final step requires the complainant to show, by a preponderance of the evidence, that the respondent's proffered reason is merely a pretext for the adverse action. He may do this by establishing that the respondent's articulated basis for the adverse employment action was based on a discriminatory motive by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Frady v. Tenn. Valley Auth.*, Sec'y 92-ERA-19 and 34 (Oct. 23, 1995).

On the other hand, in a "dual motive" scenario, if an administrative law judge concludes that the employee has proven by a preponderance of the evidence that the protected conduct was a motivating factor in the employer's action, the employer, in order to avoid liability, has the burden of proof or persuasion to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 287 (1977); *Consol. Edison Co. of N.Y. v. Donovan,* 673 F.2d 61, 63 (2nd Cir. 1982); *Dartey v. Zack Co. of Chicago,* Sec'y 82-ERA-2 (Apr. 25, 1983). As a result, in a dual motive analysis, it is the employer's motivation that is under scrutiny. *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of Labor,* 992 F.2d 474, 481-82 (3rd Cir. 1993). Also, under the "dual motive" analysis, the risk - that the illegal and legal motives behind employee termination merge and become inseparable - is placed on the employer. *Id.*

In this case, even though there is no admission by the Respondent that its actions against Complainant were motivated, in part, by an illegitimate reason, the facts appear to require the undersigned to utilize the "dual motive" analysis. First, while the undersigned determined that Respondent had satisfied its requirement to produce a legitimate, non-discriminatory reason for the adverse employment action, for reasons detailed below, there is some question as to whether every aspect of its reasons are legitimate. *Francis v. Bogan, Inc.,* Sec'y 86-ERA-8 (Apr. 1, 1988) (dual motive analysis is applicable only where an employer's adverse action was motivated by two reasons, one legitimate and one prohibited). Second, Complainant argues that there is direct evidence of discrimination based on statements by his supervisors. *See Harrison v. Stone & Webster Eng'g Group,* Sec'y 93-ERA-44 (Aug. 22, 1995) (since there was direct evidence of animus against the Complainant, and other circumstances surrounding the demotion were indicative of a retaliatory motive for the demotion, the Secretary found that the dual motive analysis was required). However, since neither of these points is explicit from the facts, the undersigned will error on the side of caution; determining first whether Claimant has proven pretext, followed by a determination of whether Respondent has satisfied the dual motive

requirement. *See Francis,* Sec'y 86-ERA-8 (an administrative law judge's discussion of the dual motive analysis is harmless where an administrative law judge also analyzed the case under pretext and made an explicit finding of pretext).

1. The Arguments

a. Direct Evidence

In this case, Complainant contends that after learning that he sent his letter to the Ohio EPA, and knowing that it was incorporated into the Ohio EPA's enforcement files, since sending his letter to the Ohio EPA was a protected activity, and he was demoted for sending it, this case includes direct evidence of discriminatory motive. (C. Br. 53). In addition, Complainant alleges that Mr. Linn was "greatly upset," and Ms. Roberto's "repeated inflammatory references to Bertacchi's actions clearly evidence her hostile animus," and that these complaints may constitute additional direct evidence of a discriminatory motive. (C. Br. 53-54). Respondent argues that Ms. Roberto was not "outraged" that Complainant sent the letter to the Ohio EPA, but was instead "upset" with his failure to raise the issues internally, or investigate their accuracy. (R. Reply Br. 14).

Next, Complainant contends that Respondent's "initial investigation was inadequate and was obviously designed to produce the results Ms. Roberto desired when she told Don Linn to 'deal with' Bertacchi's actions." (C. Br. 54). Furthermore, Complainant alleges that the investigator merely conducted an "opinion poll," and did not actually look into the validity of Complainant's accusations, or speak with all of his supporting witnesses. (C. Br. 54-55). In the end, Complainant asserts that the investigation was designed to "produce the expected results." (C. Br. 55). Complainant further argues that by instructing the hearing officer to ignore Mr. Bertacchi's whistleblower defense, in violation of the collective bargaining agreement, the city attorney was acting in bad faith. Complainant concludes that this action was designed to "intimidate and prevent future protected activity by stripping whistleblowers of a protected activity defense during the disciplinary process." (C. Br. 55).

b. Work Rules

Complainant argues that Respondent's reliance on "Work Rules" for the basis of his demotion is disingenuous. (C. Br. 56). Complainant contends his removal from a management position was an attempt by respondent to use the work rules to remove him from a position where he had the capacity to report violations to the Ohio EPA. (C. Br. 57). Yet, despite this alleged loss of trust, Respondent freely admits that Complainant was a good employee as exemplified by regular pay raises, favorable performance reviews, and a promotion to manager within three years of his employment. (R. Br. 6). Furthermore, Ms. Roberto acknowledged that other than this incident, Respondent had been a "model employee." (C. Br. 57). Complainant also notes that it is "inherently retaliatory" for an employer to argue that an employee cannot be trusted because he "might engage in a protected activity." (C. Br. 57).

Complainant further contends that Work Rule No. 1, concerning dishonesty, was not violated because both Mr. Shelby and Mr. Lendavic found that Complainant "honestly believed the truth of what he was writing to [the Ohio EPA]." Furthermore, Complainant forwards Mr. Shelby's admission that "under the interpretation used against Mr. Bertacchi of Work Rule 1, the rule could be stretched beyond dishonesty to include discipline for a mistaken belief that is honestly embraced." (C. Reply Br. 5); (T 41). Thus, Mr. Bertacchi was punished as being dishonest for something he honestly believed. (C. Br. 56).

Next, Complainant contends that Work Rule No. 10(H) was not part of the working of Rule 10, but was "developed and announced" during the investigations into Complainant's actions, and then applied retroactively. (C. Br. 56); (C. Reply Br. 5)(citing (T 42-43);(JX 4, p. 166)). The City, however, responds by arguing that there is no evidence in the record that City Work Rule 10 was reinterpreted to apply to Complainant, nor has Complainant provided the names of others to whom this rule has been differently applied. (R. Reply Br. 15).

c. City's Defenses

Respondent asserts that Complainant failed to demonstrate the due diligence and judgment expected by a manager. (R. Br. 35). In other words, Complainant was free to report his concerns to the Ohio EPA, but he must also fulfill his managerial duties and report these issues internally. (R. Reply Br. 17). Complainant justified his failure to internally report his concerns by expressing a fear of retaliation. (R. Br. 35). Yet based on his admission of a good relationship with his supervisors, the City contends that these fears were not reasonable, and therefore were not an excuse for failing reporting obligations. (R. Br. 35-36); (R. Reply Br. 13).

The City further argues that it "honestly and reasonably believed that Mr. Bertacchi's conduct was knowingly and intentionally false and therefore not protected by the Clean Water Act," and therefore was not motivated by a desire to retaliate against his protected activities. (R. Br. 38); (R. Reply Br. 18); *Saporito v. Fla. Power and Light Co.,* Sec'y 89-ERA-7 and 17 at 31 (Feb. 16, 1995). Respondent adds that the discipline steps taken against Complainant are commensurate to the violations he committed. (R. Br. 36). He received a 5% pay reduction, which is less than severe than a full demotion, and was removed his entrusted management responsibilities. (R. Br. 36).

Finally, Respondent contends that due to Complainant's falsity and recklessness, Respondent would have demoted Complainant for any one of his six listed allegations. (R. Br. 37). The reasoning here is that if the undersigned does not find all of the allegations to be protected activities, Respondent will base its decision on those unprotected activities alone. (R. Reply Br. 17).

2. Legal Standards

Complainant may prove pretext by offering either direct or circumstantial evidence. *U.S. Postal Srv. Board of Governors v. Aikens*, 460 U.S. 711, 714 n3 (1983). While Complainant contends that the facts of this case show direct evidence of retaliation, direct evidence of retaliation is uncommon and difficult to prove. *See Marchese v. Goldsmith,* 1994 U.S. Dist.

LEXIS 7940 (E.D. Pa. 1994), *aff'd without op.,* 1995 U.S. App. LEXIS 2694 (3d Cir. 1995) (proof of an illegal motive often requires inference from circumstance and witness credibility -- rarely is there "smoking gun" evidence of retaliation).

a. Direct Evidence

A supervisor's disapproval of an employee's complaining to a government agency indicates discriminatory intent. *See Blake v. Hatfield Elec. Co.*, Sec'y 1987-ERA-4 at 5 (Jan. 22, 1992) (supervisor's comment that the complainant used the NRC as a threat found to "virtually amount … to direct evidence of discrimination). A supervisor who issued a disciplinary notice for tardiness opined at the hearing that Complainant was not justified in making a complaint to OSHA, stating "I feel that [Complainant] is using OSHA and that the warning was merited." *Fabricius v. Town of Braintree/Park Dept.*, ARB 1997-CAA-14 at 5-6 (Feb. 9, 1999). The ARB found that this statement was very strong evidence of discriminatory intent. *Id.* Also, comments made by a manager or those closely involved in employment decisions may constitute direct evidence of discrimination. *Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.,* Sec'y 91-ERA-13 at 5 (Oct. 26, 1992).

b. Removal from a position of Trust

In *Scerbo,* the complainant had been transferred from the pipe yard to a less desirable inside position in the warehouse. Sec'y 89-CAA-2. The Respondent contended that the reason for the transfer was to separate the Complainant from a supervisor, who the Complainant claimed had bumped or jostled him on occasion. In part, the Administrative Law Judge wrote:

> There is no evidence of ongoing conflict, argument, or resistance to supervision. The evidence is to the effect that [the supervisor] regarded [the Complainant] as a good worker who functioned in the highest estimation within several parameters of performance. The real effect of the transfer was to remove [the Complainant] from the locale where he was observing and reporting on a situation of potential contaminating influence. What happened is that the whistleblower was removed from the area where the whistle would most likely be blown. The chilling effect on fellow workers' propensity to report problems would be the unmistakable message sent by the company in moving [the Complainant].

Scerbo v. Consol. Edison Co. of N.Y., Inc., ALJ 89-CAA-2 at 3 (Dec 19, 1989). The Secretary adopted the Administrative Law Judge's findings in regard to pretext. *Scerbo*, Sec'y 89-CAA-2 at 6.

c. Chain of Command

An employee may not be faulted for failing to observe established channels when making safety complaints. *West v. Systems Applications Int'l,* Sec'y 94-CAA-15 (Apr. 19, 1995). More recently, the Board stated:

> [I]t is a long standing principle of whistleblower case law, established by the Secretary and further developed by this Board and the United States Courts of Appeals, that it is a prohibited practice for an employer to retaliate against an employee for not following the chain of command in raising protected safety issues. This chain of command principle is as applicable to communications with a regulating agency like the DOE as it is to the raising of nuclear safety concerns within the employer's organization.

Williams v. Mason & Hanger Corp., ARB 98-30 (Nov. 13, 2002) (citations omitted).

In *Saporito v. Florida Power & Light Co.,* Sec'y 89-ERA-7 and 17 (June 3, 1994), an employee had been discharged for refusal to internally report potential health and safety violations that he instead reported directly to the Nuclear Regulatory Commission; for his failure to stay at work beyond regular working hours for a meeting; and for his refusal to undergo an examination by a company doctor. *Saporito*, Sec'y 89-ERA-7 and 17 at 2. The Administrative Law Judge found the employer's reasons for termination to be valid, and denied the employee's complaint. *Id.* at 2. The Secretary, however, disagreed, and remanded for the Administrative Law Judge to apply the dual motive test. *Saporito v. Florida Power & Light Co.,* (On reconsideration) Sec'y 89-ERA-7 and 17 at 2 (Feb. 16, 1995).

The respondent in *Saporito* argued, "It is in the interest of public's health and safety … that immediate disclosure occur. A non-confidential informant's refusal to disclose his nuclear safety concerns [to management] is not protected activity under the ERA." Sec'y 89-ERA-7 and 17 at 3. In reaching his decision, the Secretary concluded, "An employee who refuses to reveal his safety concerns to management and asserts his right to bypass the 'chain of command' to speak directly with the Nuclear Regulatory Commission is protected under the employee protection provisions of the … Act." *Saporito*, Sec'y 89-ERA-7 and 17 at 1; *see, e.g., Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1290 n.2 (9th Cir. 1991)(letter outside "chain of command" raising safety complaints constituted protected whistleblower activity); *Brockell v. Norton,* 732 F.2d 664 (8th Cir. 1984)(a police department employee's First Amendment rights were violated when he was fired specifically because he reported suspected cheating on police certification examinations to the regional test administrator without first reporting it to the chief of police and the mayor); *Pillow v. Bechtel*, Sec'y 87-ERA-35 at 22 (Jul. 19, 1993)("going around established channels to bring a safety complaint [is] not a valid basis for [choosing and employee] for layoff."); *Nichols v. Bechtel Const., Inc., Sec'y* 87-ERA-44 at 17 (Oct. 26, 1992)("an employer may not, with impunity, hold against an employee his going over his supervisor's head, or failing to follow the chain of command, when the employee raises a safety issue"). Concerning the employer's "immediate" notification argument, the Secretary added that the employer knew that the overseeing governmental agency was to be notified, and should have known that that agency would, in turn, tell the employer of an "imminent threat to public health or safety." *Id.* at 3.

On reconsideration, the Secretary clarified that his earlier holding did not stand for the proposition that an employee has an "absolute right" to refuse to report safety concerns internally, but that an employee's "duty" to report concerns to management and his "right" to report to an enforcement agency are "independent and do not conflict." *Saporito* (on reconsideration), Sec'y 89-ERA-7 and 17 at 2. Therefore, since it may be difficult to determine

the employer's motivation, a "dual motive" analysis is required under these circumstances. *Id.* The Secretary observed that his holding was not a direction to the Administrative Law Judge to second guess the Respondent's management decisions. *Id.* at 4 n.2. Rather, the Administrative Law Judge was only to examine whether, absent the Complainant's expressed intent to contact the NRC, the Respondent ordinarily would have fired him for failing to reveal these concerns or for other reasons, as it would any other employee. *Id.*

3. Employer's stated reason is pretext, and it fails the "dual motive" analysis.

In the instant case, Respondent needed only to prove that the managers who made the decision to demote Mr. Bertacchi had a reasonable and good faith belief that the Complainant engaged in misconduct and the decision to discipline was not motivated by protected conduct, but instead by the fact that he committed work violations. *See Lockert v. U.S. Dept. of Labor*, 867 F.2d at 519). While Respondent argues that it had an honest and reasonable belief, I am convinced by the facts of this claim that the decision to demote Complainant was ultimately a response to Mr. Bertacchi's protected activity.

I do not find Respondent's argument that Ms. Roberto was not "outraged" to be credible. The City contends that Ms. Roberto was merely "upset," but her testimony tells a different story:

Question:	Now isn't it true that you were outraged when you saw Mr. Bertacchi's letter?
Roberto:	Absolutely.
…	
Question:	Isn't it true you took the letter down to Mr. Lynn and told him this is one of your people, deal with it?
Roberto:	Yes
Question:	And that you probably told him you were outraged?
Roberto:	He would have certainly understood that I was not happy with the letter.
Question:	And by the way, Ms. Ashbrook also knew that you were outraged by the letter.
Roberto:	I would imagine she did.

(T 209).[40]

Complainant attempts to link this "outrage" to the existence of direct evidence of retaliatory motive. While there are some clear similarities to *Blake, Fabricius,* and *Lederhous*, discussed above, I am not able to reach the conclusion that the fact Respondent was "outraged" supports Complainant's assertion that it constitutes direct evidence of retaliation. This is due to the fact that it is not completely clear whether Ms. Roberto's "outrage" was based on a violation of the work rules, as Respondent contends, or a result of Complainant's engaging in a protected activity. In support of Employer's contention, however, I consider the fact that an investigation and hearing were conducted subsequent to the initial "outrage," and that Complainant was not

[40] Ms. Ashbrook also testified that Ms. Roberto was "outraged" when she told her of Complainant's letter to the Ohio EPA

ultimately fired despite Mr. Linn's statement, that he would have fired Mr. Bertacchi had he known about the letter. Therefore, Respondent's contention that the "outrage" was based on failure to follow work rules is not completely without credibility, and therefore does not, in and of itself, constitute direct evidence of retaliation.

When a senior management employee demonstrates "outrage" to the extent that it is "certainly understood" by subordinates, I find it difficult to believe this "outrage" does not have repercussions during the ensuing disciplinary proceeding. Stated another way, the evidence in this complaint facially supports a finding that as interim director to the department of public utilities, Ms. Roberto's intense dissatisfaction with the actions of Mr. Bertacchi had an impact on the outcome of the investigation, the hearing, and the ultimate disciplinary determination. For example, evidence of this impact can be seen in Mr. Lendavic's hearing report, which cited Ms. Roberto's *ex parte* letter. While I do not find Ms. Roberto's anger to be direct evidence of discrimination, analysis of the facts is necessary to determine whether there is circumstantial evidence of a retaliatory motive.

Looking first to the investigation of Mr. Bertacchi's actions, I do not agree with his characterization of the process as merely an "opinion poll" designed to "produce expected results." However, based on Respondent's comments and actions surrounding the investigation, I find that there is sufficient evidence to show that pretext was present. First, under the umbrella of "outrage," I note Ms. Roberto's directive that Mr. Linn "deal with it." While not apparent exactly what "it" is, under these facts I find it clear that she wanted there to be some type of repercussion for submitting the November 12, 2001 letter to the Ohio EPA's Board of Advisors. Second, Mr. Shelby did not adequately investigate the validity of Mr. Bertacchi's accusations. Third, Mr. Shelby did not speak with Mr. Bertacchi's supporting witnesses. Finally, Mr. Shelby, as instructed by the City attorney, ignored Mr. Bertacchi's whistleblower defense.

While Respondent may have had the discretion to ignore Complainant's whistleblower defense, it did so at its own risk. As a result, while the City claims that it made its decision independent of the protected activity, due to the fact that the investigation and hearing were the direct result of the same employee action, I find that the work rule violations and Complainant's protected activity are inexorably linked. As a result, Respondent's failure to consider Mr. Bertacchi's federal defenses is insufficient to eliminate their applicability to the facts of this case. Therefore, while I do not find that the investigation was intended as some sort of façade generally designed to "intimidate and prevent future protected activity by stripping whistleblowers of a protected activity defense during the disciplinary process," (C. Br. 55), I do conclude that Respondent's contention that the investigation was completely legitimate was specifically affected and tainted by the methods used to conduct it and by the comments made by senior management officials.

Turning next to the disciplinary hearing, while Mr. Lendavic may have believed that his decision was accurately based on the facts as presented to him, I find that the credibility of his conclusions are undermined by senior management's "outrage," and his failure to consider Complainant's federal whistleblower defense. Considering Work Rule No. 1, Respondent concluded Mr. Bertacchi was dishonest when both Mr. Shelby and Lendavic concluded that he "honestly believed the truth" of his accusations. This is particularly peculiar when juxtaposed

against the fact that the whistleblower standard requires a "reasonable perceived violation." *Thakur,* ALJ 98-WPC-5 at 5. In the end, I find it difficult to reconcile these positions. As a result, while Mr. Lendavic may have interpreted Work Rule No. 1 as intended by the City, this rule stands in contrast to the whistleblower protections of the WPCA. Therefore, I do not find Respondent's reliance on Work Rule No. 1 to be a credible avenue for disciplining Mr. Bertacchi.

Concerning Work Rule No. 10, while I do not find support in the record for Complainant's contention that Respondent "developed and announced" subpart (H) during the investigation, I do find that this rule, as interpreted by Mr. Lendavic is contrary to the Act. As emphasized by the "chain of command" series of cases, it is clear that Mr. Bertacchi had a right to report his concerns directly to the Ohio EPA without first notifying Respondent. The proper analysis here, however, is: had Complainant not contacted the Ohio EPA, would Respondent ordinarily have disciplined Mr. Bertacchi for his failure to reveal his concerns internally. *Saporito* (on reconsideration), Sec'y 89-ERA-7 and 17 at 4 n.2. Upon review of the entire record, I find no evidence that respondent would have disciplined him for his failure to raise these specific concerns internally.

Finally, I find Respondent's argument – due to Complainant's admitted good relations with his supervisors there were no reasonable fears of retaliation – to be misplaced. While fear of retaliation may be an aspect in many of the "chain of command" cases, there is no stated prerequisite that such fear must exist. Therefore, I do not find Respondent's reliance on Work Rule No. 10 to be a credible avenue for disciplining Mr. Bertacchi.

Next, turning to the disciplinary actions taken by Respondent, I find further evidence of retaliation against Mr. Bertacchi's protected activity. Similar to the employee in *Scerbo*, there is "no evidence of ongoing conflict, argument, or resistance to supervision" concerning Complainant; Respondent admits that he was a good employee as exemplified by regular pay raises, favorable performance reviews, and a promotion within three years; and Mr. Roberto readily acknowledges that other than this incident, Complainant was a model employee. ALJ 89-CAA-2 at 3. Additionally, like *Scerbo*, "the real effect of the [demotion] was to remove [Mr. Bertacchi] from [a position] where he was observing and reporting on a situation of potential [violation]." *Id.* I adopt the judge's conclusion, finding that by demoting Mr. Bertacchi, he "was removed from the area where the whistle would most likely be blown [creating a] chilling effect on fellow workers' propensity to report problems…." *Scerbo,* ALJ 89-CAA-2 at 3. Therefore, I find that Mr. Bertacchi's removal from a position that required personal faith and trust of senior management, and from various committees within the division, (R. Br. 25), further undermines Respondent's credibility

Respondent simply cannot create rules that violate federal law, and then under the guise of considering an employee's actions independent of the law, reach a conclusion and call it "honest and reasonable." Both Work Rules 1 and 10, as interpreted by Respondent, fly in the face of the protections afforded by the whistleblower provisions of the WPCA. While Respondent can declare that the adverse employment action was not retaliatory, under the guise of "work rules," it has retaliated. Therefore, I find that Mr. Bertacchi has proven by a preponderance of the evidence that Respondent's proffered reason for the adverse employment

action is not worthy of credence, but is merely a pretext for discriminatory retaliation in violation of the whistleblower provisions of the WPCA.

Turning to the "dual motive" analysis, I find that Respondent would not have reached the same decision in the absence of Complainant's protected activity. It defies logic to conclude that absent Mr. Bertacchi's letter to the Ohio EPA, the City would have proceeded with a disciplinary hearing and ultimate demotion. In fact, without the letter, there would never been an investigation or a disciplinary hearing in the first place. I am further unconvinced by Respondent's argument that even if the undersigned finds that one or more of the six enumerated complaints contained in Complainant's letter to the Ohio EPA is a protected activity, that it would have reached the same conclusion based on those items that were not protected. To embrace this contention, the undersigned would have to believe that Complainant would have been disciplined if he had simply reported to the Ohio EPA that Mr. Helton's application listed incorrect titles. I do not. Therefore, I am unconvinced by Respondent's assertion, and find it to be little more than a last ditched effort to avoid liability.

Finally, concerning "dual motive," I find Respondent's assertions to be disingenuous because the allegedly legal motives behind its actions have merged with the illegal motives, and are, therefore, inseparable. This basically takes the analysis back to one of "pretext," which I have found to exist. As a result, I conclude that Respondent has failed to prove by a preponderance of the evidence that it would have reached the same decision absent the protected conduct.

V. Remedy

Back pay must be calculated in accordance with *Johnson v. Old Dominion Security*, 86 CAA 3 (Sec'y May 29, 1991) slip; *Wells v. Kansas Gas & Elec.*, 85 ERA 22 (Sec'y Mar. 21, 1991); *see Blake v. Hatfield Elec. Co*., 87 ERA 4 (Sec'y Jan. 22, 1992). However, overwhelming exactitude is not required in damage awards, and any uncertainty must be resolved in favor of Complainant. *See e.g. Lederhaus v. Donald Paschen,* 91 ERA 13 (Sec'y Oct. 26, 1992). In this case, the award of back pay will include not only Complainant's decrease in salary, but the 2003 merit increase communicated by his supervisor. Mr. Bertacchi has, however, requested an extra 30 minutes of compensation for his added daily commute to his new work location. Since commute time can be affected by so many factors, in addition to location, and there is no evidence in the record that Respondent compensates its employees for their time spent driving to work, I am not inclined to grant Mr. Bertacchi relief based on a straight time calculation. However, since Mr. Bertacchi's change in work location appears to be directly related to Respondent's discriminatory actions, making him whole must include compensation for this added expense. A far more accurate means of calculating Mr. Bertacchi's expenses for his extended commute to and from work is to calculate the mileage difference between his home and the Sewer Maintenance Operations Center, and between his home and the work location that he has been assigned to since his demotion in July 2003, and pay Mr. Bertacchi's increased mileage (i.e. mileage for the additional miles that he drove to and from work as a result of his demotion and work relocation) at the suggested business rate in the Internal Revenue Code.

Normally an award of back pay continues either until reinstatement or final judgment. In this case, back pay will end once Complainant has been reinstated to his previous position of Industrial Waste Pretreatment Manager and Respondent has fully complied with all of the provisions of this recommended decision.

Complainant is entitled to lost fringe benefits to which he would have been entitled. *See Williams v. TIW Fabrication & Machinery, Inc.*, 88 SWD 3 (Sec'y June 24, 1992). Thus, Complainant is entitled restoration of his pension benefits, and any and all lost benefits, beginning July 2003, and continuing during for the entire period that he is entitled to back pay.

Complainant is entitled to statutory interest on his back pay calculated in accordance with 29 CFR §20.58(a) at the rate specified in the Internal Revenue Code §6621 until the date of compliance with the applicable order. *See Sprague v. American Nuclear Resources, Inc.*, 92 ERA 37 (Sec'y Dec. 1, 1994); *Wells v. Kansas Gas & Elec. Co*., 85 ERA 22 (Sec'y Mar. 21, 1991)

Complainant requests affirmative relief in the form of a posting of this decision at all facilities and work sites where Respondent's employees work. *Simmons, et al. v. Florida Power Corp*., 89-ERA-28 and 29 at 22 (Dec. 13, 1989). In addition, he requests that Respondent be ordered to post a notice to all employees informing them of their rights to report violations under the six environmental statues without fear of employer reprisal. These are legitimate requests and will be honored in the order. He further requests a declaratory judgment requiring enforcement of the terms of the Collective Bargaining Agreement, as they relate to the requirements of federal law, to ensure that protective activities under the environmental statutes will be considered during in-house disciplinary hearings. While I highly recommend CDOSD consider the protective provisions of the environmental statutes as they are applicable under the Collective Bargaining Agreement, neither enforcement of the terms of this agreement, nor the environmental statutes other than the WPCA are before the undersigned, and are therefore beyond the scope of this recommended decision and order.

Complainant requested damages in the amount of $200,000 for mental and emotional anguish. While Mr. Bertacchi states that he is not seeking emotional distress damages, he does claim that due to Respondent's attempt to terminate him, and his ultimate demotion, he has suffered humiliation, embarrassment, loss of professional reputation, and damage to his career. (C. Br. 61-62). Respondent, on the other hand, argues that unlike the Energy Reorganization Act and the Clean Air Act, the WPCA does not include specific statutory authorization for the award of compensatory damages. (C. Reply Br. 19). Also, Respondent argues that Mr. Bertacchi has failed to meet the burden of proving his damages, and that his claimed injuries are speculative. (R. Reply Br. 20). In support, Respondent notes that all of the cases cited by Complainant include substantial evidence of the injuries sustained, and most involve compensatory damages for emotional distress.

Compensatory damages may be awarded a whistleblower complainant under 29 CFR Part 24 for pain and suffering, mental anguish, embarrassment and humiliation, as supported by circumstances of the case and testimony regarding the physical and mental consequences of the retaliatory action. *See Pillow v. Bechtel Constr. Inc.*, Sec'y 87 ERA 35 (July 19, 1993).

Concerning the WPCA, while the language of the Act does not explicitly state that complainants may be entitled to "compensatory damages," since both special[41] and general[42] damages fall under the umbrella category of "compensatory damages, as opposed to exemplary or punitive damages," and since the Act does not specifically include or exclude general damages, I find that they may be awarded under the WPCA.

Turning to Respondent's second argument against the award of compensatory damages, while I find by their very nature, general damages tend to be speculative, I must also agree that Complainant has failed to provide sufficient evidence of his substantial subjective injuries for his humiliation and embarrassment suffered as a result of Respondent's attempt to fire him. In addition, I note that Complainant was not fired, and has failed to present evidence as to how returning to a position he previously held has either humiliated or embarrassed him, or has damaged his professional reputation or career. Also, he does not claim any emotional distress. Therefore, since it does not reasonably relate to the extent of such damages proved, I find the amount of $200,000 to be unreasonable. (T 8-10) 29 CFR §24.7(c)(1); *see Creekmore v. ABB Power Systems Energy Services, Inc*., 93 ERA 24 (Dep. Sec'y Feb. 14, 1996); *Crow v. Noble Roman's, Inc*., 95 CAA 8 (Sec'y Feb. 26, 1996), *citing Blackburn v. Martin*, 982 F.2d 125, 131 (4th Cir. 1992)(ERA). In addition, without additional information detailing Complainant's injuries, I cannot specify a lesser amount of general damages necessary to make him whole. As a result, no general damages will be awarded in this action.

Claimant is not entitled to punitive or exemplary damages under the WPCA or other applicable law, because of the negative implication derived from the express affirmative grant of the remedy in 29 CFR Part 24 with respect to cases rising under the Safe Drinking Water Act and the Toxic Substances Control Act. §24.7(c)(1). No other authority for such damages under the WPCA has been suggested.

ORDER

As I have found that Respondent has violated the employee protective provisions of the WPCA and 29 C.F.R. Part 24 by demoting Complainant for partaking in a protected activity, remedies and damages that must be ordered to immediately rectify those violations. Therefore,

IT IS ORDERED that Respondent either cease and desist, and/or take the following affirmative actions to abate the effects of those violations:

1. **Cease and desist** all conduct involving the above determined violations of the WPCA, to include all interference, restraint and coercion, and all discriminatory conduct toward Complainant Jeffrey L. Bertacchi for his protected activity, and take affirmative action to abate the violation related to Complainant's unlawful demotion.

[41] Damages for out-of-pocket costs which are the direct result of the defendant's wrongful act, can include loss of wages and other damages which are not speculative or subjective.

[42] Damages for injuries suffered for which there is no exact dollar value that can be calculated.

2. **Reinstate** Mr. Bertacchi to his former position as Industrial Waste Pretreatment Manager at his prior Sewer Maintenance Operations Center location.

3. **Compensate** Mr. Bertacchi with full back pay for all time lost due to his change in position, including, back pay for the 5% difference in pay for the time of his demotion in July 2003 through his reinstatement; all other pay increases to which he may have been entitled, including the 4% merit increase for the time period immediately after his demotion to which he had already been informed that he was entitled prior to that demotion, plus full scheduled wage and merit increases, thereafter at the calculated rates enjoyed by all of the other managers throughout the time period and paid by CDOSD; added commuting mileage costs to be calculated by determining the added miles required to drive to his current work location over that previously required to reach the Sewer Maintenance Operations Center, and to be paid at the business rate suggested in the Internal Revenue Code; and appropriate health, welfare and pension fund contribution and benefit obligations and increases and all other benefits, to which he might have been entitled, if any, for the time period in question.[43] Respondent will also pay Mr. Bertacchi interest in accordance with rates specified in the Internal Revenue Code §6621, from the dates of his demotion and his transfer until all of the provisions of this decision and order are in full compliance therewith.

4. **Expunge** Mr. Bertacchi's personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his protected activity and the ensuing investigation, disciplinary hearing, and demotion.

5. **Refrain** from giving directly or by implication any unfavorable or negative employment reference, or effecting any other adverse publication, including any suggestion of unsatisfactory performance or inability to give a favorable reference, relating to Complainant's demotion to any person or entity, orally or in writing or by any other means.

6. **Insure** that, in the event that Mr. Bertacchi applies for employment with other employers, no information is communicated in any manner to such prospective employers concerning the facts surrounding the demotion which gave rise to the present litigation; that, in the event that other employers have been provided such information, they immediately be notified of the present decision and order, and that all of the relevant communications are withdrawn.

7. **Provide** a letter to the appropriate offices of CDOSD and all other governmental agencies and subcontractors with whom Mr. Bertacchi had business contacts on behalf of CDOSD informing recipients that Mr. Bertacchi has been cleared of all allegations against him made in relation to his demotion in July 2003, and must include a copy of this recommended decision and order and Notice to Employees.

[43] No specific figures or total were offered into evidence at the hearing, so these calculations are left to the good faith calculations by the parties.

8. **Post** a notice consisting of copies of the attached order and Notice to Employees on all employee bulletin boards at its plants and offices for a minimum period of 90 days.

9. **Appoint** a "Point-of-Contact" management person to deal with CDOSD and other such prospective employers on the matters set forth herein.

10. **Restore** 120 hours in lost vacation time to Mr. Bertacchi, plus any other lost time, while involved with the various phases of the present litigation including all lost vacation time or pay for lost time due to such matters as attending depositions and preparation for this hearing, as well as the hearing itself.

11. **Compensate** Mr. Bertacchi for his attorneys' fees and costs of litigation.

A

THOMAS F. PHALEN, JR.
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, NW, Washington, DC 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, NW, Suite 400-North, Washington, DC 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, DC 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).

RECOMMENDED NOTICE TO EMPLOYEES

IN THE MATTER OF:
JEFFREY L. BERTACCHI V. CITY OF COLUMBUS – DIVISION OF SEWERAGE AND DRAINAGE
CASE NO. 2003-WPC-11

POSTED BY THE ORDER OF AN ADMINISTRATIVE LAW JUDGE OF THE UNITED STATES DEPARTMENT OF LABOR, AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which the parties had the opportunity to present evidence, the Administrative Review Board, U.S. Department of Labor, has found that the Respondent, City of Columbus – Division of Sewerage and Drainage (CDOSD), has violated the law in its treatment of Complainant, Jeffrey L. Bertacchi, and has ordered the posting of this notice.

Having found that Mr. Bertacchi's complaint to have merit in that CDOSD has violated the employee protective provisions of the Water Pollution Control Act, formerly known as the Clean Water Act (WPCA), and the implementing regulations appearing at 29 C.F.R. Part 24.1; and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Bertacchi whole, and to compensate Mr. Bertacchi for them within the provisions of the WPCA, therefore, it has been ordered that CDOSD take certain actions to abate the effects of those violations, concerning which it is directed that the following action be taken:

1. WE WILL cease and desist all conduct involving the above determined violations of the WPCA, to include all interference, restraint and coercion, and all discriminatory conduct toward Complainant Jeffrey L. Bertacchi for his protected activity under the WPCA;

2. WE WILL immediately reinstate Mr. Bertacchi to his former position as Industrial Waste Pretreatment Manager at his prior Sewer Maintenance Operations Center location, including reinstatement to the various committees which he was previously affiliated, or that are commensurate with the position of Industrial Waste Pretreatment Manager;

3. WE WILL immediately pay Mr. Bertacchi his full back pay for all time lost due to his change in position; to include back pay for the 5% difference in pay from the time of his demotion in July 2003 through his reinstatement; to include all other pay increases to which he may have been entitled, including the 4% merit increase for the time period immediately after his demotion to which he had already been informed that he was entitled prior to that demotion; to include full scheduled wage and merit increases, thereafter at the calculated rates enjoyed by all of the other managers throughout the time period and paid by CDOSD until all of the provisions of this decision and order are in full compliance therewith, plus appropriate health, welfare and pension fund contribution and benefit obligations

and increases and all other benefits, to which he might have been entitled, if any, for the time period in question;

5. WE WILL immediately restore 120 hours in lost vacation time to Mr. Bertacchi, plus any other lost time, while involved with the various phases of the present litigation including all lost vacation time or pay for lost time due to such matters as attending depositions and preparation for this hearing, as well as the hearing itself;

6. WE WILL immediately pay Mr. Bertacchi interest in accordance with rates specified in the Internal Revenue Code §6621, from the dates of his demotion and transfer until all of the provisions of this decision and order are in full compliance therewith;

7. WE WILL immediately pay Mr. Bertacchi the added commuting costs to be calculated by determining the added mileage required to drive to his current work location over that previously required to reach the Sewer Maintenance Operations Center, and to be paid at the business rate suggested in the Internal Revenue Code;

8. WE WILL immediately expunge Mr. Bertacchi's personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his protected activity under the WPCA;

9. WE WILL immediately insure that, in the event that Mr. Bertacchi applies for employment with other employers, no information is communicated in any manner to such prospective employers concerning the facts surrounding the demotion which gave rise to the present litigation, and that, in the event that other employers have been provided such information, they will immediately be notified of the present decision and order, and that all of the relevant communication will be withdrawn;

10 WE WILL appoint a "Point-of-Contact" management person to deal with CDOSD and other such prospective employers on the matters set forth herein;

11. WE WILL immediately address a letter to the appropriate offices of CDOSD and all other governmental agencies and subcontractors with whom Mr. Bertacchi had business contacts on behalf of CDOSD, which will state that Mr. Bertacchi has been cleared of all allegations against him made in relation to his demotion in July 2003, and will include a copy of this order and **Notice to Employees**;

12. WE WILL immediately post a notice consisting of copies of the attached order and **Notice to Employees** on all employee bulletin boards at its CDOSD wastewater treatment plants and offices for a minimum period of 90 days; and

13. WE WILL pay Mr. Bertacchi his attorneys' fees and costs of litigation.

APPROVED, this _____day of _____, 2005

City of Columbus -
Division of Sewerage and Drainage

APPENDIX A – Mr. Bertacchi's Letter to the Ohio EPA Board of Advisors

November 12, 2001

Ladies and Gentlemen of the Board:

It is with great regret that I must write this letter however, I believe the integrity of the Operator Certificate Program is of utmost important (sic).

I am specifically writing regarding an app1ication you received from a City of Columbus employee, Mr. Douglas Helton. Mr. Helton is currently licensed as a Class III Wastewater Works Operator and is Plant Manager of the Jackson Pike Wastewater Treatment Plant, 2104 Jackson Pike, Columbus, Ohio 43223.

Mr. Helton has been in responsible charge of the Jackson Pike facility for a number of years. His length of tenure is explicitly spelled out in his Class IV report. While I do not doubt Mr. Helton's tenure, I do take exception to his claims of knowledge and ability. I was asked to be a reference for Mr. Helton and am listed as such in his references list. I have reviewed Mr. Helton's application prior to writing this letter and take great exception to the way Mr. Helton has presented himself to the Advisory Board. Due to my misgivings about Mr. Helton's self-representations, I have not sent the requisite reference form to the Advisory Board. Instead, I have chosen to contest Mr. Helton's application with the following facts:

1) Mr. Helton is not the author of his application; a consulting engineering firm on contract to the City of Columbus prepared Mr. Helton's application and may be responsible for at least four (4) other applications in the process of being submitted for approval. I believe that one of the basic tenets of the Class IV application is to prove one's ability to accurately and concisely communicate via the written word.

2) Section 2 – Administration; Mr. Helton is indeed the Manager of the Jackson Pike Wastewater Treatment Plant however, the organizational chart included in this section is misleading. Several of the positions that are illustrated on the enclosed chart do not actually exist as titled. Case in point, the Chemist II in charge of the laboratory does not carry the working title of "Regulatory Compliance Process Manager". Other individuals have also had nebulous titles applied to their positions.

3) Section 5 – System; while Mr. Helton has the ability to operate the Jackson Pike facility, he has no working knowledge of the wastewater collection system. The City of Columbus' collection system is comprised of several CSO/SSO points, regulators, storm tanks and large trunk sewers for storage capacity during periods of high flows. Mr. Helton does not understand the complex system controls that protect both this facility and the public during inclement weather. He also is not cognizant of how the collection system upstream of his facility is affected by operational decisions made during

such periods. Mr. Helton views the operation of the collection system as a sewer maintenance function and not related to the operations of his specific facility.

4) Section 6 – Safety Program; Mr. Helton's stated involvement in the safety program is exaggerated. While Mr. Helton has managerial oversight of a safety technician within his facility, the Division of Sewerage & Drainage (DOSD) Safety Office administers the program. After some investigation I discovered that Mr. Helton was not the author of the current, or past, safety manual used by the DOSD.

5) Section 8 – Research; Mr. Helton does not discourage treatment related research. However, his involvement in that research is overstated. Mr. Helton was listed as a co-author of the paper included in his application as a courtesy. I have performed many research projects at both the Jackson Pike and Southerly Wastewater Treatment Plants and in both cases the Plant Managers regarded the research as necessary but bothersome. Mr. Helton relates that he oversaw the recent digester research that took place at Jackson Pike. That research was overseen by our Assistant Administrator with analysis and changes being conducted by the Process Analyst assigned to the DOSD Technical Support Staff.

6) Section 9 – Design; Mr. Helton has no relevant experience designing a facility or upgrades to a facility. Upgrades to his facility are generated by catastrophic failure of pertinent operating equipment and tankage. The DOSD General Engineering Section (GES) and the Technical Support Section (TS) are charged with designing and budgeting these upgrades. Often, design teams are created using the GES and TS staff members as well as operators from the affected area within the facility. Mr. Helton does maintain managerial oversight of his employees during this process.

As a final note I would like to address the last paragraph of the application guideline. It clearly states that the Part II application must be "in your own words". I have first hand knowledge that Mr. Helton's, and other applications from the City of Columbus, have been or will be prepared by a consulting engineering firm.

I want to thank the Advisory Board of Examiners for taking the time to accept and read this commentary regarding an applicant. I hope that the issues I have raised are taken into consideration during the review of the application. As stated at the beginning of this correspondence, it is with great regret that I must write this letter regarding a co-worker.

(JX 3)

APPENDIX B – "Failure to Practice Due Diligence" Defense

Mr. Selby's investigation concluded that while Complainant "honestly believed" the accusations contained in its letter were true, due to his failure to investigate their accuracy, his beliefs were not reasonable. To reach this conclusion, both Mr. Selby and Mr. Lendavic looked beyond the information known to Complainant and determined he had violated Work Rule 1 for dishonesty.

I have determined that Mr. Bertacchi's complaint was "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Thakur*, ALJ 98-WPC-5 at 5. Contrary to this rule, Respondent seems to have had disregarded Complainant's perception of the violations, as is evident from their failure to interview his witness, Mr. Roush. Furthermore, Respondent's argument that Complainant was required to thoroughly investigate the complaints he made in his 2001 letter to the Ohio EPA's Advisory Board is without merit. However, since Respondent is arguing that Complainant's belief was not reasonable, and so much of the hearing before me focused on this position, I find that there is some value in taking the time to review this argument. I note, however, that since it is Complainant's reasonable perception at issue in this claim, and most of Respondent's evidence was beyond Complainant's perception, Complainant's failure to discover this additional information is arguably irrelevant to the matter before the undersigned. *Id.* Furthermore, I find that a due diligence requirement would tend to undermine the purpose of the whistleblower provisions of the WPCA because it would require an employee to know that the alleged safety violations were true in order to insure protection under the Act. *See Oliver*, Sec'y 91-SWD-1 at 8 (the purpose of the whistleblower statutes is to encourage employees to come forward with complaints of health hazards so the remedial action may be taken).

Mr. Bertacchi's letter to the Ohio EPA identified six specific problem areas with Mr. Helton's Class IV plant operator's license application: 1) the application was not written in Mr. Helton's own words; 2) the organizational chart as presented is misleading because several of the listed positions do not exist; 3) Mr. Helton's knowledge of the wastewater collection system is limited to operating the facility, and he has no working knowledge of how the system actually functions; 4) Mr. Helton exaggerated his involvement in the safety program, and while he had managerial oversight, he was not the author of the safety manual; 5) Mr. Helton overstated his involvement in research; and 6) Mr. Helton has no relevant experience in designing or upgrading a facility, and in fact, upgrades to his facility were generated by catastrophic failure. While I have found that these complaints constitute two distinguishable instances of protected activity under the Act, and based Complainant's perception, these accusations were reasonable, in this appendix I will independently review each alleged violations to determine whether Complainant's failure to practice due diligence renders his complaints unreasoned.

Paragraph 1: In your own words

At the hearing, Mr. Helton was asked whether Ms. (Dunn) Donahue wrote any part of the Class IV application for him, to which he responded, "Absolutely not." (T 613). In fact, in regard to the truth of Mr. Bertacchi's accusation concerning authorship of the application, Mr.

Helton stated that the allegation was "hogwash." Furthermore, he claimed that he spent approximately 20 hours a week for 4 months or so working on the application, which was verified by Ms. (Dunn) Donahue and Mr. Tippery.

While I credit the amount of time that Mr. Helton claims that he devoted to the application, I find that the amount of time that Mr. Helton spent on his application is not determinative of whether the application was or was not "in your own words." More important than the amount of time Mr. Helton spent working on his application, what is relevant to this issue is the kind and degree of input that Ms. (Dunn) Donahue provided in preparation of the application.

Ms. (Dunn) Donahue testified that that she knew that the Class IV license application Guidance document required that the content be in the applicant's "own words." (T 555). She detailed that her approach was to type Mr. Helton's exact statements and dictation, and then she would send the document back to him with indented questions about matters that he should clarify. This type of assistance, she opined, was acceptable under the guidelines.

Mr. Tippery testified that he created the May 10, 2000 draft of the application, (CX 12), from a hard copy of Mr. Helton's 1997 submission, and handwritten changes supplied by Mr. Helton. This draft of Part 2 was used to begin preparation of what ultimately became Mr. Helton's November 2, 2001 application to the Ohio EPA's Advisory Board. (JX 2). Mr. Tippery stated that he was never asked to retype the 1997 application "cover to cover at any one time," (T 86), but instead, Mr. Helton would send him portions of the draft with changes marked, and Mr. Tippery would make those changes and forward the draft to Ms. (Dunn) Donahue. He further explained that he did not confer with Ms. (Dunn) Donahue on the changes she was making, nor was he responsible for preparing or coordinating Mr. Helton's final draft for submission.

Mr. Tippery also testified that he attended at least six meetings with Mr. Helton and Ms. (Dunn) Donahue, and while he did not routinely see Ms. (Dunn) Donahue's notes, on occasion he saw pages that contained both Ms. (Dunn) Donahue's and Mr. Helton's handwriting. He opined that these meetings were for the purpose of reaching an understanding of what Mr. Helton was trying to say in his application. Mr. Tippery further described how Ms. (Dunn) Donahue would sometimes go through a paragraph sentence by sentence and would point out inconsistencies in the application, stating what needed to be emphasized or not. He also noted that at the end of each meeting Ms. (Dunn) Donahue would summarize where they were in the process, what was going to happen next, what needed to be finished, and what sections needed to be written.

Finally, with regard to writing style, Mr. Tippery testified that he had told Ms. (Dunn) Donahue that Mr. Helton "REALLY likes your writing style." (T 107). He continued by adding that both he and Mr. Helton both adopted her writing style throughout the application writing process.

Ms. (Dunn) Donahue's testified that she provided editorial assistance in the form of grammar recommendations, and made suggestions for clarifying various sections by expanding

or shorten the discussions, writing lead paragraphs or sentences to introduce or explain the subject matter, and that he provide supportive data. (T 559-69). She, however, denied making "stylistic changes" or changes to the way he phrased portions of the application." (T 563). Yet, when asked whether she "ever" made "any changes to any of the materials in Mr. Helton's application *without having him review and approve those changes,*" she also answered "No." (Emphasis added).

Mr. Helton responded to Complainant's counsel's questions concerning his seeking assistance on the application as follows:

> **Q.** You weren't sure you could write your application by yourself to get your story across to the licensing board, correct ?
>
> **Mr. Helton:** Yes, that's correct. (T 651).
>
> * * * * *
>
> **Q.** And you needed Colleen Dunn's help because you would be unable to communicate the points you were trying to get across without her help, isn't that true?
>
> **Mr. Helton:** Yes, I'd say so. (T 653).
>
> * * * * *
>
> **Q.** Given your last testimony about using blunt sentences and your writing style often reflects the way you talk, could you dictate a paragraph, any of the paragraphs in here in the form they are in to Ms. Dunn on one try?
>
> **Mr. Helton:** Dictate without my notes? Probably not on one try. Not in this order anyway. I could get all the information out but not necessarily in this order. With my notes, I could give it like you see here. … (T 687).

While Ms. (Dunn) Donahue denies making any stylistic changes to Mr. Helton's application, considering the list of items she considered to be "editorial changes," I find this contention to be without merit. In fact, I find grammar and organization to be two of the most essential elements of style, and even if Mr. Helton added his own introductory sentences and paragraphs, based on Mr. Tippery's testimony, it is apparent that after the changes were made the new draft was sent back to Ms. (Dunn) Donahue for additional "editorial changes." I also find that Mr. Helton's testimony further emphasizes Ms. (Dunn) Donahue involvement, as he admits his inability to communicate his qualifications, or to even dictate a paragraph without the assistance of notes. Next, I conclude that when Ms. (Dunn) Donahue denied ever making any changes to Mr. Helton's application "without having him review and approve those changes," that she was not actually denying that she had made changes, but was merely affirming that he

had approved all changes. Finally, I note that the undersigned previously found Mr. Bertacchi's testimony to be more credible than Mr. Helton's. As part of that determination I identified a notable discomfort in Mr. Helton's demeanor and presentation, which I am convinced is symptomatic of an inability to articulately represent himself in a clear and concise manner. As confirmed by Mr. Bertacchi, Mr. Helton appears to have the technical skill to operate a water treatment facility, but what he is lacking is the education, or more precisely, the communication skills required to express his thoughts. The undersigned recognized this deficiency by observing Mr. Helton's testimony. Similarly, Mr. Bertacchi testified that he had previously seen documents authored by Mr. Helton, and knew that the final draft of the Class IV application was not in Mr. Helton's own words. In my judgment, the apparent discomfort during Mr. Helton's testimony demonstrates a definite discomfort with communicating his thoughts, and I find it reasonable that this would translate to his writing ability. Therefore, I find that Mr. Helton's inability to present himself verbally is more than likely reflected in his writing ability.

Based on the testimony of Mr. Helton, Ms. (Dunn) Donahue, and Mr. Tippery, as well as my own observations, I find it reasonable to believe that Mr. Helton lacked the ability to communicate his thoughts and qualifications in a Class IV application without the Ms. (Dunn) Donahue's assistance. I further find that the "editorial changes" she admitted to making most likely rose to the level of major stylistic changes.

Turning to substantive changes, Ms. (Dunn) Donahue's impact is readily apparent. An example of this can be seen in the Thermophilic digestion discussion. (CX 4). In the first paragraph Mr. Helton described "physical changes to our digester system and the reason why [it] was we were having some foaming problems." To correct these problems, he stated "So we put in a sight glass so we could see the elevations of our sludge levels in the digesters and get some sampling off the sight glass…[to see if they were] having stratification or grease build up in the top of the digesters and things of that nature." (CX 4 at 51). In response, Ms. (Dunn) Donahue asked, "Did you put the sight glass in all of the digesters or just one representative?" Mr. Helton responded,

> Just one as a representative…. We could confirm because all of our analyses said our digesters were fine …. [but we could not tell when they were] on the verge of getting … upset because of the uniqueness of the [new geodesic dome] Dyster cover."

Ms. (Dunn) Donahue responded by asking:

> What do you define as an upset? Is that when you consider gas entraining? Because I know that you've had some Dyster covers "blow out," and you've had them pop open in some cases. But what do you call an upset?

Mr. Helton responded,

> "An upset is when the digesters start to get sick and they're not reducing solids and they're pH is changing." It's then "extremely difficult" to get them back, taking "significant" time to do so. In "our old digesters, you were able to see

> the foaming," and "you could hose it up." It "wouldn't get entrained into the sludge so you could keep it moving. Now, you have this geodesic dome over this [the Dystor cover] that doesn't allow the foam to relieve itself." The specific gravity of the sludge is changed by the foam so it does not flow freely. The build up gets "entrained into the gas system" and hinders the boilers, the incinerator burners, and the sludge of the digesters, which then affects the pumps and causes them to fail, since they can only pump the sludge at a specific gravity. The conditions leading to the pump failures are the first warnings, but are not upsets, yet. The Dystor cover [geodesic dome] blowing out or pushing out like a balloon is the first sign, and by "touching it and pushing it in," plus their experience, these actions and conditions would tell them whether it was foaming. He added that a "small difference" in the foaming, however, can generate more foaming, a change in the specific gravity of the sludge flow, a slow down in the pumps leading to their failure, and a resulting change lowering the temperature of the sludge necessary to maintain heat into the digesters for their operation. This is an "upset."

Ms. (Dunn) Donahue then asked,

> To clarify, because the big push now to go to thermophilic is because you supposedly get a Class A sludge. And is more of a regulatory push. But you guys actually did it because the foaming issues ended up with possible damage to the equipment, upset of the entire process, something that's pretty significant and much more than "we'd like to have sludge that we could do more things with."

(*Ibid.*) Mr. Helton responded:

> "Yes", stating that there was an "opportunity", and "enough history … on thermophilic sludge … to know that it mitigates … some foaming …. [and] … to put more sludge into the same capacity digester you had before." The reasons for trying it are, "to mitigate some … foaming physically and … potential foaming", allowing "more capacity with the same amount of digesters."

It is apparent to the undersigned that Ms. (Dunn) Donahue's questions about the digester contained information that had not been used in the prior text draft. For instance, she was the first to mention gas entraining and the advantages of Class A sludge. These questions suggest that Ms. (Dunn) Donahue had done a substantial amount of her own research and writing concerning the digester. At the very least, it appears that she has prodded the development of Mr. Helton's application by means of her own knowledge and understanding of the digester process, drastically furthering what he had initially said on the topic.

I find Ms. (Dunn) Donahue's questions arguably introduced substantive rather than procedural additions into Mr. Helton's draft. While it is ultimately a determination for the Ohio EPA Board of Advisors whether this type of assistance is permissible under the guidelines, I am

of the opinion that Mr. Bertacchi had reasonable cause to believe that her actions either exceeded the permissible participation requirement, or come very close to the line.

In summary, while I find credible Mr. Helton's assertion that he spent a great deal of time preparing his Class IV application, of importance in this complaint is the type and degree of assistance provided by Ms. (Dunn) Donahue. Based on the evidence presented at hearing, I find that Ms. (Dunn) Donahue provided Mr. Helton a significant amount of editorial and substantive assistance in the preparation of the application. Again, it is not for the undersigned to determine whether this rises to the level of impermissible assistance under the Class IV guidelines, but I do find that the evidence is sufficient to establish a "reasonable belief" that Mr. (Dunn) Donahue exceeded the "in your own words" restriction. Therefore, I find that even if Mr. Bertacchi had performed the due diligence Respondent claims was required under Work Rule 1, the amount of work performed by Ms. (Dunn) Donahue was a substantial enough basis for Complainant to have reasonably believed that the application was not in Mr. Helton's own words.

Paragraph 2: Incorrect Position Titles

The second paragraph of Mr. Bertacchi's letter to the Advisory Board concerned Mr. Helton's administration of Jackson Pike Waste Water Treatment Plant, and the accuracy of position titles listed on the application. Mr. Bertacchi claimed that several titles included in the organizational chart were misleading. Specifically, he challenged the existence of several of the positions on the chart, and noted that other positions were given "nebulous titles." In support of this accusation, Mr. Bertacchi explained that while Mr. Hickman was in charge of the laboratory, his title was "Chemist II," not "Regulatory Compliance Process Manager," and that he had worked very close with Mr. Hickman, and knew that he had not carried that working title in all the time that they had worked together, nor had he ever heard anybody refer to Mr. Hickman as a Regulatory Compliance Process Manager. In support, Mr. Roush testified that he was not aware of anybody that referred to Mr. Hickman as Regulatory Compliance Processing Manager, and that the Regulatory Compliance Processing Manager for the Jackson plant would be the plant manager.

Mr. Helton denied that the Mr. Hickman's title was misleading. Mr. Hickman confirmed that Mr. Hickman was commonly known as a "Chemist II," but he contended that Mr. Hickman's actual title, "Regulatory Compliance Process Manager," was not created for the application, but to reflect the managerial responsibilities of the position. Similarly, Mr. Helton stated that Jeff Hall's title, "Process Analyst Flow Supervisor II," was known throughout the plant as the "Solids Handling Supervisor" or the "Wet Stream Supervisor." (T 623).

Gary Hickman, who had been employed at the Jackson plant for nearly 20 years, testified that he was a Chemist II responsible for managing a laboratory and supervising two Chemist Is. (T 779-780). When asked about the "Regulatory Compliance Manager" title that appeared on Part II of Mr. Helton's Class IV application, Mr. Hickman explained that this was a "working title," as was the title "Chemist/Regulatory Compliance Manager," which was adopted around 1999 to "provide a more accurate description of the job duties [he] was performing at the facility." (T 786-787).

Had Mr. Bertacchi asked Mr. Hickman's title directly, he may have found out that the "Regulatory Compliance Process Manager" title was correct. It is just as possible, as demonstrated at the hearing, that Mr. Hickman would have claimed to be a "Chemist II," or even a "Chemist/Regulatory Compliance Manager." Noting that Mr. Bertacchi conferred with Mr. Roush concerning Mr. Hickman's title, and based on Mr. Hickman's claim that his "working title" was "Chemist II," there is no guarantee that further due diligence would have rendered completely accurate results.

I find that job titles given on Mr. Helton's organizational chart differed enough from the rank and file "floor" titles for Mr. Bertacchi to believe Mr. Helton's application was misleading. Furthermore, while more in-depth inquiries concerning the accuracy of his accusations may have revealed that the titles were correct, even if Mr. Bertacchi had performed the due diligence Respondent claims was required under Work Rule 1, based on the multiple titles Respondent uses to refer to the same positions, there is no guarantee Mr. Bertacchi would have arrived at the right answer. Therefore, I conclude that there was a substantial enough basis for Complainant to have reasonably believed that the "Regulatory Compliance Process Manager" title was misleading.

Paragraph 3 : Knowledge of the Water Collection System

Paragraph three of Mr. Bertacchi's letter alleged that Mr. Helton did not have the extent of working knowledge of the waste water collection system that he claimed in Section 5 of Mr. Helton's application. Upon review of the October 24, 2003 draft, it is apparent to the undersigned that Mr. Helton was relying on his supervision over the employees that possessed the detailed knowledge necessary to control and operate the wastewater collection system, while Mr. Bertacchi emphasized the limits of Mr. Helton's training and knowledge to actually perform the detailed tasks that were involved in the plant's operation. Section 5 of Part II of Mr. Helton's application, which was submitted on November 2, 2003, differed from the draft reviewed by Complainant, in that Mr. Helton added, "… although I am not directly involved in the management of the collection system." According to Mr. Bertacchi, this new language corrected his objection, and that based on this addition, the final version of Section 5 was an "accurate and true" portrayal of Mr. Helton's lack of direct involvement the management of that system. (T 493).

Concerning the accuracy of the draft Section 5 reviewed by Mr. Bertacchi, I find that the language arguably supports the positions of both Mr. Helton and Mr. Bertacchi. But I also find that the disclaimer that was added to the final submission, is not only a substantial clarification, but also validates Mr. Bertacchi's criticism of the draft language.

I conclude that substantial evidence supports Complainant's reasonable belief that he was reviewing the final draft, and that Mr. Helton did not have the extent of working knowledge of the waste water collection system that he claimed. On the other hand, I find that if Mr. Bertacchi had performed the additional due diligence that Respondent claims is required under Work Rule 1; he would have discovered Mr. Helton's corrective language. I note, however, that there was no reason for Mr. Bertacchi to believe that the draft he reviewed was not the final application, nor did Mr. Helton notify or provide an updated draft for his review. Therefore, I find that based on Complainant's review of the October 24, 2003 draft, his beliefs about the inaccuracy was reasonable.

Paragraph 4: Authorship of the Safety Manual

Mr. Bertacchi's letter alleged that Mr. Helton's claimed involvement in the development of a safety manual was "exaggerated." Specifically, Mr. Bertacchi alleged that while Mr. Helton he had managerial oversight of the safety technicians within the facility, he was not involved in the manual's authorship. In support, Mr. Bertacchi testified that there was one Safety Manual for the division, and that the Safety Manager, Robert Miller, was responsible for its preparation.

Mr. Bertacchi testified that he had discussions with Bob Roush and Bob Miller who told him that Mr. Helton was not the author of the Safety Manual. Mr. Miller testified that he was Safety Program Manager in CDOSD, and had responsibilities involving the manual as part of the Safety Program. In addition, Mr. Miller testified that Mr. Helton was not one of the authors of the manual. He went on to state, "I originally authored the manual." (T 797).

I find that Mr. Helton had managerial oversight of the safety technicians within his facility, and may have provided statistical and other substantive information that was used by the authors in preparation of the safety manual. In addition, contrary to the claims in Mr. Helton's application,[44] I find that he did not participate in the authorship of the manual. Furthermore, I find that Mr. Helton's involvement was only in the broadest, contributory sense of the term, and that his application was, thus, "exaggerated." Finally, I find that by talking to Mr. Roush and Mr. Miller, Mr. Bertacchi had performed the due diligence Respondent argues was required under Work Rule 1. Therefore, I conclude that Mr. Bertacchi's belief in the "exaggerated" claims of participation and authorship were reasonable, and that he sufficiently investigated the veracity of this accusation.

Paragraph 5: Involvement in Digester Research

Mr. Bertacchi alleged that Mr. Helton "overstated" his claim that he oversaw the recent digester research at the Jackson plant. He explained that the research was actually overseen by the Assistant Administrator and the analysis and changes were performed by the Process Analyst assigned to the CDOSD technical support staff. (JX 3, p. 2). Mr. Bertacchi concluded that while the people who conducted these functions may have worked for Mr. Helton, it was improper for him to take credit for their research. Furthermore, based on Mr. Bertacchi's personal involvement in many of the research projects at both the Jackson and Southerly plants, he opined that even though Mr. Helton did not discourage treatment related research, Mr. Helton considered such research to be "necessary but bothersome." While Mr. Helton disagreed with Mr. Bertacchi's assessment, his testimony included only a description of functions performed, but did not mention his specific role in the process.

Due to Mr. Bertacchi's personal involvement in the area of research, and the fact that Mr. Helton provided no concrete evidence to dispute Mr. Bertacchi's accusations, I find that substantial evidence exists for Mr. Bertacchi to characterize Mr. Helton's claimed involvement

[44] "I was one of the authors that proactively developed the original safety manual in 1993, a majority of which remains unchanged today." (JX 2: Par. 2, p. 83, Section 6, Safety Program; and Ex. 6-1).

in the digester research as "overstated." Also, based on Mr. Bertacchi's personal involvement in this area, I find that he had sufficient facts on which to base his opinion without the additional investigation that Respondent alleges was required under Work Rule 1.

Paragraph 6: Design Experience and Upgrades by Catastrophic Failure

Mr. Bertacchi alleged that GES and TSS were charged with designing and budgeting upgrades, and that Mr. Helton had "no relevant experience designing a facility or upgrades to a facility." He explained that Mr. Helton merely maintained general, managerial oversight of the GES and TSS employees during this process, but had no actual hands-on involvement with it. Also, Mr. Bertacchi alleged that upgrades to Mr. Helton's facility were generated by catastrophic failure of pertinent operating equipment and tankage. Mr. Bertacchi claimed that he based these allegations on his direct involvement with the design and the budgetary process, and personal knowledge of facts concerning the catastrophic failure involving the land application sludge holding tank and the digester lids. (T 231).

Mr. Helton claimed to have been involved in facility and design meetings regarding the design of the Jackson plant. (T 634-636). He also alleged involvement with GES to insure completion at the 30%, 60%, 90% stages. Turning to upgrades, Mr. Helton disagreed with Mr. Bertacchi's description of improperly performed functions that might have either constituted "catastrophic failures" or resulted in potential "catastrophic failures." He further asserted that there were no "catastrophic failures" or potential "catastrophic failures."

It is not possible for the undersigned to resolve whether Mr. Bertacchi's or Mr. Helton's diagnosis of "catastrophic failures" is more accurate. Such a decision must be left up to the experts at the Ohio EPA. For now it is enough to note that two highly qualified wastewater employees disagree on this issue. Also, I find that based on Mr. Bertacchi's hands-on familiarity with the General Engineering Reports, no additional diligence was necessary for him to reach his reasoned belief.

Turning to Mr. Bertacchi's objection to Mr. Helton's claims of experience in designing and upgrading a facility, I find nothing in the evidence supporting a conclusion that Mr. Helton held more than a managerial role in these tasks. As a result, while it may be technically accurate to say that he played a role in designing and upgrading a facility, I find it equally accurate to conclude that he has no relevant facility design and upgrade experience. Finally, due to Mr. Bertacchi's hands-on experience in this area, I find his belief to be reasonable, and see no need for additional diligence to reach his conclusion.

Conclusion

Based on the evidence presented at the hearing, I find that all of the challenges Mr. Bertacchi made to Mr. Helton's Class IV application were formulated on a reasonable basis. This being said, I do not necessarily find Mr. Helton's claims to be inaccurate. For instance, in paragraphs 1, 4, 5, and 6, there are legitimate differences of opinion to be determined by the Ohio EPA's Advisory Board. Also, paragraphs 3, 4, 5, and 6 present areas where Mr. Helton claimed knowledge and experience, but based on the evidence, it appears that he did little more

than manage those with the knowledge and experience. As a result, I can clearly see how Mr. Bertacchi could reasonably believe Mr. Helton's claims to be half-truths, exaggerations, and overstatements.

Had Mr. Bertacchi practiced the additional diligence Respondent required under Work Rule 1, and uncovered all of the evidence that was presented at hearing, the only accusations that might fall from reason are those found in paragraphs 2 and 3. The WPCA, however, does not require such precision. As a result, I find that Mr. Bertacchi's allegations, based on his perception, are reasonable, and that Respondent's after-the-fact determinations of inaccuracy are irrelevant to the whistleblower provisions of the Act. *Keene,* ARB 95-ERA-4 at 7.