

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 26 January 2007**

CASE NO: 2006-SOX-12

In the Matter of:

ALFRED LEAK, JR.  
Complainant

v.

DOMINION RESOURCES  
SERVICES, INC.  
Respondent

APPEARANCES:

Richard Sternberg, Esq.  
R. David Briggs, Esq.  
For the Claimant

James P. Smith, Esq.  
Kenneth B. Stark, Esq.  
For the Employer/Carrier

Before: DANIEL L. LELAND  
Administrative Law Judge

INITIAL DECISION AND ORDER

This case arises out of a complaint filed pursuant to the employee protection provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX), and Section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. § 60129 (PSIA). The undersigned held a formal hearing in the above-captioned matter from May 23 to May 26, 2006 and from July 12 to July 13, 2006 in Cleveland, Ohio. Complainant's exhibits A – ZZZZ and Respondent's exhibits 1 – 80 were received into evidence. Complainant and Respondent submitted post-hearing briefs.<sup>1</sup>

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<sup>1</sup> The following abbreviations have been used in this decision and order: CX = Complainant's exhibit, RX = Respondent's exhibit, and TR = Transcript of Hearing.

## PROCEDURAL HISTORY

On May 6, 2005, Alfred K. Leak (Leak or Complainant) filed a timely complaint with the Occupational Safety and Health Administration (OSHA), alleging that on March 23, 2005, Dominion Resources Services, Inc. (Dominion or Respondent) violated SOX and PSIA when it terminated him for voicing concerns that Respondent was failing to maintain gas distribution systems at the pressure levels required by state and federal laws, and for Complainant's refusal to falsify records. (Compl. at 2). On September 29, 2005, OSHA dismissed the complaint on the grounds that the evidence showed that Respondent would have taken adverse action against Complainant regardless of the alleged protected activity. On October 19, 2005, Complainant filed timely objections to OSHA's determination and requested a hearing before an administrative law judge (ALJ).

On May 12, 2006, the undersigned granted in part Respondent's April 17, 2006 Motion for Summary Decision, dismissing the portion of Leak's complaint filed pursuant to SOX.

## ISSUES

- I. Whether Complainant demonstrated that his protected activity was a contributing factor in Respondent's decision to terminate him.
- II. Whether Respondent demonstrated by clear and convincing evidence that it would have terminated Complainant in the absence of his protected activity.

## SUMMARY OF THE EVIDENCE

Complainant is a resident of Maple Heights, Ohio. He has a wife and two children. (TR 67-68). He first became employed by East Ohio Gas as an engineer for the Engineering Services Group in 1993. From 1993 to 2002, Leak held a variety of different positions with East Ohio Gas under four different supervisors and agreed with his performance evaluations for each of those years. (TR 71-87; CX A-J). From 1999 to 2001, Leak was employed as a Pipeline Safety Representative; in 2000, he received certification for company sponsored training from the Transportation Safety Institute in pipeline safety rules and regulations. (TR 79-82). Leak became certified as a Six Sigma Black Belt in 2002. (TR 85; 89-90). Six Sigma is a process whereby certain problems are measured using statistical data to analyze and generate solutions. (TR 83). A Black Belt is a person that works on complex Projects and seeks to save or grow company revenue by an amount of one million dollars. (TR 84).

In 2001, Dominion acquired East Ohio Gas. (TR 88). In August 2003, there was a company reorganization and Timothy McNutt became the Manager of the Gas Planning Department. (TR 633). Mr. McNutt has worked for Dominion East Ohio for approximately twenty and one half years. (TR 630-31).<sup>2</sup> Mr. McNutt was recently promoted to the Director of Gas Planning and Optimization. (*Id.*). He stated that the Gas Planning Department is responsible

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<sup>2</sup> Mr. McNutt began his employment in a two year management training program. (TR 630). He has worked in the Transmission Division, the Engineering Office, and the Design Group, and has worked as a Division Engineer, the Supervisor of Corrosion, and the Director of Gathering Operations. (TR 632-33).

for ensuring that the design of the pipeline system provides reliable service to customers on the coldest day of winter, and for developing and maintaining sophisticated hydraulic modeling used to determine whether customers can be served on that peak day. (TR 633-34). From a business standpoint, gas planners analyze requests and problems that the company has and develop different options and potential solutions for presentation to the Operation and Design Group. (TR 634, 37-38). Complainant began his work as a Gas Planner under the supervision of Mr. McNutt in 2003. (TR 94, 655).

The Public Utilities Commission of Ohio (PUCO) is the agency that regulates Respondent's natural gas operations in Ohio. (TR 539). In early 2003, PUCO, through its investigator Victor Omameh, performed an audit of Dominion and subsequently issued a Notice of Probable Non-Compliance (Notice) to Dominion on April 18, 2003. (TR 541-42; RX 1, 79). A Notice is a document that is generated by PUCO requesting further information from Dominion regarding questions arising out of an audit. (TR 539). When Dominion receives a Notice, Brian Witte conducts the initial investigation, gathers the information that is required, and generally writes a response letter to PUCO. (TR 540).<sup>3</sup> Mr. Witte began work as a consulting engineer in the Compliance Group in 2001, and is supervised by Clarence Moore. (TR 537-38, 578). Mr. Witte's duties include enabling PUCO to perform their annual audits by providing access to people and documents, as well as site visits. (TR 538).

One of the six issues that the Notice identified was that Dominion did not have adequate documentation to support how it determined the maximum allowable operating pressures (MAOP) for the pipeline systems in its Northeast Shop. (RX 1).<sup>4</sup> Dominion responded to the Notice on May 14, 2003. (RX 2). Mr. Witte was responsible for basing Dominion's reply on records responsive to the Notice. (TR 543). Mr. Witte was unable to provide PUCO with the documentation that they requested because Dominion did not have that documentation. (TR 593-94). As a result, Mr. McNutt's group was responsible for locating the MAOP records and historical data to reply to the Notice. (TR 543-44).

### **The MAOP Project**

Prior to Complainant assuming the lead on the MAOP Project (Project), Mr. Witte worked on the Project for approximately one year. (TR 99). Kertis Limpert also worked on the Project in 1999 and 2000. (TR 246-247).<sup>5</sup> Mr. Limpert has been a Consulting Engineer since 1998 and in the Gas Planning Department since 2001. (TR 1078-79). Mr. Limpert received a spreadsheet when he assumed the Project, which he used and updated to perform his own

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<sup>3</sup> Mr. Witte was hired by Dominion in 1989, where he has worked as a Management Trainee, an Engineer, a Senior Engineer, and the Supervisor of an engineering department. (TR 537-38).

<sup>4</sup> A pipeline system is a set of contiguous pipes that have a set boundary. (TR 1084). There are three "shops" in Cleveland: the East side, the Northeast side, and the West side. (TR 644). Operating pressure requirements are for a peak day - the coldest day expected during winter or the day of greatest demand for gas. (TR 306).

<sup>5</sup> Mr. Limpert began his employment with Dominion and its predecessors in 1986. (TR 1078). He was a staff assistant to the Manager of Construction, worked as a junior engineer, the District Supervisor of Gas Operations, and managed the Engineering Department in the Cleveland area. (TR 1078). His current job duties include hydraulic modeling of Dominion's gas systems, sizing pipes and regulator stations, making recommendations for improvements to the systems, and handling questions about pipe stresses with regard to placement, such as placing pipes under highways. (TR 1079).

research, and subsequently provided to Leak when Leak assumed the Project. (TR 1098, 1108, 1161; RX 75).

When the Gas Planning Department took over the Project, Mr. McNutt was confident that they would complete the Project. (TR 664). Leak was assigned to lead the Project on approximately June 22, 2004. (TR 96; CX K, L; RX 4). Mr. McNutt stated that he was excited to assign the Project to Leak because it fit well with the skills he had gained from previous projects. (TR 98, 666). When Complainant was assigned the Project, he did not know that PUCO had issued a letter of probable non-compliance to Dominion. (TR 98).

Leak's Project duties included: gathering historical records for the medium pressure systems that could be used to justify the MAOPs for those systems; performing field work to determine the current operating pressure of the systems; comparing current operating pressure with historical records; performing further analysis where discrepancies were identified; ensuring that the MAOP numbers from the Strategic Asset Management System (SAMS)<sup>6</sup> matched the MAOP values that each shop maintained, the numbers listed in the Planning Department, and the numbers identified on the regulator inspection reports; and determining a defensible MAOP based on this work. (CX L; RX 4, 7; TR 243-46, 251-52, 294-95, 297-99, 349, 667-68, 676-77).

Leak was also expected to model the medium pressure systems to determine if the documented MAOP was capable of supplying gas to customers on a peak day. (TR 305-07, 678-79). To create a system model, information must be extracted from SAMS and input into the Stoner modeling software utilized by Dominion. (TR 1089). The data is extracted from SAMS in the form of text files, which are then used as information for the hydraulic software to produce and analyze a given model. (*Id.*). If modeling indicated that the MAOP pressures were inadequate for this purpose, Leak was to develop different options to remedy that deficiency to ensure the system could provide adequate pressure. (TR 245-46, 349, 679-81, 856-57). Leak was required to summarize these findings and present them in a report to Respondent's Compliance Department for review. (TR 245-26, 294-95, 546, 681-82, 693-94; CX L; RX 4, 7;). Mr. Moore would assess the different options based on the information gathered, and make the final decision based on the information he felt most comfortable presenting to PUCO. (TR 669).

Over the course of the Project, Complainant met with Mr. McNutt on approximately a weekly basis. (TR 153, 697). Complainant was the first person to establish the pipeline system boundary.<sup>7</sup> (TR 470). The four largest systems in the Northeast Shop were NM 2, 8, 9, and 11,<sup>8</sup> which Leak believed comprised more than ninety percent of the Northeast Shop. (TR 120, 308-

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<sup>6</sup> SAMS is a geographic information database, first developed in the late 1990's, that manages most of the information regarding Dominion's pipeline systems. (TR 90, 1079). SAMS shows exactly where pipes are located in a specific system, as well as other information such as the product that it carries, the distribution, the MAOP, the MAOP source, the number of pipes in the system, and the number of stations. (TR 1080-82; RX 76). Prior to SAMS, the company relied on field notes and monuments to provide the locations of its pipelines, distribution systems and facilities. (TR 91). These historical records were assembled and input into SAMS to compile all of the manual records into an electronic format where information could then be extracted and examined. (TR 92, 639-40).

<sup>7</sup> Leak relied upon various sources in determining the MAOP of a given system, including historical files consisting of pressure charts and incomplete uprate files. (TR 253-257, 262, 266-267, 292-93; RX 72.7, 72.11).

<sup>8</sup> "NM" is a system boundary designation assigned when SAMS was created. (TR 652). For example, NM 1 = Northeast shop, medium pressure system number one. (TR 653).

309; CX S). Leak determined that six valves connected those four systems together and that an open valve has the same effect as an interconnected pipeline system. (TR 309, 311; RX 8). Leak told Mr. McNutt in October of 2004 that these six systems comprised one system. (TR 110, 702).

On October 7, 2004, Mr. McNutt was concerned that while Leak was doing a lot of work, he was not making progress on the Project. Therefore, Mr. McNutt met with Leak and created a document that outlined a roadmap for completing the Project. (TR 698-700; RX 7). Mr. McNutt testified that these were the same Project objectives that Leak had received initially. (TR 700; CX L, RX 4, 7). Mr. McNutt stated that the objectives were not listed in order of priority, rather, they were a chronological ordering resulting in an approved summary. (TR 702).

On November 19, 2004, Leak informed Mr. McNutt, Bob Majikas, Area Manager, and Mike Andrejcek, Operations Supervisor for the Northeast Shop by memo that the connected, or “looped” system comprised of NM 2, 8, 9, and 11 assumed the lowest MAOP of the four systems.<sup>9</sup> (TR 119-121, 702-03; CX S; RX 8). Mr. McNutt created a document in response on November 23, 2004, in which he altered the MAOPs of the four systems to illustrate another configuration option whereby the systems were isolated, or unlooped. (TR 703-04; CX U; RX 9). Leak met with Mr. McNutt on November 23, 2004 at which point they discussed unlooping 2, 8, 9, and 11. (TR 705-15; CX T). Leak testified that Mr. McNutt instructed him to identify pipeline systems and MAOP values as if the system valves were closed, or as if the systems were not looped together. (TR 140). Leak stated that he was concerned that complying with Mr. McNutt’s request would move away from the letter and the spirit of the pipeline safety rules and regulations.<sup>10</sup> (TR 143). Leak testified that Mr. McNutt instructed him that he was a planner, and not to wear a compliance hat. (TR 348). Mr. McNutt testified that the job responsibilities of gas planning and compliance are different; they are two separate departments. (TR 713-14). Leak explained that planners address particular concerns and after doing network analysis, offer recommendations; compliance polices the company and its adherence to pipeline safety rules, regulations, and company standard operating procedure (SOP). (TR 348).

Leak testified that at this meeting, Mr. McNutt became irate that Leak had given the November 19, 2004 memo to Operations. (TR 124). Mr. McNutt stated that he became frustrated because it seemed that Leak was not considering other options besides uprating what Leak had

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<sup>9</sup> Because Leak ascertained that NM 2, 8, 9, and 11 were an interconnected pipeline system, he reasoned that the looped system assumed the lowest MAOP of the four systems. (TR 119-120, 309, 311, 702-03; CX S; RX 8). Brian Moidel, *infra*. p. 14, concurred that if two systems with different MAOPs are connected, the MAOP of the connected system is the lower MAOP. (TR 1171, 1187-88). Leak stated that he believed that once the MAOP of a system is justified, any isolated portion of that system continues to carry the MAOP of the justified system. (*Id.*). Leak stated that it carries on the value of the justified MAOP because it must have justification documentation beginning as a new system. (TR 487-489). However Mr. Moidel and Mr. Limpert testified that if two systems are separated, and documentation exists to support a previous, higher MAOP in one of the systems, it will assume its previous MAOP. (TR 1169).

<sup>10</sup> Leak stated that he did not believe that the interconnected systems could be unlooped. (TR 442). Leak stated that he learned from Lane Miller, *infra*. p. 14, for the first time in March 2005, that the systems could be isolated with a blind plate. (TR 316). He testified that prior to that conversation with Mr. Miller, despite having talked with Mr. McNutt about looking at the systems independently, Leak maintained that he did not know that the systems could be isolated. (TR 164, 316-318).

identified as the existing MAOP pressure of the looped system.<sup>11</sup> (TR 690-91, 704-05). He stated that it was not Gas Planning's role to lock into one option, it was to analyze and present several options. (TR 691). Mr. McNutt told Leak to consider other data besides the MAOPs he indicated. (TR 122-123, 338; CX T). Mr. McNutt crossed out one of Leak's figures and recorded another figure because Mr. McNutt stated that there was evidence that one of the systems was previously operating at a higher pressure. (TR 247-248, 705; RX 9, 69). Leak recalled that Mr. McNutt stated, "I set you up," during the meeting. (CX T). Mr. McNutt denied saying "I set you up," to Leak, but stated that he said something about the Project being a test of Leak's capabilities, which he had begun to question. (TR 707-08). Leak testified that he left the meeting with the understanding that he was to model the combined systems of NM 2, 8, 9, and 11 as one system. (TR 133).

Leak stated that he met with Mr. McNutt several times during the month of December. (TR 133). Mr. McNutt stated that Leak emailed him on December 10, 2004. (TR 818; RX 11). Mr. McNutt testified that Leak had not determined whether or not the numbers he identified would provide service and if they did not provide service, what number would. (TR 819). He stated that he instructed Leak to perform modeling, and to ascertain the current system operating pressure for the winter of 2004. (TR 819). Leak stated that Mr. Witte's December 14, 2004 email in reference to the documentation and method for justifying the MAOP of a pipeline gave him the impression that the MAOP Project goal was changing in scope from its original scope. (TR 146; CX X).

As of December 19, 2004, Leak had not yet gone into the field to perform research. (TR 820). Mr. McNutt stated that Leak had gathered a lot of data, as requested, and put together some maps identifying the boundaries of the system. (*Id.*). However, Leak did not propose documented MAOP options along with the issues associated with each option. (TR 821). Leak did not relay to Mr. McNutt that he had analyzed NM 2, 8, 9, and 11 as though they were isolated, nor that he had run complete modeling on those systems. (*Id.*).

In January 2005, Leak believed that the MAOP for NM 2, 8, 9, and 11 was 25 pounds but that it was operating above that; thus, it was operating as an over-pressurized system and constituted a public safety hazard. (TR 388-89). Mr. McNutt testified that he did not believe the failure to establish MAOPs in the Northeast shop's medium pressure systems was a safety concern because the systems had been operating at those pressures for, in some cases, over 15 years. (TR 663). Mr. Witte also testified that Dominion's lack of documented MAOPs was a paperwork issue, and not a safety issue because the MAOP of the lines operate well below the strength of the pipelines. (TR 545). Edward Steele, Chief of the Gas Pipeline Safety Section of PUCO and PUCO investigator Mr. Omameh testified to the same. (TR 539; RX 79-80).

Leak created spreadsheets with the actual pipeline operating pressure in the field on January 5, 7 and 11, 2005, but they did not contain the current operating pressures of NM 2, 8, 9, and 11. (TR 822-24; RX 18, RX 20-21). On January 12, 2005, Leak met with Mr. Limpert and Mr. McNutt. Mr. McNutt altered the January 11, 2005 spreadsheet during the meeting to reflect a higher operating pressure because Mr. Limpert had referenced information that the system was

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<sup>11</sup> An uprate is a process that Dominion uses when they are seeking to raise the value of a given system. (TR 130-131).

operating at 60 pounds in the nineties. (TR 824-26, 1120-21; CX CC; RX 21, 69). Mr. McNutt instructed Leak to treat NM 2, 8, 9, and 11 as a single system with all valves open and to confirm Mr. Limpert's information. (TR 826). Mr. Limpert stated that Mr. McNutt did not dictate a 60 pound pressure for NM 2, 8, 9, and 11, he told Leak to see if that could be supported. (TR 1123-24).

Leak confirmed that the systems had been tied together prior to the pressure chart Dominion had indicating 60 pound operating pressure for the NM 11. (TR 826, 829; RX 69). On January 14, 2005, Leak compiled a spreadsheet demonstrating what the pipeline looks like if the valves are closed. (TR 161-64; CX EE). Leak justified the MAOP as 60 with valves open on the January 18 and 24, 2005 spreadsheets. (TR 394-96, CX FF-GG; RX 26-27). Complainant stated that he did so at the directive of Mr. McNutt, but that 60 pounds was not in accordance with pipeline safety rules and regulations. (TR 397, 399). Mr. McNutt stated that establishing the document with a 60 pound MAOP did not end Leak's assignment; he considered it another option. (TR 830).

Complainant was to have completed this Project by December 31, 2004. (CX L; RX 4). Mr. McNutt stated that Leak did not complete the Project by the deadline. (TR 820). Leak stated that the Project was not completed by the December 31, 2004 deadline because the scope of the Project proved to be much larger than originally thought. (TR 138). Complainant later stated that he did complete the Project by the December 31, 2004 deadline. (TR 378). However, Leak also stated that he submitted his final position on the Project on March 21, 2005. (TR 449-50; RX 46).

Complainant's sole recommendation was that Respondent had no alternative but to uprate the Northeast system. (TR 334, 371-373). Leak calculated that the cost to uprate the system would range between \$40 million and \$100 million. (TR 133, 333-34, 371). Leak's predecessors previously assigned to the MAOP Project in 1997 and 1998 recommended that Dominion uprate its systems, but no uprates were ever performed. (TR 477-479, 481).

### **Complainant's 2004 Performance Evaluation**

Dominion's process for employee evaluations in 2004 focused on what an employee was asked to do and the characteristics of the employee's performance. (TR 671). The first step in the process is the creation of a Performance Summary and Feedback form. (TR 672; RX 4; CX L). Mr. McNutt provided a Performance Summary and Feedback form to Leak in late May or early June 2004. (*Id.*). It described what tasks Leak would be responsible for and detailed how he would accomplish those tasks. (TR 673). It also stated that he would be evaluated on qualities like innovation, improvement, motivation, and interpersonal skills. (TR 674).

Mr. McNutt wrote performance evaluations for a total of six people in 2004. (TR 924). Mr. McNutt asked his entire staff to submit a list of items that they had completed that he might not have been aware of in advance of preparing the year end evaluations. (TR 832; RX 24). On January 14, 2005, Leak submitted a self-assessment of his performance. (TR 156-57; CX DD; RX 24). Leak stated that regarding the Project, he had compiled data from the GIS system and manual records that documented each medium pressure system in the Northeast Shop, and that

various sources were updated accordingly. He stated that he relayed oral and written communications to Operations and Pipeline Safety. Leak also stated that the MAOP Project had “proved to date Dominion operates a safe and reliable distribution system in accordance with DOT regulations and the standard operating procedures of Dominion.” (RX 24). Leak stated that considering 68 systems overall, most of them were operating within pipeline safety guidelines. (TR 158-59). Leak said that he chose not to voice concerns about the Project in his evaluation “because he did not want something to surface during research that could come back and haunt us as individuals or haunt the company indirectly,” and he did not feel that it was the appropriate “place and time to air that laundry.” (TR 160). At this time Leak understood that the MAOP deadline had been extended through April by PUCO. (TR 160; RX 14).

Mr. McNutt provided his Performance Summary and Feedback Form to Complainant and met with him on February 3 and 7, 2005 to review it. (TR 167, 836-37; CX KK; RX 29, 30). Leak stated that he had no concerns about his employment at the end of January 2005. (TR 166). Leak testified that he was shocked and deeply disturbed by his review. (TR 168). Leak stated that Mr. McNutt had never questioned his aptitude or ability to perform the tasks required by the Project. (TR 155-156). On February 4, 2005, Leak provided Mr. McNutt with the thirty eight weekly reports he had sent to Mr. McNutt over the course of 2004. (TR 171; CX LL). Mr. McNutt stated that Leak also proposed an exit strategy in conjunction with a re-examination of his performance evaluation. (RX 29). Mr. McNutt interpreted an exit strategy to mean moving Leak to another position. (TR 839-840). After discussion with Leak, Mr. McNutt did not change the overall score of the evaluation, though he did agree to modify one section of the evaluation. (TR 838-39, 843).

Mr. McNutt’s overall rating of Leak’s performance was a B+. <sup>12</sup> (RX 31). He rated Leak a B on his MAOP Project performance. (*Id.*). Mr. McNutt stated that Leak had reviewed all of the previous MAOP work related to the Northeast Shop and developed a records system to store MAOPs going forward, but that Leak did not complete the summary and documentation of the Northeast systems with acceptable MAOPs, the details of deficiencies, or proposed remedial action. (*Id.*). He stated that Leak struggled to complete the Project even with supervision. Mr. McNutt also stated that Leak was still developing an overall understanding of gas planning after being in the section for one and one half years. He found that Leak needed to improve his understanding of customer needs and developing plans to meet them, and was concerned with Complainant’s ability to grasp the technical and analytical demands of gas planning. (*Id.*). Leak asked what recourse was available to him if he did not agree with his evaluation. In response, Mr. McNutt emailed Leak information regarding Dominion’s Problem Resolution process on February 7, 2005. (TR 173-74; CX MM).

Mr. McNutt discussed the situation with Kathleen Johnson from Human Resources (HR) after he met with Leak on the February 7, 2005. (TR 840-41, 1007-08). Ms. Johnson began her employment with Dominion in July of 1978. (TR 999). <sup>13</sup> Currently, she is an HR Generalist and

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<sup>12</sup> The performance rating scale is as follows: B = Below expectations; M = Meets expectations; C = Consistently exceeds expectations.

<sup>13</sup> Ms. Johnson worked as a Clerk in the Wage and Salary Department, a Clerk in the Health and Safety Department, a Secretary for the head of the Employee Benefits Department, a Secretary to the Manager of Labor Relations, and as Executive Assistant to the Vice President of Human Resources.



reports to Charles Johnston, Manager of Human Resources, Customer Service, and Planning in Richmond, Virginia. (TR 999, 1004, 1011). HR Generalists support directors and anyone who reports to the directors in the capacity of providing training on corporate HR initiatives. (TR 1000). They attend staff meetings, provide guidance, assistance, discipline, policy interpretation, and fill vacancies where there are positions to be filled. (TR 1000). Ms. Johnson stated that it is normal for managers to come to her regarding underperforming employees. (TR 1011).

Mr. McNutt spoke with Ms. Johnson about an exit strategy for Leak that could be implemented within six months. (TR 841, 925). Ms. Johnson's notes reflect that Mr. McNutt felt that Complainant did not have the knowledge or the skills to continue in his position. (TR 1009; CX SS). He stated that the operations group did not trust Complainant's work product, and that he could not follow directions. (TR 926, 1009-1010; CX SS). Mr. McNutt and Ms. Johnson discussed creating a development plan for Complainant, or a mechanism used to improve aspects of his performance. (TR 841-44, 932). Ms. Johnson stated that typically an employee who receives a B rating is put on a development plan that outlines the following six or twelve months in a goal-oriented fashion to help the employee improve their performance. (TR 1008). It is not a disciplinary policy. (*Id.*). She stated that the exit/transition plan was to put him on a path to improvement and if Leak did not improve, then he would be transitioned to another position. (TR 1010; CX SS). In the event that a suitable new position could not be found, or he failed to follow the development plan, Leak would be terminated. (TR 1013-14; CX SS). Mr. McNutt put another person on a development plan who is still employed. (TR 842). He stated that he did not intend to terminate Leak's employment, but sought to find somewhere else in the organization where his skills would fit better. (TR 842-43). Ms. Johnson spoke with Mr. Johnston on February 15, 2005. (TR 1011-12; CX SS). Ms. Johnson asked for his guidance in creating a development plan for a B performer and explained the circumstances to her boss. (TR 1012).

### **Complainant's Problem Resolution Forms and Hotline Complaint**

Mr. McNutt emailed Leak information regarding the Problem Resolution process on February 7, 2005. (TR 174; CX MM). In early February 2005, Ms. Johnson spoke with Leak on the telephone regarding what process was in place to dispute his performance evaluation.<sup>14</sup> (TR 1006-08). The Problem Resolution process provides "a way for employees to resolve employment related issues, to seek clarification, and/or appeal decisions regarding their job or policy interpretations." (CX MM). It provides for successive levels of management to review the matter. (*Id.*).

On February 11, 2005, Leak filed two Problem Resolutions – one regarding his 2004 performance evaluation and the other regarding the Project. (TR 175; RX 32). In his first Problem Resolution, Leak stated that his concern regarding his 2004 performance evaluation

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<sup>14</sup> Ms. Johnson did not see a problem placing Leak on a development plan after he had asked about the Problem Resolution process to challenge his performance review because the processes were unrelated. (TR 1015). She stated that the Problem Resolution process is available to an employee for any reason, not just performance problems, and that an employee that receives a B on their performance review is automatically placed on a development plan. (*Id.*). She stated that Dominion received Leak's Problem Resolution forms after she spoke with Mr. McNutt and Mr. Johnston. (TR 1015-16).

stemmed from a subjective summary of results and feedback, the evaluation's category ratings, and his overall rating. (RX 32). He stated, as was required by the form, that Mr. McNutt was the cause of the problem and that he sought candid, objective facts with respect to his performance evaluation. (*Id.*). In his second Problem Resolution, Leak stated that the compliance mandate by PUCO might result in a reduction of the current MAOP for ninety percent of the Northeast Shop. He stated that key documentation might be purged or negated from the Project, and again stated that Mr. McNutt was the cause of the problem. Leak stated that the relief he sought was to insure the inclusion of key documentation, including uprate files, with respect to the mandate by PUCO. (RX 32).

Complainant stated that he filed the Problem Resolutions because of the negative information Mr. McNutt had recorded about him and because he was concerned that work product was being produced under his name that did not reflect justifiable MAOPs for the Northeast Shop. (TR 176). Leak's concern stemmed from the November 23, 2004 meeting and the weekly meetings thereafter where he believed that Mr. McNutt attempted to remove parameters that justified the MAOP of 25 to create new parameters that fit his predetermined MAOP value. (*Id.*). Leak testified that he believed that Mr. McNutt was going to remove all of the information contained in the incomplete uprate files. (TR 324-328, 336-337; RX 32). Mr. McNutt stated that he never told Leak that documents should be ignored or destroyed.<sup>15</sup> (TR 849-50).

Phillip Powell is the Director of Planning and Reliability for Gas and Electric. (TR 722). His duties include leadership of the gas and electrical planning groups; reliability on the electric side, and pipeline integrity on the gas side. (*Id.*). Mr. McNutt worked directly under Mr. Powell. (TR 723). Because Complainant was experiencing difficulty with Mr. McNutt, the Problem Resolutions were sent to Mr. Powell's attention. (TR 195, 763, 768, 770-71; CX MM). Mr. Powell did not receive training in the Problem Resolution process, but had read the policy. (TR 736). Mr. McNutt stated that he first received the Problem Resolutions on approximately February 16, 2005. (TR 847-48).

Also on February 11, 2005, Leak placed an anonymous<sup>16</sup> telephone call to the company hotline which allows employees to express their concerns regarding ethical issues within the company. (TR 177; CX OO, TTTT). Leak stated that his negative evaluation did not precipitate his hotline complaint; rather Leak felt that he and Mr. McNutt had different interpretations of the pipeline safety rules, regulations, and Dominion SOP. (TR 178). Complainant believed that the

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<sup>15</sup> Mr. Limpert stated that he and Complainant discussed whether an incomplete uprate file established a MAOP of 25. (TR 1109; RX 32, CX RR). Mr. Limpert stated that it did not because the document did not substantiate that a system had operated at that particular pressure. (TR 1110). Mr. Limpert stated that he told Leak that the document should be discounted. (TR 1110-11). Mr. Limpert stated the he told Leak to check with Mr. Moore or Mr. McNutt about the file because Mr. Limpert felt it could be discarded, though Mr. Limpert stated he had no authority to tell Leak to discard it. (TR 1111).

<sup>16</sup> Leak stated that he felt that the questions that the hotline had asked revealed his identity. (TR 183). Mr. McNutt was aware that someone had called the compliance hotline and made a complaint before Leak was terminated. (TR 940). He had thought that Leak had made the complaint, but he was not sure. (TR 941). Mr. Powell was also aware that a call was made to the company hotline. (TR 790). He stated that he did not make a connection between the hotline complaint and Leak. (TR 790-91). He was unaware at the time of the meeting that a company hotline complaint was filed, but he eventually became aware. (TR 740).

Project was moving in the direction of a violation of federal regulations and reported that key documents might be purged or disregarded. (*Id.*). The company conducted an investigation and concluded that there was no merit to the complaint. (TR 941; CX PP). Leak did not know if an investigation was ever conducted in relation to his complaint. (TR 183-84).

On February 18, 2005, Leak requested that a representative from human resources be present at the Problem Resolution meeting because he felt as if that would ensure that he was properly represented during the Problem Resolution process.<sup>17</sup> (TR 187; CX UU; RX 33). Mr. McNutt agreed to contact Ms. Johnson. (*Id.*). The Problem Resolution meeting was scheduled with Leak, Mr. McNutt, Ms. Johnson, and Mr. Powell for February 23, 2005.<sup>18</sup> (TR 187, 194).

On February 21, 2005, Complainant changed the MAOP back to 25 from 60. (TR 1124; RX 36). On the same day, Leak asked for a meeting with Michael Andrejcek, Mr. Limpert, Mr. Moore, Mr. Witte, and Mr. McNutt to review the justification of the Northeast MAOP systems and to obtain consensus from Pipeline Safety, Gas Planning, and Operations regarding the data. (TR 188; CX VV). No meeting was held. (TR 189). Instead, Mr. McNutt met with Leak and prepared a revised Project goal for Leak. (TR 190, 854-56; CX XX; RX 34). Leak stated that the February 21, 2005 list of goals had the same intent as what he understood the Project to be in June 2004. (TR 406-407; RX 4, 34).

### **The February 23, 2005 Meeting**

Mr. Powell testified that the purpose of the meeting was to address Leak's Problem Resolutions. (TR 737). Prior to the February 23, 2005 meeting, Mr. Powell had a discussion with Mr. McNutt. He also had discussions with Ms. Johnson to clarify points made in the Problem Resolutions and the process that would be followed at the meeting. (TR 737-38). Mr. Powell stated that he was unaware that Mr. McNutt had requested that Ms. Johnson assist him in transitioning Leak out of the department. (TR 739-40). Ms. Johnson also met with Mr. McNutt before the meeting and had a brief discussion that did not involve strategy. (TR 854). Ms. Johnson thought that the purpose of the meeting was the Problem Resolution and the development plan they were intending to implement, but that it was not Dominion's intention to issue discipline to Leak at that time. (TR 1042, 1050).

Ms. Johnson stated that she was the last to arrive at the meeting. (TR 1017, 1035, 1039). However, Mr. McNutt recalls that Mr. Powell, Ms. Johnson, and himself were assembled in the conference room prior to Leak's arrival. (TR 933). Leak brought a tape recorder with him to the

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<sup>17</sup> Ms. Johnson testified HR gives advice to directors, managers, or employees with questions about HR related matters. (TR 1000). She supported Mr. Powell in 2005. (TR 1001-01). Mr. McNutt was a member of the group she supported. (TR 1001). She stated that HR Generalists do not support employees in meetings with management because they are representatives of the company. (TR 1001). No circumstances exist where she would represent an employee against the company, but she would provide an employee with advice regarding Dominion policy. (*Id.*). Ms. Johnson stated that she attended the February 23, 2005 meeting because she received an email from Leak requesting than an HR person attend. (TR 1016-17).

<sup>18</sup> Prior to this meeting, Mr. Powell had met previously with Leak concerning work he was doing on the Project during staff meetings. (TR 724). In addition to Leak, Mr. Powell would also get information on the Project from Mr. McNutt and Mr. Limpert. (*Id.*).

meeting. Complainant stated that he placed it on top of the conference table in front of himself and Mr. McNutt. (TR 196, 198). Mr. McNutt recalled that Leak had the tape recorder in his suit coat pocket. (TR 862). Mr. Powell stated that Leak did not hide the tape recorder in his jacket, it was on the conference table, but that he did not recall Leak putting the recorder on the table prior to speaking. (TR 747-48, 801). Leak stated that he wanted to record the meeting so there was a fair assessment of what was said. (TR 196). Ms. Johnson stated that Leak asked if he could record the meeting prior to beginning the tape and was told that he could not tape the meeting. (TR 934, 1018-1019; CX AAA; RX 38). Mr. Powell also stated that there was a discussion, prior to Leak recording, about whether or not taping would be permitted. (TR746). The transcript confirms that the tape began with Complainant asking whether an exception could be made. (CX AAA; RX 38).

It was discovered at some point during the meeting that Complainant was recording. (TR 747; 1019). Mr. McNutt stated that Ms. Johnson was very clear that she felt the meeting could not be taped. (TR 936). Leak testified that he was definitely not told that he could not tape the meeting, nor was he told that there was a policy in place that prohibited such taping. (TR 415-417). Mr. Powell stated that no one told Leak that it was against policy to tape, because they were still unaware of the company position on taping; however they asked that the meeting be stopped to check the policy. (TR 743, 746-47).

Leak stated that he would not give Ms. Johnson the tape. (TR 200). Leak stood in the hallway while Mr. Westbrook from the Legal Department joined the meeting. (TR 200, 748-49, 1058). Ms. Johnson had called Mr. Westbrook because she wanted a legal opinion regarding Complainant recording the meeting without their knowledge, after they instructed him not to. (TR 1064). Ms. Johnson stated that the company intranet lists the policies that Dominion has in effect but that Dominion does not have a written policy regarding tape recording meetings. (TR 1005-07). However, she stated that it was Dominion's practice not to allow meetings to be taped. (TR 1006; 1055). During her work in labor relations, it was always stated that there was no taping of formal meetings.<sup>19</sup> (TR 1006). Ms. Johnson testified that Dominion does allow its employees to take notes. (*Id.*). It was Mr. Powell's belief that a manager can decide, on a case by case basis, whether or not an employee may tape a meeting. (TR 800).

Leak was called back to the meeting after about an hour, and Mr. Westbrook departed. (TR 200; CX BBB). Leak stated that Mr. Powell stated that he would be subject to disciplinary action if he removed the tape from the premises, but that Leak could place the tape in the hands of an employee he trusted. (TR 201; CX CCC). Ms. Johnson noted that Mr. Powell stated that Leak's actions were considered insubordinate. (CX CCC). Leak and Mr. Powell gave the tape to Ron Hill. (*Id.*).

After the meeting Mr. Powell spoke with Ms. Johnson and Mr. McNutt, and later spoke with Leak. (TR 750; CX CCC). Mr. Powell had decided that a development plan was necessary for Leak, and that the Problem Resolutions would be worked through. (TR 755, 791). Mr. Powell testified that there would still be a need to do a development plan even if the Problem Resolution was resolved in Leak's favor. (TR 756-57).

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<sup>19</sup> Mr. Limpert did not recall attending a meeting that was recorded, nor did he recall an employee asking to tape any meetings that he attended. (TR 1138).

## Events Following the February 23, 2005 Meeting

Because the February 23, 2005 meeting was adjourned due to Complainant recording the meeting, there was little substantive discussion regarding the Problem Resolutions. (TR 937). Mr. McNutt and Mr. Powell felt that Leak did not have a chance to present his side of the Problem Resolutions. (TR 757, 938).

After the February 23, 2005 meeting, Mr. Powell talked with Mr. McNutt about Leak's MAOP Problem Resolution. (TR 991-92). Mr. McNutt stated that documents were not being purged or negated. (TR 991). On February 24, 2005 Mr. Powell sent an email to Mr. McNutt, Mr. Westbrook, and Mr. Johnston. (TR 757, CX III). Mr. Powell took it upon himself to contact Mr. Johnston because he wanted to resolve the Problem Resolutions within procedural guidelines, despite the fact that the Problem Resolution policy did not require going through HR. (TR 758-59).

Also on February 24, 2005, Mr. Powell responded to Leak's performance evaluation Problem Resolution via email. (CX EEE, HHH). Mr. Powell concurred in Mr. McNutt's appraisal ratings and determined that execution of a development plan was appropriate to resolve performance issues. (CX HHH). On February 25, 2005 Mr. Powell responded to Leak's MAOP Problem Resolution via email. (CX KKK). Mr. Powell stated that he verified with Mr. McNutt that all pertinent documentation, including uprate records, would be included and that Dominion intended to comply with DOT pipeline safety regulations and company policy. (CX KKK). Mr. Powell said that after he responded to these initial requests, he did not feel that the Problem Resolution Process was complete. (TR 761).

Mr. Powell met with Leak on March 1, 2005, on the telephone for two hours, and then on March 9, 2005 in a dinner meeting. (TR 208, 792-93, 796-97, 801; CX MMM; NNN). On March 1, 2005, they discussed Leak's individual concerns in each category of the evaluation. Mr. Powell stated that they discussed the MAOP issue as well, but that the majority of the meeting was devoted to Complainant's appraisal. (TR 797-98; CX MMM). Later that same day, Complainant sent Mr. Powell the spreadsheet of documents of his weekly work schedules. (TR 769-770, 799). On March 9, 2005, Mr. Powell and Leak met for dinner at Hornblowers for about two hours to discuss the appraisal and the Project. (TR 798). Mr. Powell felt that the documents Leak had sent him substantiated his performance appraisal. (TR 769-799, 803, 810). Mr. Powell stated that Leak did not inform him what specific documents were being deleted, so he could not check the documents because he did not know what documents to look for. (TR 801-02).<sup>20</sup> Mr. Powell verified that the deletion of documents was not allowed. (TR 802). Mr. Powell stated that he understood that Leak was also concerned about certain MAOP documents being disregarded. (TR 805-06).

Mr. McNutt met with Leak on March 11, 2005. (TR 863-64; RX 40). He stated that at this meeting, he and Leak discussed the six major systems, NM 2, 8, 9, 11, 12, and 14. (TR 864-866). Mr. McNutt had not previously reviewed the uprate files, and he asked Leak to gather all

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<sup>20</sup> Mr. Powell stated that he did not consider the uprate files Leak emailed on March 18, 2005 to be the documents in question, only that they had been transferred. (TR 774-75, 808-10; CX YYY).

of the incomplete uprates in question so that he could review them. (TR 866). For the first time, Complainant asked Mr. McNutt to sign the MAOP justification summary sheets Leak had prepared, which Mr. McNutt did not do. (TR 866-67; CX XXX; RX 70).

On March 14, 2005, Leak replied to Mr. Powell's February 25, 2005 response to his MAOP Problem Resolution. (TR 771; CX QQQ). It stated that Mr. McNutt needed to sign the MAOP justification records to underscore the collaborative effort of the Project and to ensure the inclusion of key documentation including the uprate files. (CX QQQ). On March 15, 2005, Leak emailed Mr. Powell inquiring after the status of his requests. (TR 772; CX SSS).

### **Complainant's Conversation with Lane Miller**

Leak contacted Brian Moidel for advice over the course of the Project. (TR 1183). Mr. Moidel is employed by Dominion as a compliance engineer. He is currently responsible for maintaining Dominion's standard operating procedures and following the development of federal codes and regulations, and is available to company employees for matters of code-related issues. (TR 1171). On March 14, 2005, Mr. Moidel sent an email to Mr. Moore stating that Leak was asking him the same questions over and over regarding operating pressures and establishing MAOPs, but with regard to different scenarios. (TR 1184; RX 77). Mr. Moidel did not respond to Leak's request. (TR 1185, 1199). Mr. Moidel did not know that after he did not respond to Leak's questions in the March 14, 2005 email, Leak contacted Lane Miller on March 15, 2005. (TR 1200; CX RRR). Lane Miller is an instructor at the Transportation Safety Institute, a training organization at the United States Department of Transportation. (TR 216, 443).

Leak stated that he contacted Lane Miller to get his interpretation on the regulations. (TR 447). Complainant testified that he shared the status of the Project with Mr. Miller and that Mr. Miller asked if Dominion had been caught yet. (TR 216; CX RRR). Mr. Witte testified that he believed that Leak contacting Lane Miller was outside of protocol. (TR 575). He stated that any correspondence between any type of regulatory agency would go through the Compliance Department. (TR 576, 620). Mr. Moidel also stated that typically, employees go to the Compliance Department before they go outside of the company with a question. (TR 1196-97). Mr. Witte testified that in his opinion, acting outside of protocol would merit a warning, and the second time it would be considered insubordination. (TR 617-19). Mr. Witte stated that there is a difference between reporting a violation to DOT regarding someone doing something willfully wrong and asking DOT for an interpretation of federal guidelines. (TR 626-27). He testified that Dominion's ethical policy states that the employee has a duty to report that fact to the company or to a regulatory agency. However, he added that the employee should report it internally first, using the compliance hotline. (TR 621-22). Mr. Powell testified that Leak should not be punished for reporting suspicions that regulations or laws were being broken, stating also that reporting was required of Leak under the Dominion ethics code and the law. (TR 787-88; CX RRRR-SSSS).

On March 17, 2005, Leak attended a meeting with Mr. Witte and Mr. McNutt. (TR 215, 572; CX UUU-VVV; RX 43). Mr. Witte attended because Complainant requested that a pipeline safety representative be present. (TR 215). During that meeting, Leak again asked Mr. McNutt to sign the MAOP justification records he created on February 28, 2005. (TR 215, 573, 870-871;

CX XXX). Mr. McNutt and Mr. Witte testified that Leak stated that he would not do further work on the Project without a signature. (TR 574, 872). Leak submitted his final position on the Project in an email on March 21, 2005. (TR 449-450; RX 46).

Leak testified that during this meeting, Mr. McNutt stated that “it’s too late, the PUCO is coming.” (TR 419). Mr. Witte stated that while Mr. McNutt indicated that the PUCO update was needed and Dominion needed to reply, he did not say that “the PUCO is coming.” (TR 547-75). Also during this meeting, Complainant relayed that he contacted Lane Miller about the Project earlier in that week. (TR 216, 574-575, 870). Leak stated that Mr. McNutt became very upset and stated that he was moving this Project from planning to compliance. (TR 216). Leak testified that he took this to mean that he had been relieved of his duties as Project leader. (*Id.*). Mr. McNutt stated that he would have to get other personnel involved on the issue. (CX VVV). Mr. McNutt stated that he was concerned that Leak chose to go around their pipeline safety group in light of the fact that it was not Leak’s role to do code interpretation. (TR 870). Mr. McNutt ended the meeting so that another meeting could be scheduled with Mr. Moore present so that Mr. Moore could assess Leak’s issues regarding the code. (TR 870-73). Prior to March 17, 2005, Mr. McNutt had not seen Leak defiant before, and Mr. McNutt stated that it was out of character for him. (TR 924).

Leak met with Mr. McNutt on March 18, 2005. They reviewed the uprate files. Leak again requested that Mr. McNutt sign the Project justification records and Mr. McNutt again refused. (TR 874; RX 44). Mr. McNutt requested the uprate files from Leak and Mr. McNutt took the files home with him to review them. (TR 217, 875-77). Also on March 18, 2005, Leak sent a Problem Resolution packet to Ken Barker, Mr. Powell’s direct supervisor. (TR 773; CX XXX).

Leak met with Mr. McNutt and Mr. Moore on March 21, 2005. (TR 222-23, 877; RX 45). After the meeting started, Leak asked if he could meet with Mr. McNutt privately; Mr. McNutt did not oblige. (TR 878). Mr. McNutt did not meet with Leak by himself as Leak had requested because Leak’s position involved code interpretation, and Mr. McNutt wanted Mr. Moore involved. (TR 957). Mr. McNutt stated that Leak reiterated the information regarding the six systems and the 25 pounds and again asked Mr. McNutt to sign the justification records, which Mr. McNutt refused to do. (TR 879). Mr. McNutt testified that Leak stated that he would not do what Mr. McNutt asked him to do because Mr. McNutt would not do what Leak wanted him to do. (TR 879). Mr. Moore helped Leak carry boxes of uprate files to Mr. Moore’s office. (TR 223-24).

Leak sent an email on March 21, 2005 submitting his final position on the Project and summarizing his recollection of what transpired at the March 21, 2005 meeting with Mr. McNutt and Mr. Moore. (TR 449-450; RX 46). Complainant stated that the Project had been transferred to Mr. Moore. Mr. McNutt did not think it was an accurate reflection of what he told Leak to do that day but he did not send an email correcting Leak’s interpretation. (TR 960; RX 46). Another meeting was scheduled with Mr. Moore for March 27 or 29, 2005. (TR 958).

## **Decision Day Discussions**

After the March 21, 2005 meeting, a meeting and simultaneous conference call was held between Mr. McNutt, Ms. Johnson, Mr. Westbrook, Mr. Moore, Mr. Powell, Mr. Johnston, and Dominion Counsel Kenneth Stark. (TR 880-81, 961). Mr. McNutt testified that they determined at the meeting that Dominion needed to ascertain whether there was a legal reason Leak wanted Mr. McNutt to sign the MAOP justification records. (TR 881, 972, 1022-23). Based on Leak's position, they would determine whether or not to execute an Employment Decision Day.

However, Mr. Powell stated that on March 21, 2005, Dominion had decided to give Leak an Employment Decision Day. (TR 776-77, 782). Mr. Powell stated that Dominion's policy permits management discretion to choose what disciplinary steps to take. (TR 780-81). Mr. Powell stated that he agreed with the decision to give Leak an Employment Decision Day in the midst of the Problem Resolution process. (TR 782-83). Mr. Powell acknowledged that if Leak were terminated, he would not have an opportunity to proceed to step three of the Problem Resolution. (TR 783).

An Employment Decision Day is described as a Final Notice in Dominion's discipline policy. (TR 775, 780; CX FFFF, QQQQ; RX 47). The Employment Decision Day process is the final step before termination, whereby a manager informs the employee that the employee is being given a decision making day for a specified offense. (TR 1005). The purpose of the Employment Decision Day is to let the employee go home to decide if he wants to continue employment with Dominion or not. (*Id.*). An Employment Decision Day may be issued without verbal or written warning depending on the seriousness of the infraction. (*Id.*). Receiving an Employment Decision Day does not mean the employee will be terminated. (*Id.*). If the employee chooses to stay, an action plan is written by the employee in conjunction with the decision-making day to indicate to the company how the employee is going to change his behavior and improve his performance. (TR 1048). Dominion's discipline policy provides that "[t]he type of action taken is at management's discretion and depends on many factors such as the severity of the offense. This policy does not always require a progression regarding options. Management may choose the discipline they determine appropriate; even where there is no record of discipline." (CX QQQQ). Those options are a verbal notice, a written notice, a final notice – Employment Decision Day, and termination.

## **The March 23, 2005 Meeting and Termination Letter**

Mr. McNutt did not give Leak any advanced notice about the meeting on March 23, 2005 because he felt that there was no need to do so. (TR 965). Ms. Johnson stated that the March 23, 2005 meeting was not related to the February 23, 2005 meeting. (TR 1024). She stated that the meeting was precipitated by Leak's insubordination for Leak's failure to perform assigned work in response to Mr. McNutt not signing the forms Leak requested that he sign, and that the purpose of the meeting was to find out if Leak could provide any legal or safety reasons for being so insistent about Mr. McNutt signing the forms. (TR 1022-23). A "script" was prepared for the meeting. (RX 48). Mr. McNutt stated that the purpose of his first questions for the meeting on March 23, 2005 was to learn if there was a legal justification for him having to sign the documents. (TR 972, 996-997; RX 48). Mr. McNutt stated that the meeting was not the result



of Leak's work on the Project. (TR 966). He later stated the meeting *did* relate to the Project in that it was a supervisor-employee situation, *i.e.*, the fact that he was asking Leak to do something regarding the Project and Leak was refusing. (TR 990).<sup>21</sup>

On the morning of March 23, 2005, Mr. McNutt requested that Leak come to his office. (TR 225). Ms. Johnson was present there as well. (TR 226, 883, 1022). Leak recalled that there were papers in Mr. McNutt's hands. (TR 1025; RX 49). Leak inquired as to what the meeting was about. (TR 226; RX 49-51). Mr. McNutt stated that they had reached an impasse on the MAOP Project, and Leak inquired as to the purpose of the meeting. (TR 228, 883; RX 49-51). Mr. McNutt stated that they would get to that, and he indicated that it was in the handout, which he and Ms. Johnson stated was on the table in front of Leak. (TR 883, 1025-26, RX 50-51). Mr. McNutt stated that they did not tell Leak the purpose of the meeting because they did not know how the meeting was going to go. (TR 885-86). Leak asked if he could tape the meeting. (TR 227, 883, 1025-26; RX 49-51). Mr. McNutt stated that both he and Ms. Johnson said no, and that Leak replied that if he could not tape the meeting than the meeting was over. (TR 883-84). Leak got up and started to walk out of the office. Mr. McNutt said, "Alfred if you leave my office, you're terminated." (TR 230, 452, 884, 1026). Mr. McNutt stated that Leak replied "Then terminate me," which Leak denies. (TR 452, 884, 1027). Leak left the room.<sup>22</sup> (TR 452, RX 49). Mr. McNutt stated that he then said "You're terminated." (TR 884). Leak stated that he left the room anyway because Ms. Johnson indicated that she was going to call Mr. Westbrooks, as had happened in the first meeting. (TR 231).

Leak returned to his office. (TR 232). Mr. McNutt and Ms. Johnson stated that they followed Leak to his cubicle and asked him if he knew what he was doing, and if he would take a copy of the handout they had provided to him, to which he said no. (TR 884, 1027). Mr. McNutt stated that Leak asked him what he should do and Mr. McNutt said that he did not know because he had never done this before. (TR 884-85; RX 49-50). Mr. McNutt stated that Leak was on his computer and that he directed Complainant to shut his computer down. (TR 232-33, 885; RX 49-50). Mr. McNutt stated that Leak grabbed his bag and personal items and said "I'm leaving." Leak recalled that Mr. McNutt attempted to block Leak with his arm at one point. (RX 49). While Ms. Johnson was on the phone with Mr. Westbrooks, Mr. McNutt indicated to her that Leak was leaving. (TR 885, 1027-28; RX 49-50). Complainant testified that he was escorted out of the building; Mr. McNutt and Ms. Johnson testified that they followed Leak into a stairwell as he left. (TR 233, 885, 1028). Mr. McNutt and Ms. Johnson retrieved Complainant's ID badge and company cell phone and Leak left the premises. (TR 233).

Leak received official notice of his termination on March 30, 2005. (CX LLLL). The letter stated that the March 23, 2005 meeting was held to discuss Leak's recent insubordinate conduct in refusing to perform his assigned duties in connection with the MAOP Project. (*Id.*). Leak stated that no one had told him that he was insubordinate leading up to this meeting. (TR 234-235). Mr. McNutt stated that Leak was terminated because he asked to tape the meeting

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<sup>21</sup> Mr. McNutt stated that he would not expect Leak to do something he asked if Leak believed it was unlawful or immoral. (TR 995).

<sup>22</sup> In his deposition, Leak testified that an organization cannot function when employees refuse to meet with their bosses. (TR 453). He also stated that the Problem Resolution process does not authorize an employee to refuse to meet with a supervisor. (TR 453-54).

and when Leak was told that he could not, Leak got up to leave. When Mr. McNutt told him that if he left the office he would be terminated, Leak left the office. (TR 886). Mr. McNutt considered that to be an act of insubordination. (*Id.*). Mr. McNutt stated that Leak's refusal to work on the MAOP Project and speaking to Lane Miller did not contribute to his decision to terminate him. (TR 873, 887).

The termination letter is dated March 23, 2005 but was mailed on March 29, 2005. (CX LLLL). Ms. Johnson testified that she drafted it on March 23, 2005 but that after such letters are drafted, they are sent to the manager for changes, approval, and signature. (TR 1029). Because Mr. McNutt was traveling, she emailed it to him. (TR 1029-30). She said that it was a miscommunication and that each of them thought that the other was going to mail the letter. (TR 1030).

### **Presentation of the Project to PUCO**

After Complainant was terminated, Mr. McNutt worked with Mr. Limpert and Mr. Moore to complete the Project. (TR 887, 1125-26; RX 73). NM 8 and 9 remained connected because each system had the same documentation, NM 2 and 11 each became separate systems. (TR 890-91). Respondent did not need to uprate the connected pipeline system and based on operating history pressure charts, each MAOP established was higher than Complainant's proposed 25. (TR 888-891; RX 56). The information was presented to and approved by PUCO. (TR 979-981; RX 79).

### DISCUSSION

Section 60129(a)(1) of the Pipeline Safety Improvement Act (PSIA) provides, in part, that:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee --

(A) provided, caused to be provided, or is about to provide or cause to be provided, to the employer or the Federal Government information relating to any violation or alleged violation of any order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety;

(B) refused to engage in any practice made unlawful by this chapter or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer...

*See also* 29 C.F.R. § 1981.102(a)-(b).

The purpose of PSIA is to improve the safety regulatory program at the Department of Transportation, and to increase levels of safety throughout our national pipeline system and the

communities through which pipelines run. (Congressional Record: Nov. 14, 2002 (Senate), pp. S11067 – S11069).

To prevail in a whistleblower proceeding under the Act, the complainant must initially prove a *prima facie* case by showing: (1) that he engaged in protected activity, (2) that Respondent knew of or suspected his protected activity, (3) that he suffered an adverse employment action, (4) that the circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action, and that the respondent has not demonstrated through clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of complainant's protected activity. 29 C.F.R. § 1981.104(b)(1), (c).<sup>23</sup> However, if a case has been fully tried on the merits, it is not particularly useful to analyze whether the complainant has established a *prima facie* case.

As this case has been fully tried on the merits, the relevant inquiry is whether the complainant has prevailed on the ultimate question of liability. Thus, it must be determined whether the complainant has proven, by a preponderance of the evidence, that he engaged in protected activity, that the respondent knew about the protected activity and took adverse action against the complainant, and that the complainant's protected activity was a contributing factor in the adverse action that was taken. § 1981.109.<sup>24</sup> *see, e.g., Kester v. Carolina Power & Light Co.*, 2000-ERA-31 (ARB Sept. 30, 2003); *Paynes v. Gulf States Utilities Co.*, 1993-ERA-47 (ARB Aug. 31, 1999); *Carroll v. Bechtel Power Corp.*, 1991-ERA-46 (Sec'y, Feb. 15, 1995), *aff'd Carroll v. U.S. Dep't of Labor*, 78 F.3d 352 (8th Cir. 1996).

In [\*Hall v. United States Army Dugway Proving Ground\*](#), 1997-SDW-5 (ARB Dec. 30, 2004), the Board stated that the preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true. *Masek v. The Cadle Co.*, 1995-WPC-1, slip op. at 7 (ARB Apr. 28, 2000). Slip op. at 27. The Board stated that "[i]f the ALJ is doubtful about whether to believe the employee's evidence, he must resolve the doubt against the employee, not against the employer." *Id.* If the complainant meets his burden, then the respondent must demonstrate, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of the protected activity to avoid liability. § 1981.109; *Kester, supra*.

## **Protected Activity**

A complainant's acts "must implicate safety definitively and specifically" in order to constitute protected activity. *American Nuclear Res., Inc. v. U.S. Dep't of Labor*, 134 F.3d 1292,

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<sup>23</sup> Consideration was given to the regulations implementing the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851, in drafting the procedures for the handling of whistleblower complaints under the PSIA. 29 C.F.R. § 1981 (April 5, 2004), repromulgated as 29 C.F.R. § 1981 (April 8, 2005).

<sup>24</sup> The language of § 1981.109 is identical to that of 29 C.F.R. § 24.7, part of the regulations implementing the whistleblower provisions of the ERA and six other environmental employee protection statutes codified at 29 C.F.R. § 24. Additionally, the language of the ERA employee protection provision is substantially similar to the PSIA provision. Therefore, I find that the case law developed under the ERA carries great precedential value in analyzing the instant case. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 1986-CAA-1 (Sec'y Apr. 27, 1987) (order of remand).

1295 (6th Cir. 1998) (citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)). An internal complaint is a complaint lodged with a supervisor of the company itself. An external complaint is a complaint lodged with an outside agency. *Kahn v. Sec'y of Labor*, 64 F.3d 271, n.3 (7th Cir. 1995). Section 60129(a)(1)(A) specifically provides that internal complaints are protected activity. Additionally, refusal to work is also protected under the Act “provided that the refusal to work was properly communicated to the employer and was based on a reasonable and good faith belief<sup>25</sup> that engaging in that work was a practice made unlawful by a Federal law relating to pipeline safety.” 29 C.F.R. § 1981.102(b)(2); *Liggett Indus., Inc. v. Federal Mine Safety and Health Review Commission*, 923 F.2d 150, 151 (10th Cir. 1991); *Eltzroth v. Amersham Medi-Physics, Inc.*, 1999 WL 232896 \*9 (Dep’t of Labor Admin. Rev. Bd., Apr. 15, 1999). The employee does not have to prove that the allegedly illegal practice actually violated a Federal pipeline safety law. § 1981.102.

Complainant alleges that he engaged in two types of protected activity under the regulations, in that he provided or was about to provide information relating to a violation or alleged violation of an order, regulation, or standard under this chapter or any other Federal law relating to pipeline safety, and that he refused to engage in a practice made unlawful by this chapter or any other Federal law relating to pipeline safety. § 60129(a)(1)(A)-(B). Complainant asserts that he refused to allegedly defraud PUCO when he did not comply with McNutt’s instruction on the Project. Complainant does not specifically identify which other acts constitute protected activity. He notes only that he was terminated three business days after he spoke with DOT, and that his termination occurred seven days prior to the PUCO audit scheduled for the beginning of April 2005.

I find that the record supports that the following actions sufficiently implicated safety in the form of an internal complaint so as to constitute protected activity under the Act: (1) Leak’s November 19, 2004 memorandum and the related, subsequent discussions with Mr. McNutt on November 23, 2004 regarding compliance pertaining to the looped status of the Northeast shop; (2) Leak’s two February 11, 2005 Problem Resolutions; (3) Leak’s February 11, 2005 hotline complaint; (4) Leak’s insistence that McNutt sign the MAOP justification records to ensure the inclusion of key documentation including the uprate files; and (5) Leak’s March 18, 2005 transmission of his Problem Resolutions to Ken Barker. I also find that Leak’s continued refusal to consider alternative MAOP scenarios that did not reflect the actual status of the Northeast shop constituted protected activity.

Respondent disputes that Complainant’s communication with DOT instructor Lane Miller constitutes a protected act. Respondent asserts that Complainant’s testimony stating that he contacted Mr. Miller for an “interpretation of the regulations” is not protected activity, and that the communication must relate to an alleged violation. However, Complainant’s notes reflect that he discussed specific aspects of the Project with Mr. Miller, aspects that Leak believed

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<sup>25</sup> The reasonableness of a belief depends upon the knowledge available to a reasonable man in the circumstances with the employee’s training and experience. *Pensyl v. Catalytic, Inc.*, 1984 WL 262196 (U.S. Dep’t of Labor Admin. Rev. Bd., Jan. 13, 1984). Considerable testimony was adduced in an effort to demonstrate that Leak was handicapped in managing the Project by his own erroneous understanding of the Project. However, I find that a person with Leak’s training and experience, specifically his one and one half years as a gas planner, could have reasonably interpreted the Project, the events giving rise to its inception, and those dictating its completion in the manner in which Complainant did.

would result in a violation of pipeline safety rules and regulations. Additionally, Leak's notes from this conversation record Mr. Miller as having said "have you been caught yet," from which one may infer that Leak presented information relating to an alleged violation. Therefore, I find that the record supports that Leak's March 15, 2005 conversation with Lane Miller was an external complaint involving a scenario that Complainant believed implicated safety.

### **Respondent's Knowledge**

In order to establish that Respondent knew of Complainant's protected activity, the evidence must show that an employee of the respondent with authority to take the complained of action, or an employee with substantial input in that decision, had knowledge of the protected activity. *Merriweather v. Tennessee Valley Auth.*, 1991-ERA-55 (Sec'y, Feb. 4, 1994); *Bartlik v. Tennessee Valley Auth.*, 1988-ERA-15 (Sec'y, Apr. 7, 1993), *aff'd* 73 F.3d 100 (6th Cir. 1996). Complainant can prove that Respondent had knowledge of the protected activity by either direct or circumstantial evidence. *Bartlik, supra*.

Respondent does not dispute knowledge of Complainant's protected activity. However, I found that Leak's protected activity included his "anonymous" hotline complaint. Leak asserted that his complaint to Respondent's internal hotline was not actually anonymous since the Project was under his leadership, and that only a few people in the company were working on the Project. Therefore, despite testimony by Mr. McNutt and Mr. Powell stating that they were aware of the hotline complaint, but were unaware of who made the complaint, I find that it is reasonable to infer that Respondent had knowledge that Complainant was responsible for the complaint.

### **Adverse Action**

A whistleblower must show that an employee with authority to take the adverse action, or an employee with substantial input in that decision, knew of the protected activity. *Kester, supra*, citing *Mosley v. Carolina Power & Light Co.*, 1994-ERA-23, slip op. at n.5 (ARB Aug. 23, 1996). Mr. McNutt was aware of Complainant's protected activity set forth above, and had the requisite authority to take the adverse action. An adverse action is "simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). A complainant's discharge, or a change in his compensation, terms, conditions, or privileges of employment constitute an adverse action. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *see also* 29 C.F.R. §24.2(b).

Complainant suffered an adverse employment action when his employment was terminated. Additionally, Complainant's performance evaluation may also constitute an adverse employment action, though it is only actionable if it is found to be retaliatory and implicates tangible job consequences. [\*Jenkins v. United States Environmental Protection Agency\*](#), 1988 SWD 2 (ARB Feb. 28, 2003); [\*Gutierrez v. Regents of the University of California\*](#), 1998 ERA 19 (ARB Nov. 13, 2002).

## Contributory Factor

I must now consider whether the evidence links Complainant's protected activity to the decision to terminate Complainant's employment. The 1992 amendments to the ERA included the adoption of the "contributing factor" standard to facilitate relief for employees who have been retaliated against for exercising their whistleblower rights. "Congress may have been recalling that in 1989 it enacted the Whistleblower Protection Act. The WPA requires a complainant to prove that a protected disclosure was a 'contributing factor in the personnel action...'" *Kester*, slip op. at 7, n.15 (citations omitted). In *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), interpreting the Whistleblower Protection Act, 5 U.S.C. § 1221(e)(1), the Court observed:

The words "a contributing factor" ... mean any factor which, alone or in connection with other factors, tends to affect the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant," "motivating," "substantial," or "predominant" factor in a personnel action in order to overturn that action.

2 F.3d at 1140 (citations omitted). A complainant does not need to have any specific knowledge that the respondent's officials had an intent to discriminate against the complainant; ERA employee protection cases may be based on circumstantial evidence of discriminatory intent. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). When a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all of the evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). It is the complainant's ultimate burden to prove both that the employer's stated reason is false and that discrimination was the real reason. *Sayre v. Veco Alaska, Inc.*, 2000-CAA-7 (ARB May 31, 2005), slip op. at 7.

As previously stated, once a case has been tried on the merits, the issue becomes whether the complainant has proven by a preponderance of the evidence that the respondent discriminated against him. Therefore, I will consider the parties' arguments related to pretext in the context of whether Complainant has established that his protected activity was a contributing factor in the adverse action taken by Respondent.

### 1. Mr. McNutt's Involvement

Mr. McNutt was Leak's supervisor and the person with whom Leak worked continuously to complete the Project. Leak believed that Mr. McNutt was attempting to violate pipeline safety rules and regulations in implementing his directive for the Project. I find that Mr. McNutt's statement on November 23, 2004 that Leak was a planner and that he should not wear a compliance hat is not direct evidence of discrimination. Dominion has two separate departments established to address the ostensibly discrete needs of each department. I also find that the testimony of Mr. McNutt, supported by the testimony of Mr. Limpert, demonstrates that the revisions that Mr. McNutt made to MAOP values over the course of the project were not fraudulent, but rather directives to encourage Leak's consideration of other gas planning options.

Further, I note that Mr. McNutt permitted or coordinated the attendance of Mr. Witte or Mr. Moore from the Compliance Group at meetings with Leak in an attempt to assuage Leak's concerns.

Leak's co-workers believed that Leak broke protocol when he spoke with DOT instructor Miller; one co-worker thought that discipline was appropriate. However, the opinion of Complainant's peers is not legally significant. The anti-whistleblower animus of employees who are not in a position to take adverse action against the employee is not evidence from which anti-whistleblower animus could be found on the part of the Respondent. *Tracana v. Arctic Slope Inspection Serv.*, 1997-WPC-1 (ARB July 31, 2001). Rather, a supervisor's disapproval of an employee's complaining to a government agency indicates discriminatory intent. *See Blake v. Hatfield Elec. Co.*, 1987-ERA-4, slip op. at 5 (Sec'y Jan. 22, 1992). Mr. McNutt testified that he was "concerned" that Leak had gone around Dominion's pipeline safety group, especially with a deadline approaching. Mr. McNutt also testified that employees should not do illegal things and have the right to report concerns to outside agencies. I find that Mr. McNutt's concern over the incident does not constitute disapproval indicative of discriminatory intent.

Mr. McNutt was responsible for assigning Leak the Project, stewarding his progress, and creating a critical performance evaluation based in part on his performance of the Project. Mr. McNutt participated in, but did not control, the Problem Resolution process and discussions regarding Leak's performance and complaints, and attended meetings to discuss Leak's refusals to perform work on the Project and to determine if Leak had a legal or safety reason for requesting Mr. McNutt to sign the Project justification records. Because Mr. McNutt participated in all aspects of Complainant's work on the Project, as well as discussions on how Respondent should address Leak's behavior, I find that it is reasonable to conclude that Mr. McNutt's participation in the March 23, 2005 meeting and his ultimate decision to terminate Leak at this meeting presents an inference of bias. However, this inference alone is not sufficient to carry Complainant's burden of demonstrating that his protected activity was a contributory factor in his termination, and Complainant has not met his affirmative burden in light of all of the evidence of record.

## 2. Purpose of the March 23, 2005 Meeting

It is undisputed that the March 23, 2005 meeting was convened based on behavior that I determined is protected under the Act: Complainant's refusals to perform further work on the Project unless Mr. McNutt signed the MAOP justification records. Dominion characterized these actions as insubordination. The meeting was also convened to determine if Leak had legal or safety reasons for his insistence that Mr. McNutt sign the justification records. Complainant argues that Dominion already knew that the reason Leak was requesting that Mr. McNutt sign the MAOP justification records was to ensure that the uprates files were not disregarded or destroyed and thus, refutes Dominion's explanation for the basis of the March 23, 2005 meeting and exposes it as a ruse.

Respondent's witnesses testified that the meeting was scheduled to explore Leak's safety and legal reasons for requesting that McNutt sign the MAOP justification records and, depending on his response, it intended to issue Leak an Employment Decision Day, one disciplinary level

preceding dismissal. In an Employment Decision Day, the onus is on the employee to determine if they would like to remain with the company or end their employment. The evidence does not demonstrate that the reason provided by Respondent for convening the meeting was a ruse. Respondent was entitled to gather additional information pertaining to the justification records, even if it knew that Leak's insistence that McNutt sign those records was connected to Leak's concern that the update files would be destroyed or disregarded. Indeed, a script was prepared that memorialized the scope of the meeting. I also find that the fact that Mr. Powell and Mr. McNutt's consideration of an Employment Decision Day indicates an absence of animus, and shows an effort to retain, rather than terminate Leak.

It is undisputed that neither Mr. McNutt nor Ms. Johnson revealed the purpose of the March 23, 2005 meeting to Complainant at the meeting's outset, even after he inquired. "An employer cannot provoke an employee to the point where she commits such an indiscretion... and then rely on this to terminate his employment. The more extreme an employer's wrongful provocation the greater would be the employee's justified sense on [sic] indignation and the more likely its excessive expression." *Moravec v. HC & M Transportation, Inc.*, 1992 WL 752682 \*6 (Sec'y of Labor, Jan. 6, 1992). However, holding a meeting and declining to orally reveal its purpose to the employee is not an instance of provocation on the part of Mr. McNutt or Ms. Johnson. When the March 23, 2005 meeting was convened, neither Mr. McNutt nor Ms. Johnson could have anticipated the way in which Leak reacted at the meeting, so as to be reasonably accused of crafting a plan to provoke and entrap him in advance.<sup>26</sup> The discussion regarding safety and the possibility of an Employment Decision Day were not reached. Leak's own behavior, outlined below, short-circuited the meeting and precipitated his ultimate termination. I find that the meeting was indeed based on Complainant's protected activities, but that the meeting's purpose does not demonstrate that Complainant's protected activity was a contributory factor in his termination.

Further, I find that the record supports that Dominion followed its Problem Resolution process in good faith. I do not find that the concurrent pursuit of Leak's Problem Resolutions and an Employment Decision Day conflicts, or demonstrates that Dominion's investigation of Leak's concerns was a farce. The former is a procedure to address employee grievances; the latter is a platform to address employee performance deficiencies. It is reasonable that Respondent could deploy these two policies simultaneously.

### 3. Temporal Proximity and Complainant's Intervening Conduct

Complainant states that he was terminated three business days after he spoke with the DOT, and notes that his termination occurred seven days prior to the PUCO audit scheduled for the beginning of April 2005. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984), quoting *Ellis Fischel State Cancer Hospital v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981).

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<sup>26</sup> In *Saporito, infra.*, the ALJ rejected the idea that the employer orchestrated the sequence of events leading to its request that the complainant undergo a medical exam as a means of luring him into insubordination as grounds for termination. He found that the employer could not have anticipated the complainant's reaction. Slip op. at 6.



Temporal proximity “may provide powerful evidence of retaliatory animus.” *Thompson v. Houston Lighting & Power Co.*, 1996-ERA-34 (ARB Mar. 30, 2001), slip op. at 6. Temporal proximity focuses on the gap between the date of the protected activity and the date of the adverse action. *Keener v. Duke Energy Corp.*, 2003-ERA-12 (ARB July 31, 2006). However, it is “‘just one piece of evidence for the trier of fact to weigh in deciding the ultimate question of whether a complainant has proved by a preponderance of the evidence’ that retaliation was a contributing factor in the adverse personnel action.” *Thompson*, slip op. at 6; *Leveille v. New York Air Nat’l Guard*, 1994-TSC-3 and 4, slip op. at 4 (Sec’y Dec. 11, 1995) (the complainant must prove by a preponderance of the evidence that the respondent’s real motive was intentional discrimination.). “[S]tanding alone... [temporal proximity] is not ‘solid evidence’ of causation attributable to retaliatory motive. Rather, temporal proximity must be considered in the context of the specific facts and circumstances.” *Gale v. Ocean Imaging*, 1997-ERA-38 (ARB July 31, 2002), slip op. at 8, n.3; *See Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3d Cir. 2000).

The temporal proximity at play in the instant case certainly permits the inference of retaliatory animus; however, Leak’s own behavior undercuts such an inference. “[U]nder certain circumstances, even adverse action following close on the heels of protected activity may not give rise to an inference of causation... where the protected activity is separated by an intervening event that *independently* could have caused the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there is no longer a logical reason to infer a causal relationship between the activity and the adverse action.” *Tracana, supra.*, slip op. at 8. (emphasis in original).

Leak refused to attend the March 23, 2005 meeting if he could not record the meeting, after already being told on February 23, 2005 that Respondent did not permit him to record meetings. Further, Leak exited the meeting because he could not record only after he was instructed that if he left the meeting, he would be terminated. Complainant’s behavior constitutes an “intervening event of sufficient weight to preclude any inference of causation which otherwise would have been drawn” from the causal relationship between the activity and the adverse action. *Tracana*, slip op. at 8.

The Secretary has stated that “even when an employee has engaged in protected [activity], employers may legitimately discharge for insubordinate behavior, work refusal, and disruption.” *Sprague v. American Nuclear Resources, Inc*, 92-ERA-37 (Sec’y Dec. 1, 1995), *revs’d on other grounds, American Nuclear Resources, Inc. v. U.S. Dep’t of Labor*, 134 F.3d 1292 (6th Cir. 1998), slip op. at 5, citing *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986); *Abu-Hjeli v. Potomac Electric Power Co.*, 1993 WL 831969 (Sec’y of Labor, Sept. 24, 1993). The Secretary has held that “[t]he right to engage in statutorily protected activity permits some leeway for impulsive behavior, which is balanced against the employer’s right to maintain order and respect in its business by correcting insubordinate acts. A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline.” *Dodd v. Polysar Latex*, 1994 WL 897252 \*7 (Sec’y of Labor, Sept. 22, 1994). However, neither Leak’s refusal to attend the meeting, nor his departure from the meeting, even after the was told doing so would result in his discharge, was impulsive behavior manifested in the midst of his protected activity.

For example, in *Saporito v. Florida Power & Light Co.*, 1989-ERA-17 (ARB Aug. 11, 1998), the complainant filed a number of internal and external complaints regarding a variety of issues including nuclear safety concerns. The Vice President (VP) sought to know the nature of his safety concerns and instructed the complainant's supervisor to summon him to a meeting. The complainant refused to attend due to "family business." *Id.* at 4. The supervisor relayed the complainant's response to the VP and the VP still wanted to proceed with the meeting. The complainant refused again, based on family needs, and then refused because he said he was sick. He continued to refuse and the supervisor suspended the complainant for defying a direct order/insubordination. The supervisor relayed this information to the VP and the VP held complainant's suspension in abeyance so that he could return to work to continue discussing his protected concerns with outside investigators. *Id.* The complainant did not return for two weeks related to stress.

The complainant was discharged for three stated reasons: refusal to provide information on public health and safety issues, refusal to meet with the VP and refusal to consent to a medical examination by the company doctor upon his return to work. *Id.* at 5. The Board agreed the ALJ's determination that the employer could have discharged the complainant for his refusal to meet with the VP. *Id.* at 8. The Board rejected complainant's argument that by refusing to attend the meeting, he was asserting his right to exclusively reveal his safety concerns to the NRC because the complainant did not provide that as his reason for refusing to attend the meeting. The Board stated that this was not a situation where the employee's conduct was the result and manifestation of his protected activity. It stated that just because one of the Employer's objectives was to discuss the complainant's protected activity, the complainant was not "insulate[d]... from all directives given by his employer." It added that if the meeting had proceeded and the VP asked again about his safety concerns, perhaps then he would have been justified in refusing to reveal those concerns but because the complainant refused to meet at all, that scenario was never reached.

Similarly, Leak's departure from the meeting is not an impulsive act related to his protected activities. Because the meeting never got started, there was nothing protected about Leak's refusal to attend because he could not record the meeting, or his subsequent departure. Additionally, it is important to note that Complainant understood that refusal to meet with a supervisor interferes with a company's ability to function. TR 453-54. He chose to exit the meeting despite this understanding, and a clear warning of the consequences he would suffer if he chose to leave. The rights afforded to the employee are "a shield against employer retaliation and not a sword with which one may threaten or curse supervisors." *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995). Therefore, Complainant's behavior is outside of the scope of impulsive behavior's "leeway principle,"<sup>27</sup> and Leak's behavior severs any inference of causation one could draw from temporal proximity or Mr. McNutt's involvement in the decision-making.

#### 4. Dominion's Disciplinary Policy

Mr. McNutt threatened Leak with termination based on Leak's refusal to attend the March 23, 2005 meeting if he was not permitted to record the meeting. Leak was fully aware that

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<sup>27</sup> *Harrison v. Roadway Express*, 2002 WL 31932546 \* 12-13 (Dep't of Labor Admin Rev. Bd., Dec. 31, 2002).

Dominion would not permit him to record given the events that transpired at the February 23, 2005 meeting. It is not for this court to assess the appropriateness of discipline meted out by employers to employees for various infractions. “It is well-settled... that an employer may terminate an employee for any reason, good or bad, or for no reason at all, as long as the employer’s reason is not proscribed by a Congressional statute. *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271 (7th Cir. 1995). Courts “do not sit as a super-personnel department that reexamine an entity’s business decisions. No matter how medieval a firm’s practices, no matter how high-handed its decisional process, no matter how mistaken the firm’s managers,” the Act will not interfere. *Id.* at 280-81. Further, refusal to meet with a supervisor is a recognized ground for termination. *Hartsel v. Keys*, 87 F.2d 795, 803 n.8 (6th Cir. 1996) (citing *Langford v. Lane*, 921 F.2d 677, 683-84 (6th Cir. 1991) (the court noted that refusal to meet with a supervisor constituted insubordination.).

Additionally, Dominion is not required to maintain a progressive discipline policy. *Gale, supra.*, slip op. at 13. While Respondent’s policy provides alternative forms of discipline, a supervisor may employ any step at any time, and may base that decision on numerous, and largely unspecified factors. Therefore, when Leak refused to attend the meeting, Mr. McNutt made a business decision to terminate Leak in conformance with Dominion’s discipline policies and the applicable legal authority. Dominion did not need to tolerate Leak’s refusals. Further, based on the foregoing, I do not find that Mr. McNutt’s selection of termination as appropriate discipline if Leak walked out of the meeting is an example of employer provocation, discussed above. The record does not demonstrate that Dominion calculated a plot to set Leak up. It does not demonstrate animus on the part of Mr. McNutt. An employee “must prove that the lawful justification for the termination was ‘phony.’” *Kahn, supra.* It is not enough for the complainant to show that the reason given for a job action is not just, or fair, or sensible, rather, he must show that the reason is a phony reason. *Id.* I find that Complainant has not proven that animus influenced the decision to terminate him. In light of that, and the other evidence of record, Complainant has therefore failed to demonstrate that the purpose of the March 23, 2005 meeting, or the reaction to his insubordination at that meeting were pretextual.

Further, there is no evidence of disparate treatment in this case. Respondent was ordered to provide Complainant with the names and last known addresses of all past employees of its Cleveland facility who have been terminated on the basis of insubordination from March 23, 2004 to March 23, 2005. Leak has not shown that other employees who behaved similarly to himself were *not* terminated, “that is, that he was treated differently because of his whistleblowing.” *Acord v. Alyeska Pipeline Serv. Co.*, 1995-TSC-4 (ARB June 30, 1997), slip op. at 6. Proof of disparate treatment is not a necessary element of proof in a whistleblower case under the Acts;” however, the lack of such evidence supports a conclusion that the lay off was not retaliatory. *Id.* at n. 10; *see DeFord v. Sec’y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Thus, Complainant is an employee whose protected actions cannot insulate him from discipline levied in accordance with Respondent’s discipline policies, in response to behavior that undercuts causal inferences, and in the absence of disparate treatment.

Finally, *Perkovich v. Roadway Express, Inc.*, 106 F.3d 401 (6th Cir. Jan. 22, 1997) is illustrative to the instant case. In *Perkovich*, the complainant filed an internal sexual harassment complaint with the company’s general counsel regarding her immediate supervisor. A

performance review occurred two days later with her supervisor and the supervisor above him. The complainant came to her performance review with a tape recorder after she was informed by memo that she could not have her attorney present at the meeting. *Id.* at 3. The meeting was adjourned to determine if recording devices were permitted. She was later advised that they were not permitted, but that she could take notes. The meeting was rescheduled, but complainant told her supervisor that she still intended to tape the meeting. Management replied with a memorandum stating that continued insubordination of that sort would subject her to discharge. She was terminated when she attended the rescheduled performance meeting with a tape recorder. *Id.*

The Sixth Circuit determined that the district court erred when it found that the complainant did not demonstrate an inference of causation when she was terminated seven days from the time that she filed her grievance. However, the court found that the complainant failed to offer any evidence that she was not terminated for attempting to tape-record her performance review after being warned if she did so, she would be fired. She did not present evidence “that others were not terminated for violations of the tape recording policy or comparable instances of insubordination, or [create] a jury submissible issue that the reason for her discharge was other than the one offered” by Respondent. Thus, the complainant failed to show that Respondent’s asserted non-discriminatory reason for termination was pretextual. *Id.* at 6-7.

The complainant in *Perkovich* was told that she could not record meetings and that if she attempted to do so in the future, she would be fired. When she attempted to do so, she was terminated. In Complainant’s case, Leak was told that he could not record meetings. When he refused to attend a subsequent meeting because he could not record, he was told he would be terminated if he left the meeting. When he exited the meeting, he was terminated. *Perkovich* highlights not only that the complainant must demonstrate that the respondent’s proffered reason was pretext, but also supports Dominion’s contention that lack of a written policy against taping is irrelevant.

## 5. Conclusion

The Board has instructed that “where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the factfinder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken... [f]air adjudication of whistleblower complaints requires ‘full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken.’” *Timmons v. Mattingly Testing Services*, 95- ERA-40 (ARB June 21, 1996), slip op. at 11 (footnote omitted).<sup>28</sup>

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<sup>28</sup> In *Timmons*, the Board found that the ALJ did not err in refusing to hear testimony concerning corrective measures taken *after* the complainant's termination, because that evidence is not relevant to the mindset of the respondent at the time of the complainant's termination. Slip op. at 11-14. Therefore, I decline to consider evidence that the MAOP Project was approved by PUCO because that evidence is not relevant to the mindset of Dominion’s officials at the time of Leak’s termination.

After reviewing all of the evidence, I find that Complainant has failed to demonstrate by a preponderance of the evidence that his protected activity was a contributory factor in his termination. As a result, a discussion of whether or not Respondent would have demonstrated by clear and convincing evidence that it would have terminated Complainant in the absence of his protected activity is unnecessary.

ORDER

IT IS ORDERED THAT the complaint of Alfred Leak, Jr. is DISMISSED.

**A**

DANIEL L. LELAND  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties 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 20001-8002. The Petition must also be served 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 decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).