U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 13 February 2006

Case No.: 2005 SDW 00002

In the Matter of

BERNICE JOHNSON,
Complainant
v.

EG&G DEFENSE MATERIALS, INC.,
Respondent

Appearances:
Mick G. Harrison, Esq., for Complainant
Lois A. Baar, Esq., for Respondent

Before:
RICHARD E. HUDDLESTON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above action arises upon a complaint filed on December 2, 2004, by Bernice Johnson versus EG&G Defense Materials Inc., at Tooele Chemical Agent Disposal Facility pursuant to the *Solid Waste Disposal Act*, 42 USC § 6971 (a/k/a *Resource Conservation & Recovery Act*) ("RCRA"). The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.[1]

This claim is brought by the complainant, Bernice Johnson (hereinafter referred to as "Complainant") against her employer, EG&G Defense Materials, Inc. (hereinafter referred to as "EG&G" or "Respondent.") Complainant alleges that EG&G has taken adverse employment actions against her in retaliation for her engagement in protected activities.

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[1] It is again noted that when this matter was docketed with the Office of Administrative Law Judges, it included an assertion of whistleblower protection under a number of other environmental acts (now dismissed). The first such Act listed was the Safe Drinking Water Act ("SDWA"), 42 USC §300j-9(i). As a result the case number assigned to this case carries the designation of "SDW" instead of "SWD."

On February 7, 2005, Respondent filed a motion to dismiss the complaint. On March 18, 2005, an order was issued granting in part and denying in part, the Respondent's motion to dismiss. The order dismissed Complainant's whistleblower claims under several environmental whistleblower statutes. However, Respondent's motion to dismiss Complainant's whistleblower complaint under RCRA was denied by the March 18, 2005 order.

On July 11, 2005, Respondent filed a second motion to dismiss Complainant's whistleblower complaint under RCRA. This second motion to dismiss was denied by an order dated August 3, 2005.

The formal hearing in this matter was held on August 24 - 26, 2005, in Salt Lake City, Utah.[2] During this hearing, both parties were given the opportunity to offer testimony, documentary evidence, and oral arguments. The record was left open for ten days for the submission of Complainant's additional documents. (TR. at 674). The Complainant then rested her case (TR. 675). The Respondent indicated that it had no witnesses to call, but indicated that a motion to dismiss would be filed. Therefore, the Respondent was directed to file their motion to dismiss by October 17, 2005, with a reply to that motion by November 14, 2005. (TR. 679-680). The parties were then advised that, depending on the outcome of the motion to dismiss, an additional briefing schedule would be issued.

Following the hearing, on October 17, 2005, Respondent filed a Memorandum in Support of Post-trial Motion to Dismiss Complainant's Case. Although the Complainant had been granted until November 14, 2005, to file a response to the motion, Complainant did not file a response to the motion to dismiss.

DISCUSSION OF LAW AND FACTS

Background

Respondent, EG&G is the operator of the Toole Chemical Demilitarization Facility (TOCDF), a chemical weapons facility under a contract with the Army. (TR. at 275). Complainant, Bernice Johnson, was employed by Respondent and had duties that included taking inventory of the chemical agent monitors and providing property, including furniture, as needed by the TOCDF staff on request. Complainant was employed by Respondent for approximately eleven and a half years. (TR. at 539). At the time of her termination, Complainant was employed by Respondent as a Disposition/Equipment Specialist in the Property Department. "Her duties as Equipment Specialist included performing warehousing, inventory control and property management." (Original Complaint of Discrimination at 2). Complainant's employment responsibilities also included "tracking property, including chemical agent monitors, and providing property, including furniture, needed by TOCDF staff on request as appropriate." *Id.*

[2] RX – Respondent's exhibit; CX- Complainant's exhibit; and TR – Transcript.

As a part of Complainant's duties as a disposition equipment specialist in the property department, she was assigned to work on the FY02, 03 and 04 asset inventory, which included an inventory on the ACAMS units at the site.[3] (TR. at 271). Complainant's supervisor was Chris Smith, the property administrator. (TR. at 543-44, 551). An ACAMS unit samples and detects chemical agent at the site. (TR. at 137). The ACAMS inventory assigned to Complainant was the first one of its kind at the facility. (TR. at 303).

Mr. Smith described the procedure that was supposed to be followed upon receipt of a shipment of ACAMS:

> The initial inspection, which is open the box, make sure the unit is in tact and matches the PO or transfer document, tagging the unit, which is placing the bar code, the asset bar code on the unit, and possibly even identifying the EG&G part number, if the item is to go in stock in the warehouse.

(TR. at 285). Mr. Smith noted that the Receiving Department is responsible for these initial tasks. (TR. at 286). Mr. Smith further testified that it would be a failure of the Receiving Department if "a number of ACAMS had not been tracked [and . . .] had not have a bar code put on them the first day they were received." (TR. at 286). Mr. Smith described the cause of the bar code problems a "process deficiency." (TR. at 289).

Mr. Smith testified that the Army imposes certain conditions on Respondent for how government property is handled. (TR. at 275). Mr. Smith noted that the procedures are guided by the Federal Acquisition Regulation. (TR. at 276). Respondent had lost its Army approval to manage property under the Army contract from March to May of 2003. (TR. at 276).

Randy Roten testified that Battelle, a subcontractor of Respondent, is responsible for agent monitoring at the facility, including proper operation of the ACAMS units. As a part of the oversight, Battelle "tracks and trends" ACAMS systems[4], performs preventative maintenance and repairs, and checks them everyday by "challenging them." (TR. at 183.) The Monitoring department is required to operate and track the ACAMS in compliance with the RCRA permit. (TR. at 184-5). Mr. Roten acknowledged that there "was an incident at TOCDF within the last one or two years where [. . .] Battelle had determined that one ore more employees had actually tampered with the agent gate on one or more ACAMS." (TR. at 168). However, Mr. Roten testified that there was no relation between any this incident or tracking or identifying what the source of which ACAMS alarmed and the Property Division bar codes. (TR. at 182).

Complainant testified that in the course of taking the physical inventory for the Property Department, she found 162 ACAMS units that did not have Property Department bar codes and

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[3] Mr. Smith explained that Complainant was assigned the FY02 asset inventory, "which then led to FY03 and ultimately FY04." (TR. at 270).

[4] The Monitoring Department uses the ACAMS station number and the ACAMS serial number to "track and trend" the ACAMS units. TR. at 146-7, 159, 178, 182, 186, 529). Notably, the RCRA permit specifically uses the station numbers and serial numbers of the ACAMS units. (TR. at 158, 201, 203).

were not in the Property Department data base. (TR. at 552-3). Complainant further testified that she believed that she placed a bar code sticker on approximately eight ACAMS units for which bar codes had been previously been issued. (TR. at 568).

Complainant testified that she initially attempted to inform her supervisor, Chris Smith, of these discrepancies in September or October of 2004. Specifically, Complainant testified:

> I said, "Chris, we need to talk about the – about the inventory on the ACAMS." I think that's what I said. "Chris, I need to talk to you about these ACAMS."
>
> [. . .]
>
> I believe he said, "I'll get back with you, I've got to go – go to a meeting," I think it was, "I need to go to a meeting, I'll get back with you," or something like that.
>
> [. . .]
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> I think it was approximately probably towards to the end of the day, between like, I think it was 2:30 or 3 and everything had quieted down.
>
> I mean during the day, it's constantly busy because I remember when I was going, I was coming back from the job site and then I got all my paperwork kind of organized.
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> And I don't have a desk down on site, so I'm carrying about two to three clipboards with me and trying to figure out, you know what's the most priority inventory that I was doing which was the ACAMS.
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> And then I said to myself, "I need to talk to Chris about these, inventory on the ACAMS."
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> And I says, "Chris, I need to talk to you about these." And – and again he says, "Well, I'll get back with you," or, "Give me a minute," or "I got a – phone calls or emails," or the phone starts ringing. He answers the phone or his cellular phone.
>
> So I know he's a very busy person, too, so everybody's constantly busy, our whole department. Our phones is ringing off the hook all the time.

(TR. at 618-20). Complainant testified that she again attempted to approach Chris Smith about the inventory approximately two to three weeks prior to her termination. Complainant recalled that she stated, "I want to talk to you about these ACAMS [. . .] And there's some discrepancy that I found that is bothering me. I'm really concerned about them." (TR. at 621). Complainant testified to Mr. Smith's response on this occasion:

> He says, "Oh, I'll get back to you," or, you know, "I'm going to a meeting." That's all he said or that's how much I can remember.

(TR. at 621-2). Complainant testified that there were other occasions on which she tried to talk to Mr. Smith:

> It was basically in the afternoons sometimes, you know, before quitting time about – at that time, we get off work at 3:30 so it had to be between, I would say approximately 2:30 and 3:30 or something like that.

(TR. at 622). Complainant indicated that Mr. Smith never had time for any discussion regarding the inventory. (TR. at 620).

In the following interchange during the hearing, Complainant was asked directly by her attorney who she informed about the discrepancies she found in the inventory:

> Q: Okay. And I want you to tell the court who, if anyone, you ever told about finding 162 or a number of ACAMS that did not have the bar codes and were not in the data base. Who did you ever tell about that information?
>
> A: Nobody.
>
> Q: You never verbally discussed it with anyone?
>
> A: No.
>
> Q: Okay. Now would Mr. Smith have had any way of knowing that you made these findings, even though you didn't speak to him about your knowledge?
>
> A: That I don't know.

(TR. at 623-4).

Upon further questioning, Complainant opined that the ACAMS inventory log would reflect her findings of 162 ACAMS not have bar codes or not being in the data base.[5] (TR. at 624-5). Mr. Smith testified that on or about October 27, he examined some documents on Complainant's desk that included some inventory work. (TR. at 425). Mr. Smith noted that Complainant was not present when he reviewed these documents and explained, "It was after hours when I had the time to sit down and actually look at the documents." (TR. at 322).

Mr. Smith acknowledged that Complainant informed him that some of the ACAMS were assigned two bar codes. (TR. at 419). However, Mr. Smith noted that this was done merely in passing, and that Complainant did not articulate a safety or environmental concern as a result of

[5] In describing the equipment log, Complainant testified:

> This is the equipment log that I wrote down the bar codes and the description and the year of the manufacturer, factory year and the manufacturer, the models, and the model number which is the ACAMS. And then I wrote down the ACAMS serial number.

(TR. at 559).

this double tagging. (TR. at 420, 423). Mr. Smith testified that he responded to Complainant that he "needed to review the package before we did anything, any more with that project." (TR. at 420). Mr. Smith articulated his concerns with the double tagging as potentially causing problems with the end of the year reporting. (TR. at 420). Mr. Smith later noted that he initially learned that more than one bar code had been assigned to various units on October 27 when he looked at some documents on Complainant's desk. (TR. at 452). He testified he was not sure of the date in which Complainant spoke with him about the issue. (TR. at 452).

After Mr. Smith learned of the double tagging, he drafted a "Performance Progress Evaluation" of Complainant, which was completed subsequent to Complainant's October 7, 2004 evaluation. This document noted:

> Multiple ACAMS were assigned asset tags without verification that the original asset tag may have fell off the units. A cross check of the serial numbers in the Property data base was not completed prior to assigned creating ten duplicate asset tags. On October 20th, 2004, you went to the site and only removed six of the duplicated asset tags.

(CX 37). Mr. Smith noted he was prompted to draft this document after he discovered that there were multiple tags assigned to some of the ACAMS. (TR. at 419).

Complainant was asked why she was concerned about the discrepancies she found in the inventory:

> I feel that it's so important to recognize these numbers, there's accountability for our property. And it's very critical to me because I'm the person responsible, performing the ACAMS.

(TR. at 573). Complainant noted that she was "very curious" as to why these 162 wasn't accounted for at the time." (TR. at 575). Complainant further stated:

> My biggest concern was these inventories. I know how critical it is. And just like these six pages, to me, performing inventory is so important because these seven or sic pages consist of different locations.

(TR. at 622).

Complainant was terminated on November 2, 2004. (TR. at 562). Mr. Smith testified that Complainant had some performance issues, and had received several "below standard" performance appraisals prior to her termination. (TR. at 415). Mr. Smith testified that the reason for Complainant's performance was "a substandard job performance." (TR. at 421).

Respondent's Monitoring Department does not use the Property Department government bar codes for any tracking, identifying or locating ACAMS units. (TR. at 146, 201, 510, 529-30,

423)[6]. Randy Roten testified that the Property Department's "accountability system for the bar codes doesn't affect how [the Monitoring Department] operate[s] the ACAMS." (TR. at 168). Jeff Jolley specifically reaffirmed that "[t]he bar code is only for the Property's inventory." (TR. at 525). Ryan Russell and Mr. Smith both testified that discrepancies in how the Property Department is tracking its inventory of ACAMS units would not mean that air monitors were missing from the system that is used to prevent the release of a chemical agent.[7] (TR. at 158, 421). Mr. Russell stated specifically:

> In our RCRA permit, in our state document we don't use bar codes for tracking purposes. We use station numbers and serial numbers of the ACAMS. That's what our whole RCRA permit is based on. All of our tracking and trending is done through that. We don't associate bar codes for – nobody in our department even knows what bar codes are.

(TR. at 158)

Mr. Smith, Mr. Roten, Mr. Jolley and Mr. Russell each testified that if the Property Department locates ACAMS units that are not listed it their database is not an issue related to the RCRA permit. (TR. at 159, 201, 203, 530, 531, 535, 422.) These men additionally testified that a discrepancy in the Property Department database does not raise an environmental issue of any kind. (TR. at 159, 204, 536, 421-4). Mr. Smith noted that his only concern about the difference between what is in the Property Database and what is found in a physical inventory was a cost reporting concern. (TR. at 423.)

Analysis

As discussed above, Respondent filed a motion to dismiss prior to the hearing which was denied on August 3, 2005. Respondent's motion was renewed at the conclusion of the Complainant's evidence which coincided with the conclusion of the hearing. (TR. at 675). In its post-hearing brief supporting this motion, Respondent argued that this complaint should be dismissed because Complainant has not established by a preponderance of the evidence that she engaged in protected activity. Given the timing of the Respondent's motion to dismiss at the conclusion of Complainant's presentation of evidence, I will treat it as a motion for judgment as a matter of law. The rules governing hearings in whistleblower cases contain no specific standards for granting a motion for judgment as a matter of law. See 29 C.F.R. Parts 18 and 24 (2005). It is therefore appropriate to apply Fed. R. Civ. P. 50, the Federal Rule of Civil Procedure governing motions for judgment as a matter of law. Fed. R. Civ. P. 50(a)(1) provides:

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[6] The RCRA permit is the "governing document" for the Monitoring department. (TR. at 185).

[7] Ryan Russell is the Monitoring operations supervisor and runs the four monitoring teams that control ACAMS operations at the plant. (TR. at 136-7). Randy Roten in the TOCDF Laundry Manager. This position involves monitoring for chemical warfare agent, which includes the ACAMS instruments. (TR. at 165). Jeff Jolley is the Monitoring operations coordinator. (TR. at 488).

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

Id. A "moving party is 'entitled to a judgment as a matter of law'" when "the nonmoving party has failed to make a sufficient showing of an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Liberty Lobby, In*., 477 U.S. 242, 323 (1986).

The employee protection provisions of the various environmental acts prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146 at 14, 1988-SWD-00002 (ARB Feb. 28, 2003). To prevail on a complaint of unlawful discrimination under these environmental retaliation statutes, a complainant first must establish a *prima facie* case, thus raising an inference of unlawful discrimination. *Id.* at 15. A complainant meets this burden by showing that (1) the employer is subject to the applicable retaliation statues, (2) that the complainant engaged in activity protected under the statutes of which the employer was aware, (3) that she suffered adverse employment action, and (4) that a nexus existed between the protected activity and the adverse action. *Id.*[8] Once the complainant establishes a *prima facie* case, then the respondent has the burden of producing evidence that the adverse action was motivated by legitimate, non-discriminatory reasons. *Id.* If the respondent is successful, the complainant, as the party bearing the ultimate burden of persuasion, must then show that the proffered reason was not the true reason, but a pretext for retaliation. *Id.*

As stated above, to prevail in this case brought under the environmental whistleblower provisions, Complainant will have to prove by a preponderance of the evidence that she engaged in activity protected by RCRA. The Secretary, U.S. Department of Labor, ("Secretary") has broadly defined protected activity as a report of an act, which the complainant reasonably believes is a violation of the subject statute. The standard for determining whether a complainant's belief is reasonable involves an objective assessment and the allegation need not be ultimately substantiated. *Minard v. Nerco Delamar Co*., 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8. The alleged act must at least "touch on" the subject matter of the related statue. *Nathaniel v. Westinghouse Hanford Co*., 91 SWD 2 (Sec'y Feb. 1, 1995), slip op. at 8-9; and *Dodd v. Polsar Latex*, 88 SWD 4 (Sec'y Sept. 22, 1994). Making a complaint or communicating a concern to the employer is thereby a fundamental premise of protected activity.

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[8] RCRA, the environmental act at issue in the present case, defines protected activity:

> 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 Act or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act or of any applicable implementation plan.

42 USC § 7001(a).

In the present case, it was not clear which acts Complainant alleges are her protected activity. In her previous "Response in Opposition Respondent's Motion to Dismiss," dated March 8, 2005, Complainant had alleged that her protected activities included "reporting to her supervisors discrepancies she found regarding how chemical agent air monitors (called ACAMS) were or were not being tracked and handled, including that bar codes used to track each ACAMS appeared to have been switched in some cases." Response. at 3. However, Complainant has failed to present a legally sufficient evidentiary basis supporting a finding that she actually engaged in this protected activity. As such, I find as a matter of law that she did not, and thus has failed to establish her *prima facie* case.

To begin, there is no evidence that Complainant ever made a complaint or communicated her concerns about her findings in the inventory, and thus fails to establish that she engaged in protected activity. Complainant clearly testified that she told "nobody" about finding a number of ACAMS units at the EG&G plant that were not in the Property Department database:

> Q: Okay. And I want you to tell the court who, if anyone, you ever told about finding 162 or a number of ACAMS that did not have the bar codes and were not in the data base. Who did you ever tell about that information?
>
> A: Nobody.
>
> Q: You never verbally discussed it with anyone?
>
> A: No.
>
> Q: Okay. Now would Mr. Smith have had any way of knowing that you made these findings, even though you didn't speak to him about your knowledge?
>
> A: That I don't know.

(TR. at 623-4). Without any evidence that she ever reported or voiced her concerns regarding the missing bar codes, Complainant failed to engage in protected activity.

While there is evidence that Mr. Smith viewed Complainant's inventory log, it does not appear that Complainant ever actually showed it to him herself. Mr. Smith merely testified that he had examined some documents on Complainant's desk that included some inventory work. (TR. at 425). Complainant was not present when Mr. Smith's review of these documents occurred after hours. (TR. at 322). Even if this document clearly reflected Complainant's findings that 162 ACAMS did not have bar codes or were not in the database, this cannot be construed as "a report of an act, which the complainant reasonably believes is a violation of the subject statute,"[9] as there is no evidence that Complainant brought this document to Mr. Smith's or anyone else's attention.

[9] *Minard v. Nerco Delamar Co*., 92 SWD 1 (Sec'y Jan. 25, 1995), slip op. at 8.

Notably, there is evidence in the record that Complainant had told Chris Smith about the double tagging issue of the ACAMS. (TR. at 419). However, in order to be protected under the whistleblower provision of an environmental statute such as the RCRA, an employee's concerns or complaints must be "grounded in conditions constituting reasonably perceived violation of environmental acts." *Minard v. Nerco Delamar Co.*, 1992-SWD-1, slip op. at 5 (Sec'y Jan. 25, 1994). This requirement would also apply had Complainant been successful in affirmatively voicing her concerns about the missing bar codes on the 162 ACAMS. Notably, the environmental acts do not require that a complainant articulate each statute or regulation that potentially could be violated because of a defect or safety issue about which he complains. Nonetheless, a communication about a hazard or defect is insufficient where the complainant has not reasonably perceived a violation of the environmental acts or regulations. See *Crosby v. Hughes Aircraft Co*., Case No. 85-TSC-2, Sec. Dec. and Ord., Aug. 17, 1993, slip op. at 26.

In this case, therefore, Complainant had to have a reasonable perception that Respondent was violating or about to violate the environmental acts. An employee's belief that the employer's conduct may have a negative impact on the environment is not, by itself, sufficient to establish protected activity; the issues raised by the employee must be within the scope of the environmental statutes and regulations. *Johnson v. Oak Ridge Operations Office*, *U.S. Dep't of Energy*, ARB No. 97-057, ALJ Nos. 95- CAA-20, 21, and 22, slip. op. at 9- 10 (ARB Sept. 30, 1999) and cases cited therein.

Complainant's own testimony establishes her concerns about the problems she found in the inventory merely revolved around property record-keeping. Notably, Complainant articulated her worry:

> I feel that it's so important to recognize these numbers, there's accountability for our property. And it's very critical to me because I'm the person responsible, performing the ACAMS.

(TR. at 573). Glaringly absent from the record is any evidence that Complainant reasonably perceived that Respondent had violated or was about to violate an environmental statute.

To reiterate, there is direct evidence in the record that Complainant failed to communicate her concerns regarding the discrepancies in the Property inventory and missing bar codes on 162 ACAMS. Further, in informing Mr. Smith about the "double tagging", Complainant did not appear to have ANY perception, let alone a reasonable one, that her concerns constituted a potential violation of an environmental act. Complainant specifically stated that she was concerned merely about "accountability for our property." (TR. at 573). There is no evidence that Complainant ever held any environmental concerns. Thus, in view of my finding that Complainant did not have a reasonable perception of a violation or potential violation of the environmental acts, I find that Complainant's concerns, regardless of whether they were known to her supervisors, were not protected activities under RCRA. Therefore, as a matter of law, I find that Complainant did not establish a *prima facie* case of discrimination because she failed to engage in a protected activity.[10]

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[10] It is noted, that there was considerable evidence that, because the Complainant was a friend of the Army Contracting Officer, that the contract with the Army might be at risk of not being renewed, if the Army found out

ORDER

Accordingly, it is hereby ordered that:

1. The Respondent's motion to dismiss the employment discrimination complaint of Complainant, Bernice Johnson, against Respondent, EG&G Defense Materials, Inc.., brought under the employee protection provisions of RCRA, is GRANTED.

2. The employment discrimination complaint of Complainant, Bernice Johnson, against Respondent, EG&G Defense Materials, Inc., brought under the employee protection provisions of RCRA, is DISMISSED.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§ 24.7(d) and 24.8.

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about the discrepancies in the property inventory. As such there is evidence that such may have been a motive in any personnel action against the Complainant. However, that is not an issue before this tribunal, as it relates only to property accounting contract issues, and does not relate to any violation of RCRA or any other environmental statute.