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Office of Administrative Law Judges
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Issue Date: 11 July 2005

In the Matter of:

JAMES J. BOBRESKI,
Complainant

Case No. 2001-CAA-6

v.

DISTRICT OF COLUMBIA WATER
AND SEWER AUTHORITY,
Respondent

Appearances:

Michael D. Kohn, Esq.
National Whistleblower Legal Defense and Education Fund
Washington, D.C.
Counsel for Complainant

Mary E. Pivec, Esq.
Sheppard, Mullin, Richter & Hampton
Washington, D.C.
Counsel for Respondent

Before: Alice M. Craft
Administrative Law Judge

**RECOMMENDED DECISION ON THE MERITS OF THE COMPLAINT AND
ORDER TO THE PARTIES TO SUPPLEMENT THE RECORD AS TO REMEDIES**

This proceeding arises under six employee protection provisions known as “whistleblower” statutes: the Clean Air Act (“CAA”), 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9610; the Federal Water Pollution Control Act (“FWPCA”) (also known as the Clean Water Act, “CWA”), 33 U.S.C. § 1367; the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9; the Solid Waste Disposal Act (“SWDA”) (also known as the Resource Conservation and Recovery Act, “RCRA”), 42 U.S.C. § 6971; and the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622; and implementing regulations found at 29 CFR Part 24. The Complainant, James J. Bobreski, alleges that the Respondent, District of Columbia Water and Sewer Authority (“WASA”), removed him from his job at the Blue Plains wastewater treatment plant because he reported that chlorine detection sensors and alarms were not functioning properly.

STATEMENT OF THE CASE

Mr. Bobreski filed a complaint with the Occupational Safety and Health Administration of the Department of Labor (“OSHA”) dated November 3, 1999, amended on November 18, 1999. He alleged he had been terminated on October 29, 1999, in violation of the above-cited whistleblower statutes, and that WASA employees impermissibly “badmouthed” him thereafter. OSHA unsuccessfully attempted to conciliate the matter, and then conducted a fact finding investigation. During the investigation, WASA maintained that Mr. Bobreski was discharged for poor work performance.

On March 1, 2001, a Regional Supervisory Investigator issued his findings on the complaint on behalf of OSHA. The Investigator stated that the investigation found evidence to support Mr. Bobreski’s claim that he was discharged in retaliation for protected activity, and ordered remedies including immediate reinstatement; back pay with interest; costs and expenses, including legal fees; expungement of adverse references from his personnel records; and compensatory and exemplary damages.

WASA appealed the OSHA findings by letter transmitted to the Office of Administrative Law Judges (“OALJ”) on March 5, 2001. Mr. Bobreski cross-appealed on the award of damages. A Notice of Hearing was issued for June 26, 2001. Hearing was postponed while the parties conducted discovery and filed pre-hearing motions. The hearing was conducted during intermittent weeks between December 17, 2001 and March 28, 2002. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. At the hearing, the parties offered three stipulations and two joint exhibits into evidence. During and after the hearing, Complainant’s Exhibits (“CX”) 3, 12, 16 (for a limited purpose, *see* Tr. at 268), 17, 20, 21, 22, 24, 26, 27, 30, 31, 33, 38, 39, 40, 41, 42 (for a limited purpose, *see* Tr. at 309-310), 50, 51, 57, 60, 63 (except for p. 1, *see* Tr. at 96-97), 65 (for a limited purpose, *see* Tr. at 320), 67, 70 (answers to interrogatory numbers 1, 8, 13, 15 and 17, to be considered in conjunction with the general objections, *see* Tr. at 2795-2799), 71, 72 (except for pp. 25-29, and for a limited purpose, *see* Tr. at 721-722), 73, 74, 74a, 75, 79, 80, 82 (for a limited purpose, *see* Tr. at 2850-2851), 83, 84, 85, 86, 87, 88, 89, 90, and 91, and Respondent’s Exhibits (“RX”) 3, 82, 84, 94, 103, 104 (for a limited purpose, *see* Tr. at 1933), 105, 106, 107, 108, 109, 112, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 140, 141, 147, 152, 155, 160, and 162 (pp. 2291, 2292, 2294, 2308 and 2312, *see* Tr. at 2764-2766) were admitted into evidence. CX10, 14, 68, 72 (pp. 25-29), 76, 78, 81, and 92, and RX 144, 151, 162 (in part), and 166 were excluded from evidence.

The record was held open after the hearing to allow the Complainant to seek enforcement of a subpoena for the testimony of an inspector from the Environmental Protection Agency (“EPA”) in federal district court, and for the parties to submit closing briefs and proposed findings of fact and conclusions of law. The inspector’s report of his investigation of the Blue Plains wastewater treatment plant, RX 102, was provisionally admitted into evidence, but when the subpoena could not be enforced,¹ the Respondent was allowed to withdraw it over the objection of the Complainant. Both parties submitted briefs and proposed findings of fact and

¹ Enforcement of the subpoena was denied in *Bobreski v. U.S. Environmental Protection Agency*, 284 F.Supp.2d 67 (DDC 2003).

conclusions of law, and responded to the other's submissions. By motion filed June 18, 2003, during the period the parties were briefing the case, the Complainant sought to introduce additional exhibits, CX 93 and 93a, a recording and transcript of a radio interview of the Respondent's plant manager which took place on September 19, 1999; the Respondent objected. I hereby exclude CX 93 and 93a from evidence as untimely submissions. The record is now closed.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits admitted into evidence, the testimony at hearing and the arguments of the parties.

ISSUES

The central issue for decision is whether WASA discriminated against Mr. Bobreski in violation of environmental whistleblower protection statutes by removing him from his employment at the Blue Plains wastewater treatment plant because he reported that chlorine sensors and alarms were not functioning properly. If so, what relief should be awarded is also at issue.

APPLICABLE STANDARDS

The statutes invoked in this claim prohibit employers from discriminating against employees for engaging in whistleblower activities protected by the statutes. In order to prevail on his claim, Mr. Bobreski must establish by a preponderance of the evidence that WASA took adverse employment action against him because he engaged in protected activity. *Carroll v. U.S. Dep't of Labor*, 78 F.3d 352, 356 (8th Cir. 1996); *Kahn v. U.S. Sec'y of Labor*, 64 F.3d 271, 277-278 (7th Cir. 1995). Whistleblower cases are analyzed under the framework of precedent developed in retaliation cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. and other anti-discrimination statutes. See *Overall v. Tennessee Valley Authority*, USDOL/OALJ Reporter (HTML), ARB Nos.1998-111, 128, ALJ No. 1997-ERA-53, at 12-13 (ARB Apr. 30, 2001),² citing, inter alia, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *St. Mary's Honor Center v. Hicks*, 450 U.S. 502 (1993); and *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000).

Where there is direct evidence of discrimination, then the complainant prevails unless the respondent can establish an affirmative defense. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 997 (2002) (Title VII case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121-122 (1985) (Age Discrimination in Employment Act ("ADEA") case). When direct evidence of discrimination is not available, a complainant first must create an inference of unlawful discrimination by establishing a prima facie case of discrimination, by showing that the respondent is subject to the Act; that the complainant engaged in protected activity; that he suffered adverse employment action; and that a nexus exists between the protected activity and

² This decision and any others cited to the OALJ Law Library are published on the Department of Labor's World Wide Web site at www.oalj.dol.gov.

adverse action. The complainant must show that the respondent had knowledge of the protected activity to establish a prima facie case. *See Bartlik v. U.S. Dept. of Labor*, 73 F.3d 100, 102, 103 n. 6 (6th Cir. 1996); *Carroll v. U.S. Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1995); *Cohen v. Fred Meyer, Inc.*, 686 F. 2d 793, 796 (9th Cir. 1982); 29 CFR § 24.5(a)(2). The burden then shifts to the respondent to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. Under the traditional Title VII analysis, the burden of persuasion remains at all times with the complainant, who must prove by a preponderance of the evidence that the respondent's proffered reasons were not the true reasons and constitute a pretext for discrimination. *Burdine*, 450 U.S. at 253. In a “mixed motive” case, however, if a complainant makes a showing that protected activity “was a contributing factor” in the adverse action, the burden of persuasion shifts to the employer to demonstrate “by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s [protected activities] into account.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258. (1989); *Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, 992 F.2d 474, 481 (3rd Cir. 1993).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. SUMMARY OF THE EVIDENCE

A. Background

Beginning in December 1994, the Complainant, James Bobreski, worked intermittently for J.D. Givoo Consultants (“Givoo”).³ Tr. at 52, 353. In November 1995, Givoo was awarded a contract with the Respondent, District of Columbia Water and Sewer Authority (“WASA”), which was charged with providing wastewater treatment services for the District of Columbia and surrounding jurisdictions.⁴ *Respondent’s Proposed Findings* at ¶ 8; CX 51:13. In connection with this duty, WASA operated an advanced wastewater treatment facility in Southwest Washington known as “Blue Plains.” CX 51:13. Beginning in 1990, outside contractors had been employed at Blue Plains to perform instrumentation maintenance work there.⁵ *Respondent’s Proposed Findings* at ¶ 7 citing Tr. at 2501. Although Leeds and Northrop (“L&N”) had been awarded the original instrumentation maintenance contract at Blue Plains in 1990, Givoo obtained the contract at the expiration of L&N’s five-year term. *See id.* at ¶¶ 7, 8.

³ Through the years as a Givoo employee, Mr. Bobreski worked cumulatively on ten different short term projects at nuclear power plants. *See* Tr. at 52, 353, 384; *Complainant’s Post-Hearing Findings of Fact and Conclusions of Law* [hereinafter *Complainant’s Post-Hearing Findings*] at 1; *Respondent’s Proposed Findings of Fact and Conclusions of Law* [hereinafter *Respondent’s Proposed Findings*] at ¶ 15. Before he came to work at Blue Plains in 1999, Mr. Bobreski had never worked at a wastewater facility. Tr. at 426.

⁴ WASA, an independent agency of the District of Columbia Government, had been established in 1996 to assume functions previously performed by the District of Columbia Department of Public Works. *See id.*; *United States v. District of Columbia*, 933 F.Supp. 42, 46 (DDC 1996). Counsel for WASA stipulated that the condition of the plant in 1996 was “deplorable” due to diversion of funds earmarked for improvements at Blue Plains to the general fund of the District of Columbia. Tr. at 31.

⁵ Specifically, outside contractors were being implemented at Blue Plains due to an Environmental Protection Agency (“EPA”) consent decree that required a scheduled number of man hours in excess of the workforce that had been working at Blue Plains. Tr. at 2501.

Thus, in November 1995, Givoo began performing outside contract work at WASA's Blue Plains facility.⁶

Under its contract with WASA, Givoo assigned Mr. Bobreski to work at Blue Plains on July 13, 1999; he began working there on July 15. *See* Tr. at 52-53, 354; RX 3:1.⁷ Mr. Bobreski was certified by the Instrument Society of America ("ISA") as a second level Systems Control Technician. Tr. at 49, 400. At Blue Plains, he served as an Instrumentation and Control Technician ("I&C Technician"), in which capacity he performed preventative maintenance. Tr. at 54. Among his routine preventative maintenance assignments, Mr. Bobreski tested and maintained chlorine sensor equipment and alarms located at the Blue Plains facility. *Respondent's Proposed Findings* at ¶ 10 *citing* Tr. at 2290-91. The essence of this case involves Mr. Bobreski's work activities in and around a structure at Blue Plains known as "Chlorine Building No. 1." Up until December 2002, WASA utilized chlorine gas in the primary wastewater treatment process at Blue Plains. *Respondent's Proposed Findings* at ¶ 2 *citing* Tr. at 1542. The chlorine gas used at Blue Plains was stored in rail cars (also known as "tanker cars") positioned on tracks adjacent to Chlorine Building No. 1. *Respondent's Proposed Findings* at ¶ 2; Tr. at 76. According to Mr. Bobreski, these rail cars would pull up next to Chlorine Building No. 1, and a pipe attached to the rail cars would drain the chlorine from the rail cars into the building.⁸

According to the report of a chemical safety audit of Blue Plains performed by the EPA in 1995,

Chlorine (Cl₂) ... is a poisonous, nonflammable, greenish-yellow gas at ambient temperatures and atmospheric pressure and an amber liquid under pressure. The vapor has a pungent and irritating odor and is heavier than air. Chlorine reacts with water to form hypochlorous acid and hydrochloric acid. The OSHA permissible exposure limit ... for chlorine is 0.5 ppm ... and the short term exposure limit is 1 ppm ... The Immediately Dangerous to Life or Health ... concentration is 30 ppm. The primary route of exposure is inhalation, although dermal exposure to liquid chlorine may cause cryogenic burns. Symptoms of acute exposure include tachycardia, hypertension followed by hypotension, and cardiovascular collapse. Pulmonary edema and pneumonia often result. Effects of exposure may be delayed.

⁶ Other companies continued to serve as outside contractors at Blue Plains as well.

⁷ This was the second time Mr. Bobreski was considered to work for Givoo at Blue Plains. The first time, in 1996, he was not selected by WASA. Tr. at 2507-2508. Mr. Van Dolsen said that WASA approved him on a "conditional" basis in 1999 because there was only a year left to run on the contract. Tr. at 2161. Mr. Bobreski testified that he was never told he was a conditional hire. Tr. at 2805.

⁸ Mr. Bobreski testified that a typical tanker car consisted of a liquid volume of ninety tons. Therefore, approximately one hundred and eighty tons of chlorine would have been in the vicinity of Chlorine Building No. 1, assuming that both tanker cars were full. Tr. at 75.

Chlorine has a reportable quantity ... of 10 pounds under Section 103 of CERCLA and is identified as an extremely hazardous substance under Section 302 of the Emergency Planning and Community Right-to-Know Act ...

CX 3:13-14. The report identified process hazards associated with chlorination and dechlorination areas at Blue Plains to include “potential releases of chlorine, sulfur dioxide, caustic solution, chlorine solution and sulfur dioxide solution.” CX 3:22-23. The recommendations in the report included upgrading the stairs, decking and railings of the railcar siding at Chlorine Building 1; alarms with audible and visual components; calibration of chlorine sensors according to manufacturer’s guidelines and replacement as necessary; labeling channels on chlorine and sulfur dioxide readouts in Chlorine Buildings 1 and 2 to identify the area being monitored; and accessible keys for chlorine capping kits in the event of an emergency. CX 3:42. As this report demonstrates, chlorine is a hazardous chemical which is covered by many safety and environmental protection statutes, and an accidental release of chlorine into the air or water could have serious consequences for people at or near the plant, and for the environment. *See also* CX 3:13-14, 20, and the Material Safety Data Sheets for Liquid Chlorine appearing among the appendices to the report at 71-76, and 85-87; Tr. at 1422-1423. A History of Potential and Actual Chemical Releases at Blue Plains from 1991 to 1994 attached as an appendix to the report included five incidents involving suspected or actual chlorine leaks, with two injuries reported; also included were more detailed reports of leaks up to 1995. CX 3: 95, 97-113. *See also* CX 90:4-8.

ISA publishes guides containing recommended practices for instrument technicians. A copy of the guide entitled “Installation, Operation, and Maintenance of Chlorine Detection Instruments,” approved January 31, 1999, is found at RX 140.⁹ The guide cautions that **“CHLORINE IS A TOXIC GAS, AND OVEREXPOSURE MAY BE HAZARDOUS TO LIFE AND HEALTH.”** RX 140:14 (emphasis in original). In order to test the efficacy of the gas detectors, the guide recommends that the person performing the test follow the manufacturer’s instructions and apply a known concentration of test gas to the detector. RX 140:16. The guide also recommends that the technician test the alarm functions by actuating the alarms, and then returning them to their original condition. RX 140:19.

Mr. Bobreski testified that while he was employed at Blue Plains, there was one main system of chlorine detection at Chlorine Building No. 1, which consisted of “EIT sensors.”¹⁰ Tr. at 76-77. These sensors were connected to an electric module that detected the rate of ionization and, based on a set point, would trigger an alarm.¹¹ Tr. at 77. Five EIT sensors were located in

⁹ Mr. Bobreski testified that he had not read the standard when he worked at Blue Plains. Tr. at 401, 403. In addition to the recommended practices guide, ISA has also published a companion standard entitled “Performance Requirements for Chlorine Detection Instruments,” approved April 15, 1998, RX 141. Mr. Bobreski had not seen that volume when he worked at Blue Plains, either. Tr. at 404, 408.

¹⁰ EIT referred to the name of the company that sold the sensors. Tr. at 2681. EIT was ultimately taken over by Scott/Bachrach. Tr. at 2682.

¹¹ Mr. Bobreski testified that there were other alarm systems in Chlorine Building No. 1 to detect the presence of chlorine, but that these were geared for “plant processes” only and were not functionally engineered to act as a

Chlorine Building No. 1 and two EIT sensors were located at the rail car platform. Tr. at 78. As will be discussed below, however, Mr. Bobreski was aware of only six sensors for much of the time that he worked at Blue Plains. According to Mr. Bobreski, his bi-weekly testing of these sensors demonstrated not only that some of them were in a failing condition but also that some of them had been subjected to intentional damage. He alleged that after reporting these failures and intentional damage to his supervisors, they engaged in retaliatory action against him. Effective October 29, 1999, at the direction of WASA, Givoo removed Mr. Bobreski from the Blue Plains facility, and laid him off. CX 41.

Since Mr. Bobreski was a Givoo employee working on a WASA project, the interaction between Givoo personnel and WASA personnel, and the division of responsibility between these two entities, is central to the case at bar. In sum, the formal channel of communication¹² between these two entities as it applied to Mr. Bobreski was as follows: All of the Givoo I&C technicians, including Mr. Bobreski, would report to a Givoo foreman, Mr. Daniel Juanillo.¹³ Tr. at 1060. Mr. Juanillo would report to a WASA first line foreman, Mr. Lavirt Durrett.¹⁴ Tr. at 1060. With respect to the issues in this case, Mr. Durrett would then report to WASA's Chief of the Electrical Division/Department of Maintenance Services, Mr. Dal Van Dolsen. Tr. at 1061-1062. Mr. Van Dolsen, in turn, would report to the Department Head, Mr. Wayne Raither. Tr. at 1062. Mr. Raither would then report to WASA's Deputy General Manager and Chief Engineer, Mr. Michael Marcotte. Finally, Mr. Marcotte would report to the General Manager of the Board, Mr. Jerry Johnson.¹⁵ Tr. at 1062.

The system governing the allocation of work assignments and the documentation of work performed at Blue Plains is also significant to this case. Specific work assignments were to be delineated for Givoo employees on documents known as "work orders." In theory, WASA was responsible for issuing the work orders and forwarding them to Mr. Juanillo for distribution among Givoo technicians. However, this system of allocating work orders changed somewhat once Mr. Juanillo created the "work order request form" for Givoo employees in 1993. Tr. at

warning. Tr. at 78. Specifically, these were low pressure alarms that sounded when the tank was empty, signifying either that the tank was simply used up or that there was a leak in the line from the tanker to the chlorinator. *Id.*

¹² One of the WASA representatives who testified at hearing claimed that "the line of communication was not that formal" and that those involved did not "always follow that exact line." Tr. at 1060.

¹³ Mr. Juanillo was also known as the Givoo Project Manager or Site Manager. Tr. at 1060. He was originally hired by L&N in 1992 to work at Blue Plains as an Instrument Mechanic. Tr. at 2273; *See Respondent's Proposed Findings* at ¶ 8. In 1993, L&N promoted Mr. Juanillo to the position of Project Manager. *See id.* Once Givoo replaced L&N at Blue Plains in 1995, Givoo retained Mr. Juanillo as its Blue Plains Site Manager. *Id.*; Tr. at 2273-2274.

¹⁴ Although Mr. Durrett was not the only WASA first line foreman to whom Mr. Juanillo reported, he was the first line foreman primarily involved in the activities of this case. At the time of hearing, Mr. Durrett had been a WASA employee for approximately twenty eight years. Tr. at 838. Since 1990, he had served as one of two Instrument Control Maintenance Foremen at Blue Plains. *See Respondent's Proposed Findings* at ¶ 4 *citing* Tr. at 2496; Tr. at 838. He had held that position for approximately twenty years. Tr. at 839. Other WASA first line foremen to whom Mr. Juanillo reported were David Norton and Franklin Redd. Tr. at 1060-1061.

¹⁵ Mr. Johnson was the "number one" manager at the facility. Tr. at 1062.

2277. Instituting the work order request form allowed Givoo technicians who observed problems out in the field to document these problems on the form, which they would forward to Mr. Juanillo.¹⁶ Mr. Juanillo would then fax the work order request directly to WASA's work management system. The work order coordinator at the work management system would review the work order request, and ordinarily give Mr. Juanillo authorization to proceed with the job before an actual work order for the job was issued by WASA.¹⁷

To keep the various work orders organized, Mr. Juanillo created a spreadsheet or "tracking log" on his desktop computer.¹⁸ Tr. at 2365. He maintained the log continuously and reported all work orders received from WASA during the time that he was Givoo's project manager.¹⁹ Tr. at 2366-2367. Mr. Juanillo received all work orders from Mr. Durrett of WASA, even though the contract between Givoo and WASA stated that Mr. Juanillo was supposed to receive work orders from all supervisors to whom he reported.²⁰ Tr. at 2292. He typically received a stack of work orders from Mr. Durrett at 7:00 a.m. each morning and would then assign them to Givoo technicians that same day. Tr. at 2292. It was Mr. Juanillo's job to go through each work order, stamp it, and log it into the computer to keep track of the date received, who had assigned it, and what area of the plant would be working on it (denoted by the "R" number).²¹ Tr. at 2292.

Once Givoo's technicians completed a job pursuant to a work order, they were responsible for filling out certain parts of the work order. Specifically, they were to note the date, their employee number, the number of hours spent on the job, the "action taken" on the job, and whether any further problems existed. Tr. at 2293. Afterwards, they returned the work order to Mr. Juanillo, who would make sure that everything had been filled out properly and would log

¹⁶ Even if the employees identified a problem that was outside of the instrument and control arena, they could still request a repair on the Givoo work order request form. Tr. at 2370-2378. However, there were limits to what Givoo employees could include on a work order request form. For example, the work order request form was limited to labor type requests and could not be used for purchase orders (e.g. a request to purchase new sensors).

¹⁷ Specifically, the work order coordinator would fax Mr. Juanillo an authorization number stating that it was "ok" to proceed with the work and that a work order for the job would be issued. Mr. Juanillo clarified that if, for some reason, he did not receive this authorization, he would not proceed with the job.

¹⁸ Mr. Juanillo was assigned the task of creating the "tracking log" after inquiring of his supervisors as to what system of organization was in place and learning that there was none. Tr. at 2365-2366. He testified that insofar as instrumentation and control work was concerned, prior to his working at the facility, there "really wasn't any recordkeeping." Tr. at 2277.

¹⁹ Mr. Juanillo testified that even before he became Givoo's project manager, he maintained a work status log for L&N. He said he never emailed the spreadsheet to WASA, unless they requested a copy of it, and that WASA did not typically want a copy but just wanted Mr. Juanillo to make sure he could track the work orders for the contractor. Tr. at 2365-2366.

²⁰ Which would also include Mr. Frank Redd, though Mr. Juanillo testified that he "outright refused" to give him any work orders. Tr. at 2292.

²¹ Mr. Juanillo's work order "tracking log" (RX 151) was rejected from evidence due to problems with authenticity. Tr. at 2392. Specifically, at one point, Mr. Juanillo's desktop computer, on which the "tracking log" had been stored, was taken away from him by Givoo. He was therefore unable to testify as to the authenticity of RX 151.

it into the computer as being complete.²² Mr. Juanillo would then return the work orders (and any attached documents that might go with them) to Mr. Durrett at approximately 3:00 p.m. Mr. Durrett was responsible for noting a “reconciliation code” or “failure code” on the work order, indicating the date that he did so, and signing the work order. Tr. at 2293. He was then supposed to take the work orders to the management office to turn them in.²³ Tr. at 2293-2294.

In addition to the work order and work order request form, Blue Plains also utilized a document known as a field service report (“FSR”). Mr. Bobreski explained that FSRs included a summary of the work performed and related comments. All Givoo field technicians filled out individual field service reports on which their names would appear. Tr. at 232. Then, WASA managers would sign off on the field service reports. In Mr. Bobreski’s case, the WASA manager signing off was Mr. Durrett. The WASA manager would indicate whether the services had been performed satisfactorily. Tr. at 233. Mr. Durrett clarified that the FSR was not a WASA form but a Givoo form. Tr. at 2540. He suggested that the purpose of the FSR was not to serve as a written evaluation of a particular technician’s skills; rather, it was a means of allowing the client (i.e. WASA) to indicate whether it was satisfied with the job. Tr. at 2539.

Typically, Mr. Bobreski, like other Givoo technicians, would begin each day at the “Givoo shop,” where sometimes his work assignments were already on his desk, and other times he would pair up with a partner.²⁴ Tr. 58-59. He would then proceed to Mr. Durrett’s shop for a “brief period” before starting his work assignment. When he went into the field, Mr. Bobreski reported his observations directly to Mr. Juanillo. Tr. at 59. After completing his assignment in the field or toward the end of the work day, whichever came first, he would return to the Givoo shop and fill out a daily time sheet. Tr. at 59-60. He would then turn in his time sheet to Mr. Juanillo before visiting Mr. Durrett’s shop again. Mr. Bobreski would remain at Mr. Durrett’s shop for about fifteen to thirty minutes before leaving the work site for the day. Tr. at 60.

The section of the plant to which Mr. Bobreski was assigned was known as “primary.” Tr. at 2362. Mr. Juanillo testified that being assigned regularly to an area meant that the technician had “area control responsibility” and that the technician was to patrol the area

²² Mr. Juanillo testified that often Givoo technicians received work orders in the morning and completed the job that same day. Therefore, the work orders would be returned to Mr. Juanillo the same day that he assigned them to the technicians. Tr. at 2293. Mr. Juanillo spent approximately sixty percent of his workday at his desk where he logged in work orders before they were assigned to Givoo technicians, and completed the log once the documents were returned after the job was done. When not at his desk tracking and assigning work orders, Mr. Juanillo spent approximately ten to fifteen minutes per day driving around the facility meeting with Givoo technicians. Accordingly, he was heavily dependent upon what Givoo employees told him as far as what they had done and how long it took them to do it.

²³ Mr. Juanillo specified that he returned the work orders to Mr. Durrett either that same day or the following day, since Mr. Juanillo “did not like to have work orders sitting around, nor did Mr. Durrett.” Tr. at 2294. However, according to Mr. Juanillo, it was not uncommon to see “a foot high stack of work orders sitting on Mr. Durrett’s desk” and when Mr. Juanillo would question Mr. Durrett as to whether he got the work orders out, Mr. Durrett would simply state that he did not have time. *Id.*

²⁴ Although technicians often teamed up on assignments, it was not always the case that Givoo employees would be teamed up with other Givoo employees. Tr. at 61. At times, Givoo employees would be paired with contractors from other companies.

regularly throughout the workday. At times, the technicians would talk to the operators to see if there were any problems with the equipment. Tr. at 2632. In fact, Mr. Bobreski's understanding was that any part of WASA management was free, at any time, to approach a technician during the course of the day and give that technician an assignment. Tr. at 61. By contrast, however, Mr. Juanillo seemed to indicate that this was not the proper way for assignments to be allocated. Specifically, he testified that at one point, he became "concerned that technicians were taking orders from field operators when a piece of equipment broke down and jumping in and fixing it without a work order request from WASA." Tr. at 2363-2363. He therefore instructed the technicians that when this happened, they should call him first so that he could alert WASA of the situation.²⁵ It was then up to WASA to decide what they wanted done about it. Tr. at 2363.

As far as being on the site when the chlorine sensor testing was performed, Mr. Durrett was the most knowledgeable WASA manager. Tr. at 841-842. According to Mr. Durrett's own testimony, he was "directly responsible for the testing of the chlorine sensors located in Chlorine Building No. 1." Tr. at 839. However, since outside contractors performed the actual testing on a day-to-day basis, Mr. Durrett did not consider himself particularly knowledgeable on the technical aspects of the testing.²⁶ Tr. at 841. He further testified that he left all procedures "up to the contractor," including establishing a time frame as to how long it should take the chlorine sensors to respond to the presence of chlorine. Tr. at 846-847. He testified that technicians could establish any criteria that their professional skills led them to believe were accurate. Tr. at 847. He would then evaluate the success of a test based on what the technician had indicated under the heading "action taken" on the work order and who the technician was.²⁷ Tr. at 848.

Regarding the extent to which he maintained control over the testing process, Mr. Durrett noted that he was not the only supervisor involved in the testing, that the contractors all had their own supervisors, and that the contract stated that these supervisors were responsible for running their crew. Tr. at 843. In terms of the Givoo contract, he further testified that Mr. Juanillo originally obtained the essential documents, such as the EIT manual, from him but that it was then Mr. Juanillo's responsibility to keep the documents and to "keep his people aware of what they needed to do on the job." Tr. at 845. That notwithstanding, Mr. Durrett still had responsibility for "signing off" on the work orders pertaining to the testing of chlorine sensors. He also had responsibility for assigning reconciliation and failure codes for the testing of the chlorine sensors in Chlorine Building No. 1. Tr. at 843. However, he also testified:

²⁵ Mr. Juanillo testified that Givoo personnel, including him, had two way radios and could communicate with technicians in the field anytime during the day. Tr. at 2363. He further testified that, while Mr. Durrett also had a two way radio, he could not always communicate with him during the day, since trying to reach Mr. Durrett was like "trying to pull teeth." Tr. at 2363-2364.

²⁶ Specifically, Mr. Durrett stated that prior to October 1999, WASA employees never tested the sensors; contractors always did the work. Tr. at 845. Moreover, he testified that prior to October 1999, he never saw a WASA employee assisting a contract employee in testing the sensors. Tr. at 846. However, he also stated: "Now if those [WASA] guys were out in the field and the contractor said, hey, can you give me a hand, maybe somebody did but as far as management making those decisions, I never assigned any, any in-house person to work with the contractor." *Id.*

²⁷ He also indicated that "other factors" went into his assessment of the success or failure of a test. Tr. at 849.

[W]hen I got those work orders back, I got them from Dan [Juanillo]. Dan reported to me every day what was going on, how things had worked for that particular day before I signed anybody's field service report. So I wouldn't necessarily read all that documentation. Dan already told me what was going on. Like I said, in the contract he is responsible. So when he turns the paperwork over to me, we've done the job, everything is fine, good. I sign off on it.

Tr. at 854.

Mr. Durrett testified that he and Mr. Bobreski spoke rarely, perhaps once or twice, and that technicians communicated with Mr. Durrett through their supervisors. Tr. at 850. Mr. Durrett stated: "As long, as long as Dan Juanillo told me everything was fine, as far as I'm concerned, everything's fine." Tr. at 850. When questioned as to whether WASA was responsible for making sure their contractors did the "right thing," Mr. Durrett replied: "Read the contract. They [Givoo] are responsible." Tr. at 1023. At the same time, he seemed to admit that as WASA's first line supervisor, he was responsible for ensuring that the contractors were properly testing the sensors and taking charge if the contractors were "screwing up." Tr. at 1024.

With respect to the issues in this case, Mr. Durrett normally reported to Mr. Van Dolsen. Tr. at 1061-1062. During the entire time that Mr. Bobreski was employed at Blue Plains, Mr. Van Dolsen maintained overall management responsibility and was to ensure that the chlorine sensors in Chlorine Building No. 1 were being properly tested.²⁸ Tr. at 1063. According to Mr. Van Dolsen's own testimony, he had been designated as the project inspector on the Givoo contract, which meant that he was to ensure that the contract was being run properly and that "WASA was getting their money's worth." Tr. at 1062. He also had responsibility for ensuring that the testing procedures being implemented in Chlorine Building No. 1 were accurate, complete and thorough, and that any deficiencies noted in the testing procedures would be identified and corrected. Tr. at 1063. Mr. Van Dolsen testified that he relied on Mr. Durrett to assist him in that regard.²⁹ Tr. at 1063-1064. Under Mr. Van Dolsen's direction, Mr. Durrett was authorized to randomly establish a time frame as to how long it should take the chlorine

²⁸ He was also responsible for ensuring compliance with all regulatory provisions. Tr. at 1063.

²⁹ Mr. Van Dolsen admitted that he had no opinion as to how frequently the sensors needed to be tested. Tr. at 1065. He further admitted that in order for Mr. Durrett to carry out the responsibilities of ensuring that these procedures were complete and accurate, he would have to have known what those procedures were. Tr. at 1064. However, Mr. Durrett stated that he read the EIT Manual (CX 57) for operation and maintenance of the sensors only after Mr. Bobreski raised complaints on October 22, 1999. He admitted that he had not read the manual while Mr. Bobreski was still employed at Blue Plains. Tr. at 843-845.

Mr. Van Dolsen could not recall Mr. Durrett ever having voiced any concerns about the completeness or accuracy of the technical procedures. Tr. at 1064-1065. However, he could recall one occasion on which Mr. Durrett told him that chlorine alarms were being disconnected. Tr. at 1065.

Mr. Marcotte did not think it was necessarily an important part of Mr. Durrett's job to know the specifics of the test procedures. Tr. at 1462. He further testified that he did not think that "anyone at WASA needed to know what the specifics of the chlorine sensor testing procedures were." *Id.*

sensors to respond when exposed to a chlorine source during their biweekly testing.³⁰ Tr. at 1065.

At hearing, Mr. Juanillo provided testimony regarding the technical competence of the WASA managers with whom he interacted. Specifically, he claimed that “they were a little behind the times as far as taking care of their people, knowing exactly what was going on in the field, knowing what the problems are out there and how to take care of it and react to it especially safety issues. I would say they're below standard.” Tr. at 2277-2278. He further testified that as far as preventative maintenance was concerned at Blue Plains, it was almost “non-existent” compared to the other plants at which he had worked. Tr. at 2278-2279. He stated that when a problem was identified by one of his personnel and reported to WASA “usually nothing was done about it.”³¹ Tr. at 2279.

According to Mr. Juanillo, there was a well-known saying at the plant called the “Blue Plains shuffle,” which characterized the general work ethic at the plant. Toward the beginning of his career at Blue Plains, he was advised by two long-term WASA employees that the “Blue Plains shuffle” is “[w]here you just take your time, don't rush, don't get everything fixed on time, don't get everything fixed, because we don't need to do that. Just take your time, spread the whole day out and relax. Don't try to show up like you know what you're doing and getting things done and fixed.” Tr. at 2280.

Mr. Juanillo testified that he experienced intimidation while working at Blue Plains unlike anywhere he had ever worked in the past. Tr. at 2279. He testified that his WASA supervisors³² made him feel as though he had “no say” and that he should just do as he was told and do the “Blue Plains shuffle.” Tr. at 2279-2280. He felt that if he raised concerns to WASA management there would be “repercussions.” Tr. at 2282. He testified that he was made to feel incompetent when raising technical issues, primarily in dealing with Mr. Durrett. Tr. at 2283. According to Mr. Juanillo, Mr. Durrett “did not like to hear [about] bad things happening at the plant.” Tr. at 2402. Mr. Juanillo also testified that Mr. Durrett once said to him that “if he's going to have to go to jail, he's going to take somebody down with him.” Tr. at 2280-2281. He testified that Mr. Durrett made this comment to others as well, and that he made such a comment “at least a half a dozen or more times.” Tr. at 2281. He noted that Mr. Durrett was serious when making this comment and that it “wasn't just [an] off the wall type of thing.” Tr. at 2281. Mr. Juanillo indicated that during the summer of 1999,³³ he went to Mr. Van Dolsen in response to the way Mr. Durrett had been treating him. Tr. at 2478-2479. According to Mr. Juanillo, Mr.

³⁰ I note that Mr. Van Dolsen testified that Mr. Durrett was authorized to randomly establish a time frame for appropriate sensor response time, and that Mr. Durrett indicated that he left this responsibility to the technician's discretion.

³¹ Mr. Juanillo testified that these problems could “sit there for a period of days or months.” Tr. at 2279. He further testified that at other wastewater facilities where he had worked, they did not “waste one day” [with these types of problems]. *Id.*

³² Specifically, Mr. Durrett, Mr. Redd, and Mr. Van Dolsen.

³³ Before Mr. Bobreski arrived at Blue Plains.

Van Dolsen's reply was that "if he could, he would fire Mr. Durrett. He couldn't stand him anyway, quote, unquote." Tr. at 2479.

Mr. Glenn W. Kinsey, a teacher of instrumentation and control who had been in the field since 1966,³⁴ provided expert testimony at hearing. Tr. at 738, 741; CX 67. In defining the I&C field, he explained that in all of the process industries,³⁵ certain physical measurements must be made, including pressure, temperature, liquid level, and flow rates. I&C technicians are responsible for making these measurements as well as controlling these variables.³⁶ Tr. at 740. Mr. Kinsey testified that I&C technicians must have "unambiguous guidance" with regard to the testing and maintenance of instruments. Tr. at 1199. Since there are various purposes and approaches to using I&C instruments, the procedures to be followed must be "explicit and complete." Tr. at 1199. While generally management has the responsibility of obtaining all of the necessary information regarding plant equipment and ensuring that the procedures to be followed are clear, there is also the option of hiring someone to undertake this responsibility. However, even under circumstances where a plant has hired someone in this capacity, management is still ultimately responsible for ensuring that all duties are properly executed. Tr. at 1199-1200.

In order for I&C technicians to perform testing and maintenance on instruments, the plant must provide them with specific information. Tr. at 1200. First, I&C technicians must be provided with a process and instrument diagram, which shows the location of the device and its function at the plant. Second, they need a "so-called ladder diagram and a logic diagram," which explain how devices are electrically connected to other equipment at the plant. Finally, I&C technicians must have reference to the documents that pertain specifically to each particular instrument. Tr. at 1200-1201. Mr. Kinsey explained that if an instrument needs to be calibrated or installed in a particular way, such information is included on a specification sheet ("spec"). Tr. at 1201. With regard to the significance of the manufacturer's equipment information, Mr. Kinsey explained that this information is "of greater or lesser importance depending on the particular instrument that you're dealing with." Tr. at 1201. He stated that "sometimes it's so obvious you don't need the manufacturer's information. However, when dealing with a complicated device, the manufacturer's instructions as to procedures should be relied on for testing, repair, and the general overall operation."³⁷ Tr. at 1201-1202.

Mr. Kinsey testified that most plants keep written records as a means of monitoring operations. Tr. at 1202. Problems with particular instruments are recorded in a series of service reports, and it therefore becomes apparent which brands of equipment provide good service and which brands require constant repair. Mr. Kinsey stated that based on standard I&C operating

³⁴ He had also been Mr. Bobreski's I&C teacher at Salem Community College in New Jersey. Tr. at 738.

³⁵ Process industries include electric generating stations, chemical plants, paper mills, oil refineries and even food processing plants. Tr. at 740.

³⁶ Mr. Kinsey testified that an I&C technician who is qualified in one field "is welcome onto all kinds of process plants." Tr. at 741.

³⁷ As a standard operating procedure, most plants archive all of this information. Tr. at 1201-1202.

principles, it would be “significant in a plant like Blue Plains if manuals, specs, procedures or drawings were routinely missing or not available to the I&C technicians.” He further stated that without this information, an I&C technician would be “pretty much flying blind,”³⁸ since he would not know what he was dealing with and would not have a place to put the information that he was uncovering.³⁹ Tr. at 1202-1203. Finally, he testified that if he worked at a plant where he was not provided with this type of information, he would think he was working for a “plant that didn't know what they're [sic] doing.” Tr. at 1203-1204.

Mr. Juanillo similarly stated that when a new entity (e.g. Givoo) assumes responsibility at a plant, management (e.g. WASA) typically provides some form of documentation or information as to how certain things work and are tested. Tr. at 2283. However, when Givoo assumed responsibility at Chlorine Building No. 1, WASA provided “nothing of the sort.”⁴⁰ Tr. at 2283. He further testified that often when a Givoo employee would go to the Technical Information Center (“TIC”)⁴¹ to search for documentation pertaining to a particular instrumentation, they were unable to find it. Tr. at 2284. According to Mr. Juanillo, Mr. Durrett would insist that he should have all the information he needed, even when Mr. Juanillo protested to the contrary. Moreover, Mr. Juanillo testified that whenever he would request documentation, the “first thing they think of is that you're incompetent, that you can't do the job.” Tr. at 2284.

The witnesses who testified at hearing provided varying accounts of the general condition of the Blue Plains Facility. Mr. Bobreski, for his part, described the condition of Chlorine Building No. 1 as “absolutely deplorable.” Tr. at 67. He testified that there was garbage everywhere, which did not consist of deconstruction of plant parts but rather “loose parts, [including] soda cans, [and] in some cases, liquor bottles.” Tr. at 67. He further testified that some of the garbage “literally” blocked the doorways, and that he “found manuals in the garbage.” Tr. at 67. According to Mr. Bobreski, the basement of Chlorine Building No. 1 “virtually always had standing water in it,” the bathroom was frequently wet, and there was often water by all the doorways. Tr. at 67-68. For the most part, the exterior windows were cracked and most of them were “spray painted on the inside so you couldn't see in.” Tr. at 68. One “window had a bullet hole in it” or what appeared to be a bullet hole. Tr. at 68. Additionally, he saw no out-of-service tags in Chlorine Building No. 1, which are generally used to identify

³⁸ He similarly testified that if one was not supplied with this basic information, it would be “like trying to do work without your tools.” Tr. at 1202-1203. He further stated: “I think it would be a scary and uncomfortable experience for an I&C tech not to have that information available.” *Id.*

³⁹ For example, when an instrument is brought in from the field, one must record the “as-found” condition. There must be a specific document where the I&C technician can record this information. Mr. Kinsey testified: “You need to have some kind of, of a document that's already been in existence and you're going to add a new line of information to it or something of that nature.” Tr. at 1202-1203.

⁴⁰ Mr. Juanillo testified that when he was first hired, he was asked whether he was able to work without documentation and troubleshoot without drawings. Tr. at 2284. It was only later that he realized he had been asked these questions because there were no documentation or drawings at the facility. *Id.*

⁴¹ The TIC was where WASA stored documents.

equipment that has been temporarily suspended and that should be in plain view.⁴² Tr. at 68. Mr. Bobreski also testified as to the condition of the chlorinator instrument cabinet located inside Chlorine Building No. 1. He first noted that this was an “active” cabinet, meaning that it contained the alarms for the chlorine sensors and for the chlorinator system. Tr. at 75. The cabinet contained approximately twenty five gallons worth of a “caked” substance that looked similar to baking soda. Tr. at 74. He also noticed garbage as well as a mop and a bucket in the cabinet. Tr. at 74-75. He testified that this was not appropriate material to be stored in an active cabinet.⁴³ Tr. at 75.

Similarly, Mr. Juanillo testified that when he arrived at Blue Plains in 1992, he was “very shocked to see that it was in a deplorable condition.” Tr. at 2275. He further stated: “I have seen waste plants in my lifetime clean enough that I could eat off the floor.”⁴⁴ [Blue Plains, however,] was a total mess. The whole plant was that way.” Tr. at 2275. Mr. Juanillo testified that by the time Mr. Bobreski arrived at Blue Plains in 1999, the conditions had not “changed one bit.” Tr. at 2275. He opined that the personnel at Blue Plains “did not really care for the condition of the plant due to the fact that there were so many things that [he] found there that [he] would not even think of finding in a plant ... for example empty vodka bottles, beer bottles and things like that inside that nobody even bothered to clean up.” Tr. at 2276. Although he had never worked at a wastewater facility before, his father was a certified wastewater technician and he had visited several wastewater treatment plants in Florida which were much cleaner. Tr. at 687-688.

Mr. Juanillo testified that he first saw the conditions inside of Chlorine Building No. 1 when he was working on an inspection test there in early 1999. Tr. at 2285. He noted that the conditions inside the building were “just like the rest of the plant, deplorable.” Tr. at 2285. He noted that Mr. Bobreski and a co-worker began hauling trash out of the back room of the building as it was not possible to work in there with trash everywhere. Tr. at 2285, 2308. He further testified that there was “always a lot” of standing water in the basement of Chlorine Building No. 1. Tr. at 2286. He also stated that Chlorine Building No. 1 was “supposed to be manned” but estimated that no one was there “ninety percent of the time.” Tr. at 2287. Mr. Juanillo also testified as to the condition of the chlorine pipes at Blue Plains. He stated that “standard policy for chlorine pipes” is that they should always be “in perfect condition, painted, identified, and arrowed as to where it is going to and where is it coming from.” Tr. at 2286. However, in the case of Blue Plains, the pipes were rusted and the brackets⁴⁵ were bent, broken or non-existent. Tr. at 2286.

⁴² Mr. Bobreski clarified that he did see one out-of-service tag in one of the chlorinator cabinets, which he believed was from 1993. Tr. at 68. This was the only out-of-service tag that he ever recalled seeing. *Id.*

⁴³ Mr. Bobreski testified that the conditions of the site interfered with his work assignments. Tr. at 74. In an effort to alleviate the situation, he and a co-worker began “literally cleaning up the debris.” *Id.* They picked up trash and carted it out to the dumpsters. They also removed garbage accumulation inside the cabinets. They did not, however, remove any plant equipment, even if looked like it was going to the dump.

⁴⁴ Mr. Juanillo had been in the instrumentation field for over thirty years and had been at over half a dozen wastewater treatment plants. Tr. at 2275-2276.

⁴⁵ Mr. Juanillo explained that the brackets were the pipe supports. Tr. at 2286. He further stated that the pipes were corroded and that “[y]ou couldn't tell if it was a chlorine pipe to save your life. And it was not identified as a

By contrast, Mr. Durrett testified that at no time since he began working at Blue Plains did he believe the plant conditions deteriorated to a point that he could generally describe as deplorable. Tr. at 839. Contrary to Mr. Juanillo, Mr. Durrett testified that the longest the chlorine building was left unoccupied was for “a couple of minutes.” Tr. at 1014.

B. Specific Incidents

On his first day of field work, Mr. Bobreski was teamed up with Mr. Gerard Huffman.⁴⁶ Mr. Bobreski remained teamed up with Mr. Huffman for only two or three days. Tr. at 62. At hearing, Mr. Bobreski provided his account of working with Mr. Huffman. Their initial work assignment involved diagnosing a “feedback circuit for a motor pump” at one of the pumping stations. Mr. Huffman provided a brief explanation of the problem as well as some drawings to Mr. Bobreski. Mr. Bobreski made a few suggestions regarding the operation and which items he felt it necessary to look at first. They worked on the problem for the remainder of the day but did not finish resolving it entirely. Tr. at 64. Mr. Huffman suggested that they finish resolving the problem the next day. The next day, Mr. Bobreski recalled sitting “in the shop” waiting for his partner, Mr. Huffman, to appear. Mr. Bobreski emphasized that he had been new on the site and that Mr. Huffman was supposed to have been “breaking him in on the location of the equipment” and helping him “get a feel” for the operation. In any event, Mr. Bobreski later learned that Mr. Huffman had finished resolving the problem on his own that morning. Tr. at 64.

Although Mr. Bobreski felt that Mr. Huffman’s actions had been underhanded, he nevertheless continued to work with him for the remainder of the day. Tr. at 64-65. He recalled getting into a discussion with Mr. Huffman where Mr. Bobreski remarked on “how dirty the place was.” Tr. at 65. He testified: “[T]here were instances where I saw control cabinet doors were open and nobody around. Lights blinking, scum on the floor, it was something I was never used to, or I never remember a facility being this gross.” Tr. at 65. Mr. Bobreski further recalled that on the wire cabinet where Mr. Huffman had been working, there was “a thick layer of grease and dust.” Tr. at 65. As a result, Mr. Bobreski was prompted to inquire as to who was “minding the store.” Tr. at 65. To this, Mr. Huffman took offense. He told Mr. Bobreski: “[L]ook, I’m here to teach you.” Tr. at 65. To this, Mr. Bobreski took offense. He cursed at Mr. Huffman and said “you don’t talk to me like that and I don’t want to work with you.” Tr. at 65. Thereafter, Mr. Bobreski went to advise Mr. Juanillo of the incident.

By contrast, Mr. Huffman provided a different version of this encounter. He testified that he left the instrument site shop and went down to the pumping station while Mr. Bobreski “lingered for an hour or so.” Tr. at 1593-1594. Mr. Huffman testified that he had taken the contact out and was in the process of cleaning and reassembling when Mr. Bobreski walked in.

chlorine pipe. So anyone for example could have -- if they wanted to for some reason was doing some kind of work, cut that pipe be in big trouble because that comes from the tank car.” Tr. at 2287.

⁴⁶ Mr. Huffman, a field engineer, worked for Carolina Instrumentation Company (“CIC”) as a contract employee. Tr. at 1593, 1613-1614. This was “essentially the same work that Mr. Bobreski was doing on site.” Tr. at 1614. Although he was not ISA certified, Mr. Huffman had worked in a wastewater facility for nine years prior to working at Blue Plains. Tr. at 1613.

Tr. at 1594. At that time, Mr. Bobreski stated that the equipment was old and should be replaced. Mr. Huffman testified that he did not dispute that the equipment was old and possibly should be replaced, but as they did not have a replacement, it was their job “just to fix it.” Tr. at 1594. Mr. Bobreski replied that this was a waste of time to which Mr. Huffman responded: “It's our job to repair it. If we repair it every two weeks, once a month, whatever, we were hired to repair the equipment, and that's what we're going to do.” Tr. at 1594.

Mr. Huffman then recalled Mr. Bobreski picking up one of the contacts, pulling a screwdriver from his pocket, and prying on the contacts. Tr. at 1594. He advised Mr. Bobreski that he would break the contacts if he continued to pry on them.⁴⁷ He then took the materials away from Mr. Bobreski at which point Mr. Bobreski left and reported the incident to Mr. Juanillo. It was Mr. Huffman's understanding that Mr. Bobreski had told Mr. Juanillo that he had been offended and that Mr. Juanillo then went to Mr. Durrett. Mr. Durrett approached Mr. Huffman about the incident, and after that experience, Mr. Huffman and Mr. Bobreski were never formally paired to work together again.

Mr. Bobreski was thereafter teamed up with Mr. John Bernhardt instead. Tr. at 66. From then on, he worked with Mr. Bernhardt everyday. According to Mr. Bobreski, there was never any adverse interaction between them. He described his working relationship with Mr. Bernhardt as excellent and testified that Mr. Bernhardt's capabilities as an I&C Technician were excellent. It was Mr. Bernhardt who taught Mr. Bobreski the procedure for testing the chlorine sensors in Chlorine Building No. 1.⁴⁸ Tr. at 96. Mr. Bernhardt instructed him that a solution consisting of vinegar and bleach⁴⁹ was to be used, and that once the test solution was placed under the sensor, a response time of two minutes for the danger alarm to sound was expected. Tr. at 107-108.

Mr. Bobreski testified that the only testing criteria of which he was ever made aware were those instructions given to him verbally by Mr. Bernhardt. Tr. at 107. Mr. Bobreski did not know who had advised Mr. Bernhardt of the procedures. Tr. at 107-108. Similarly, Mr. Juanillo testified that he had originally been given verbal instructions on how to test the sensors because there was no documentation on the subject until Mr. Bobreski “looked around and found the right manufacturer's manual.” Tr. at 2288. He stated that the verbal instructions included using a mixture of bleach and vinegar; however, the work order itself “did not give any specifics as far as how long the solution has to be under each sensor, what is the time frame it's supposed to kick off or set the audible alarm.” Tr. at 2288. As a result, he testified, the technicians were determining these things on their own. The manual of Standard Maintenance Procedures for the

⁴⁷ Mr. Huffman thought that Mr. Bobreski was attempting to break the contacts, and that if he did so, the whole unit would have to have been refitted. Tr. at 1595. Mr. Bobreski, for his part, testified that he was cleaning the contacts at this point. Tr. at 464.

⁴⁸ The bi-weekly testing of the chlorine sensor was sometimes referred to throughout the testimony as the “go-no-go test.”

⁴⁹ Mr. Bobreski noted that the bleach bottle used to conduct the test “was in an old electrical cabinet, it just sat there, next to the vinegar with the cups and what have you. Anybody could get in there, anybody could spill it. It was not -- nobody signed out for it.” Tr. at 141-142.

Chlorination/Dechlorination Facilities at Blue Plains, dated with a handwritten note as “Final 7/31/97,” CX 12, called for use of a solution of bleach and vinegar, but did not specify the amounts of the ingredients to be used, or the required response time for the sensors. *See* CX 12:6. Mr. Kinsey opined that it would be “a little dangerous” if the standard practice for training or passing along the procedure of how these tests are to be performed was word of mouth from technician to technician. Tr. at 1226. Mr. Marcotte admitted that WASA had never provided Givoo with a procedure that it was to enforce in testing the sensors. Tr. at 1460-1461. He further stated that Givoo had the entire responsibility to develop, modify, implement, research, and carry out the testing procedures.” Tr. at 1465-1467, 1469. He further stated: “... I believe that WASA is generally responsible for what goes on at that plant, but with regard to specifics of the chlorine test procedures, I believe that WASA more than carried out its responsibilities. By directing Givoo to do this work, I was providing the road map for Givoo to do the work.” Tr. at 468.

On July 22, 1999, Mr. Bobreski participated for the first time in the chlorine sensor testing at the rail car location and at Chlorine Building No. 1.⁵⁰ Tr. at 96, 106; CX 63:16-18; RX 123. He testified that many things appeared “out of the ordinary” with respect to the internal alarms located in the chlorinator cabinet. Tr. at 109-111. First, Mr. Bobreski observed that one alarm “appeared to have been struck by a blunt object.” Tr. at 110. He testified that this “wasn’t an accident [because] this horn was mounted at about seven feet high.” Tr. at 111. Thus, he figured “it was not like somebody could have knocked something against, it was by -- I can only conclude that this was intentional.” Tr. at 111. Second, Mr. Bobreski found wires, indicating that two of the four audio alarms had “literally been removed from the front part of the panel.” Tr. at 110. Specifically, he explained that he and Mr. Bernhardt observed the “wiring to the horns was either cut, or in some cases, they had lumps that could pull apart and they weren’t connected.” Tr. at 111. In addition, Mr. Bobreski recalled seeing “circuit boards on the floor and circuit boards lying on top of other circuit boards.” Tr. at 111. While part of the cabinet appeared operational, part of it did not, and none of it was tagged up or identified as to its status, nor whom to call about it.⁵¹

Mr. Bobreski testified that he and Mr. Bernhardt did the best they could to reestablish the audio alarms in the chlorinator cabinet, which were directly hooked up to the EIT sensors.⁵² Tr.

⁵⁰ At that time, the work order identified six sensors as being in existence. Tr. at 106; CX 63. Company records show that six sensors were calibrated in January 1999, RX 114, and tested periodically thereafter, CX 63:1-15, RX 116, 117, 118, 119, 120, 121, and 122. However, Mr. Bobreski later learned there were in fact seven sensors in existence. Tr. at 107. *See* the parties’ stipulations 1 and 2 for a list of all seven sensors with their locations and calibration and replacement histories between 1996 and October 1999. Even after the seventh sensor was discovered, the work orders never reflected that there were seven sensors to test. Mr. Durrett testified that after Mr. Bobreski identified the seventh sensor, the work orders could not be changed to show seven instead of six because they were generated with outdated software no longer supported by the company which supplied it. Tr. at 995-997.

⁵¹ Although he “vaguely remembered a phone number on the door, written in magic marker,” Mr. Bobreski believed that this number had to do with opening and shutting the door.” Tr. 111. He recalled a padlock being on the door. *Id.*

⁵² Mr. Bobreski was certain of this connection because after he and Mr. Bernhardt hooked up the panel, the alarms would sound. Tr. at 112. He further explained that if he did not access the acknowledge button on the EIT module, the outside alarms would remain on. Tr. at 112-113. Moreover, if the chlorine had not vacated the sensor, the alarm

at 112. In addition to the problems he observed with the audio alarms on July 22, 1999, Mr. Bobreski also observed problems with the visual alarm component associated with the chlorine sensor system. Tr. at 113. Specifically, he testified that the visual component included an outside alarm that when activated was to produce a blinking red warning light (i.e. a beacon on top of the building). That day, however, the red light was not functioning. Tr. at 113-116; CX 72:3.

Mr. Bobreski testified that he never saw the work order associated with the July 22, 1999 testing of the sensors in its completed form while employed at Blue Plains (CX 63:18). Tr. at 129. Specifically, he had never seen the information under the “action taken” heading and had not seen Mr. Durrett's reconciliation code and signature as it currently appeared on the work order. Tr. at 129-130. The record shows that under the heading “action taken” were the initials of Mr. Bernhardt. CX 63:18; Tr. at 129. The work order stated that the “chlorine sniffers” had been “checked out” for “correct operation” and that “all systems sense the presence of chlorine gas and give an audible or visual alarm.” CX 63:18. None of the problems identified above by Mr. Bobreski appear on the work order. Finally, it appears that Mr. Durrett signed off on the work order on August 5, 1999. CX 63:18.

On or around July 30, 1999, Mr. Bobreski was in the vicinity of Chlorine Building No. 1 when he and Mr. Bernhardt found an audio alarm inside the chlorination cabinet, “just laying there [sic].” Tr. at 136; CX 72:4. It was found by accident and it was one of the front panel mounts. Tr. at 136-137. Mr. Bobreski and Mr. Bernhardt thereafter got some screws and mounted it back up, since there was already a hole from where it had been removed. Tr. at 137. Mr. Bobreski testified: “It was still whole and we just slipped it back up. I think we had to run some wires to it. The original wires had been cut. And there was a distance between where they landed and where they were cut that was gone. So I remember getting some wire and some nuts and bolts for this.” Tr. at 137. He explained that after he and Mr. Bernhardt re-mounted the alarm, it should have sounded if the chlorine sensors were activated. Tr. at 137-139. Instead, however, further maintenance was required as the alarm sounded at inappropriate times. Tr. at 139-140. He testified that he and Mr. Bernhardt ultimately repaired the problem. Tr. at 140.

On August 5, 1999, Mr. Bobreski conducted another bi-weekly inspection of the sensors. CX 63:25-26; Tr. at 140-141. This marked the first time that he had conducted a bi-weekly inspection alone. Mr. Bobreski testified that he was concerned about the vagueness of the testing parameters and that the two-minute time period, of which he had been advised by Mr. Bernhardt, “just seemed way too long.” Tr. at 141-142. Moreover, he noted that there were no written procedures explaining the company standard. As a result of his concerns, Mr. Bobreski decided to speak first with Mr. Juanillo and Mr. Bernhardt before conducting the inspection. After speaking with Mr. Juanillo, he ended up speaking with Mr. Durrett. Tr. at 142. Mr. Durrett advised that Givoo was responsible for maintaining the testing procedures. Tr. at 143. Mr. Bobreski then returned to Mr. Juanillo and told him that he needed to visit the TIC to learn about the testing procedures. He looked for the manual in the part of the TIC Center that had been

would remain on “no matter how Mr. Bobreski hit the acknowledge button.” Tr. at 113. After the chlorine vacated the sensor, and only then, could Mr. Bobreski get the alarm to go off by hitting the acknowledge button. *Id.*

designated for Givoo employees, and though he went through shelves of books and manuals, he did not find the EIT manual at that time.⁵³ Tr. at 143.

Mr. Bobreski thereafter set out to conduct the test, which took an hour to complete. Tr. at 146. During the test, he observed that some sensors were functional, in that some of the alarms were working, while others were not. Tr. at 146-147. Specifically, the audio alarm in the chlorinator panel was not activating when he put the chlorine under the sensor. Tr. at 147-148. This was the same audio alarm that he and Mr. Bernhart had re-mounted on July 22, 1999, which, asserted Mr. Bobreski, would have required intentional effort to undo.⁵⁴ Tr. at 148-149. He therefore reasoned that its malfunctioning on August 5, 1999 was “clearly” the result of an “intentional” and “unauthorized” act that someone committed by “drop[ping] the wires.” Tr. at 149.

In addition, Mr. Bobreski also observed that the roof light annunciator (the beacon on the roof) was defective. Tr. at 153. He went on top of the roof to further explore the problem. While there, he removed the lens, tested the bulb, and observed the bulb to be working. He therefore could not understand why it appeared defective. To further investigate the problem, he disconnected the power wires to the beacon and brought it down to the shop. When he cleaned it and “powered it up” without the lens, the beacon worked. However, once he reassembled the beacon and the lens and remounted the beacon, it appeared defective again.⁵⁵ After considering various explanations as to the source of the problem, Mr. Bobreski realized that “the inside of the lens was coated somehow.” Specifically, it appeared to have been spray painted. Mr. Bobreski testified that “[w]hoever did it did a very good, it was just not something that you find in the course of normal troubleshooting.” Tr. at 149-151. Mr. Bobreski believed that the spray painting constituted sabotage because, “if the alarm went off, they didn't want anybody to see the light.” Tr. at 151. He asserted that there was no “functional reason” for a technician to spray paint the beacon so that the alarm could not be seen.⁵⁶ Tr. at 152.

Mr. Bobreski noted these problems on the August 5, 1999 work order. *See* CX 63: 26. Specifically, under the “action taken” heading, Mr. Bobreski wrote “roof light enunciator [sic] defective, no audio alarms at the chlorinator panel.”⁵⁷ Tr. at 145. On September 1, 1999, Mr.

⁵³ He later found it at some point in September 1999. It had been under a different heading, which is why he had not found it the first time. Tr. at 144.

⁵⁴ As opposed to the “back panel alarm” that had also been disconnected but that “had lugs on it that you could just pull off.” Tr. at 149.

⁵⁵ He recalled catching a very thin blink; however, when working properly, the light was supposed to be almost blinding. Tr. at 150.

⁵⁶ Mr. Bobreski also testified that he had skimmed through all the work orders produced by WASA in this case, and that before he reported the problem, he found no documentation indicating that the beacon was not functioning properly. Tr. at 152-153. The fact that he was the only one reporting these problems bothered Mr. Bobreski, since “apparently this had been the accepted mode of operation.” Tr. at 153-154.

⁵⁷ By “roof enunciator defective” he meant that the red beacon light that he had observed as being defective on July 22, 1999, was still defective. Tr. at 145. “No audible alarm at the chlorinator panel” referred to the problem with the inside alarms of Chlorine Building No. 1. Tr. at 145-146.

Bobreski turned in a memo to Mr. Juanillo describing the problem with the lens and the audio alarm at Chlorine Building No. 1.⁵⁸ Tr. at 158-160; CX 27. Mr. Bobreski testified that he wanted to “make it known” that he had discovered both the damaged alarm and the problem with the lens of the visual alarm. Tr. at 158-159; CX 27. He stated that the memo had also been prompted by discussions with Mr. Juanillo, wherein Mr. Juanillo advised that if Mr. Bobreski had concerns, he should draft a memo regarding them. Tr. at 159. After Mr. Bobreski gave the memo to Mr. Juanillo, he was advised that it had been “faxed right out” to Mr. Durrett.⁵⁹ Tr. at 159, 2312. However, Mr. Bobreski never received a written response to his memo from anyone at WASA, nor were any of his concerns ever discussed with him. Tr. at 160.

At hearing, Mr. Durrett admitted that on the August 5, 1999 work order, Mr. Bobreski had reported that there were no audible alarms at the chlorination panel and that the roof light annunciator was defective. Tr. at 923-924. He further admitted that these observations were correct and that to address these deficiencies, another work order was generated on September 10, 1999 (Work Order # 99-81777). Tr. at 924-926; CX 63:30-31. Mr. Durrett explained that, while these deficiencies were to be handled by the electrical division, the work order had been originally directed to him by mistake. Tr. at 924-925. Therefore, on September 22, 1999, he made a notation on the work order indicating that it should be reissued to the “electric shop.”⁶⁰ See CX 63:31; Tr. at 926. He testified that in between September 10, 1999, the date the work order was apparently generated, and September 22, 1999, the date that he actually received the work order, he “had no idea who had the work order.” Tr. at 927.

In any event, Mr. Durrett testified that the visual alarm was ultimately repaired and that “those alarms have failed more than once.” Tr. at 927. He testified: “It's not a situation where Mr. Bobreski identified a problem and then months later it's just getting repaired. The thing may have been repaired the next day, two days later, and then failed again in a month or two.”⁶¹ Tr. at 927. He admitted that, while he never received affirmative notice that it had been repaired,

Mr. Bobreski testified that the work order stated that only six sensors needed to be tested and it was therefore his understanding that there were only six sensors in existence at Chlorine Building No. 1.

⁵⁸ Mr. Bobreski claimed that he prepared the memo on August 31, 1999, but actually gave it to Mr. Juanillo on September 1, 1999. Tr. at 160, 2312. In addition, while the memo states that it is in reference to Chlorine Building #2, this appears to be a typographical error. It should state that it is in reference to Chlorine Building No. 1.

⁵⁹ In fact, Mr. Juanillo testified that he faxed all of Mr. Bobreski's memos, and some of his own, to Mr. Durrett. Tr. at 2312.

⁶⁰ He also explained that “Reconciliation Code #7,” which is noted on the work order, signifies that the work order had been mistakenly directed to Mr. Durrett. See also CX 71.

Mr. Durrett further testified that, because the electrical division ultimately handled the job, he could not recall what the precise defects had been. Tr. at 924-925.

⁶¹ Mr. Durrett testified that he did not know why the visual alarm was defective, though he stated: “I know at one point, I'm not sure if it was the Inspector General or if it was OSHA, but they said that you should have a brighter light. I know that but as far as the defect, I don't know about that.” Tr. at 927. Mr. Durrett never acknowledged that the cover had been spray painted. Tr. at 927-928.

since this was the responsibility of the electric shop, he inferred that it had because if it had not been repaired “in all of that time from September 22, 1999 to October 22, 1999, somebody would have said something.”⁶² Tr. at 933. Mr. Durrett further testified that the visual alarm had definitely been repaired by the time Mr. Bobreski left the facility, though he could not recall who repaired it. Tr. at 931. However, he was certain that it had been repaired, since the people who conducted the bi-weekly testing after Mr. Bobreski left the facility found that it was functioning.⁶³ Tr. at 931.

Mr. Raymond Hall of the electrical section at WASA also testified regarding the visual alarm. Mr. Hall testified that he was aware that the problem had been reissued to the electric shop, though he could not recall the exact date that it had been reissued. Tr. at 1161. In any event, the electrical division investigated the problem with the visual part of the alarm and in late September or early October 1999 found that “one of the lenses had been painted on the inside.” Tr. at 1161. In mid-November 1999, the lens was replaced. However, in February 2000, the Office of Inspector General for the District of Columbia conducted an investigation at Blue Plains and found that the November 1999 repair had been inadequate, and that the roof top visual alarm on Chlorine Building No. 1 was still inadequate. Tr. at 1162-1163. WASA operators also confirmed that the visual alarm could not be seen in the sun. Tr. at 1163. Therefore, the visual roof top alarm on Chlorine Building No. 1 was again replaced, this time with a combination of red amber such that it could be seen in bright sunshine. Tr. at 1163-1164. He stated that this took place in the month of February or March 2000. Tr. at 1164.

In early August 1999, Mr. Bobreski and Mr. Bernhardt, as the area technicians in primary, were called to repair the relay terminal display (“RTD”) panels on three pumps that were down at Pumping Station 2. Tr. at 2423. According to Mr. Juanillo’s testimony, they spent several days dealing with the problem but were unsuccessful in repairing those RTD connections. Tr. at 2423-2424. Mr. Van Dolsen ultimately intervened and assigned Mr. Huffman to see if he could repair the problem. Tr. at 2162, 2424. Mr. Huffman had the pumps back in service within a relatively short period of time by the afternoon of August 5, 1999. Tr. at 468, 2162, 2424. Subsequently, Mr. Van Dolsen advised Mr. Juanillo that he wanted an explanation as to why Mr. Bobreski and Mr. Bernhardt had taken so long and failed to repair the problem when it took Mr. Huffman only a short amount of time to solve the problem.⁶⁴ Tr. at

⁶² However, it was brought to Mr. Durrett’s attention on cross-examination that Mr. Bobreski had reported the visual alarm as not functioning during that time period. Tr. at 933. Mr. Durrett responded that he would have to defer to Mr. Juanillo on this issue. Moreover, he could not explain why there was no work order indicating that it had been repaired. *Id.*

⁶³ Mr. Durrett admitted that, since the work orders are computer generated, the work order initiating the repair of the visual alarm must have been included in the computer generated records at least at one point. Tr. at 935. However, the only work order associated with this job that could be located was the work order forwarding the job to the electrical division. That notwithstanding, Mr. Durrett insisted that the repair had taken place. In addition, Mr. Durrett admitted that if a new lens was ordered, there must have been a document noting the purchase of a lens. Although no such document was produced, Mr. Durrett still refused to concede that the lens was not purchased. Tr. at 935-936.

⁶⁴ Testimony provided by Mr. Hall suggests that the solution reached by Mr. Huffman was a “temporary fix” to a recurring RTD problem that had been around for over two years. Tr. at 1174-1176.

2162, 2424. Mr. Juanillo reported this conversation to Mr. Bobreski, who then wrote a memo to Mr. Durrett explaining his assessment of the RTD problem. Tr. at 468-469, 2162-2164, 2424-2425.

In his memo, dated August 10, 1999, CX 21, RX 84, Mr. Bobreski explained that he and Mr. Bernhardt had been directed to determine the cause of a faulty temperature indication at Pump Station 2. They determined that the cause of the problem was neither corrosion nor heat but instead observed that the fork lugs were too big for the terminal strip. Mr. Juanillo admitted that Mr. Bobreski's assessment in the August 10, 1999 memo had been inaccurate in that excessive heat build up in the control cabinet was determined to be the root cause of the problem. Tr. at 2426-2427. He was advised by Mr. Durrett that Mr. Van Dolsen was "not happy" with the explanation provided by Mr. Bobreski in the August 10, 1999 memo. Tr. at 2427-2428. Mr. Juanillo alerted Mr. Bobreski of this fact, and, on August 27, 1999, Mr. Bobreski drafted another memo explaining the "break down" of the situation further. Tr. at 2428. He stated that "[n]ew evidence shows that while the problems outlined in [the August 10, 1999 memo] are contributing factors, the core problem now appears to be heat build-up." CX 26. Mr. Durrett did not accept Mr. Bobreski's explanation as accurate. Tr. at 2513-2514.

Louis Couvillon⁶⁵ and Eduardo Arredondo,⁶⁶ both electricians who worked together at Blue Plains for WASA, were also involved in the RTD incident and provided similar accounts at hearing. Mr. Arredondo admitted that the equipment at issue was "junk" and that the panels installed there needed "a lot of maintenance." Tr. at 1737-1738. He testified that, since Mr. Bobreski had been new on the site, he and his partner, Mr. Couvillon, advised him that this was a recurring problem⁶⁷ and that they knew how to fix it in a particular way. Tr. at 1732. Mr. Arredondo specified that the problem was actually an instrumentation issue, and not considered an electrician's responsibility, but that he and Mr. Couvillon had nevertheless had occasion to work on the problem in the past. Tr. at 1732-1733.

At that time, however, Mr. Arredondo and Mr. Couvillon had had a "full plate workwise" and did not have time to work on the problem, other than to direct Mr. Bobreski on how to do so. Tr. at 1733. According to Mr. Arredondo, Mr. Bobreski, kept insisting that the problem was electrical, and therefore not the job of an I&C Technician, even before he picked up a tool to start troubleshooting or diagnosing. Tr. at 1733-1734. In addition, Mr. Bobreski kept asking for manuals, diagrams, and schematics. Tr. at 1733. Mr. Arredondo testified that because he and Mr. Couvillon had no manual to provide, they explained the problem to Mr. Bobreski once

⁶⁵ Mr. Couvillon had worked at Blue Plains for approximately fifteen years. Tr. at 1674. His tasks included anything from insulation work to repair work on different motors, pumps, and systems. Mr. Couvillon testified that his duties sometimes required that he work closely with the I&C technicians.

⁶⁶ Mr. Arredondo had been an electrician for WASA for thirteen years. Tr. at 1725-1726. His tasks included "troubleshooting mostly and repairing" electrical equipment. Tr. at 1726. In that capacity, he worked closely with the I&C technicians at Blue Plains on an almost daily basis.

⁶⁷ They had had "some nuisance tripping" on the alarm panels, which was normally due to corrosion on the terminals, excess heat, and loose connections. Tr. at 1732.

again. They also offered Mr. Bobreski a ladder,⁶⁸ since they noticed that he had only an empty van with a personal toolbox. Tr. at 1733-1734. At that point, they set up the ladder for Mr. Bobreski, and then went off to do their work in another part of the plant. Tr. at 1734.

Mr. Arredondo testified: “we were in and out that day, maybe two or three times and when we came back the following day, the ladder was still there, and I believe the second day later, it was still there, and it didn't look like the cover was ever taken off. It was still dusty. Normally there's fingerprints all over it.” Tr. at 1735-1736. He testified that afterwards, another technician, Mr. Huffman, was sent to fix the problem. Tr. at 1736. He noted that Mr. Huffman was very familiar with the problem, and to fix it he tightened up the connections in the panel and redid the connections. Frustrated with Mr. Bobreski's work performance (or lack thereof), Mr. Arredondo and Mr. Couvillon went to speak to Mr. Van Dolsen a few days later. Tr. at 1739. Mr. Couvillon told Mr. Van Dolsen that Mr. Bobreski “wasn't working out in that area” and that he “wasn't actually doing any troubleshooting.” Tr. at 1740. Rather, he was insisting that the electricians go through their systems repeatedly before he would become involved. Mr. Couvillon stated that he wanted Mr. Bobreski transferred to some other department or for Mr. Van Dolsen to “just get rid of him.” Tr. at 1740. According to Mr. Arredondo, Mr. Van Dolsen replied that Mr. Bobreski was still new at the plant, that he wanted him to give him some time to learn his way around, and that they should “basically just give him a break.” Tr. at 1740. After that, they never again complained to Mr. Van Dolsen about Mr. Bobreski. Mr. Bobreski testified in rebuttal that he and Mr. Bernhardt had, indeed, tested the wiring, and that Mr. Bernhardt had removed and replaced the cover referred to by Mr. Couvillon and Mr. Arredondo as never having been touched. Tr. at 2810-2814. They left the ladder in the same place when they were done, so the electricians could find it to retrieve it. Tr. at 2816.

Mr. Van Dolsen opined that the diagnosis in Mr. Bobreski's August 10, 1999 memo was specious, and not valid. Tr. at 2168, 2243. As a result, he told Mr. Juanillo “maybe you ought to get him off our job.” Tr. at 2168. He testified that, although Mr. Bobreski had identified a problem with the cable bundles causing undue stress, there was in fact no excessive strain on any instruments. He also took issue with Mr. Bobreski's assertion regarding the use of ring terminals instead of spade links. Tr. at 2168-2169. After that, Mr. Van Dolsen did not see Mr. Juanillo again until the next morning. Both Mr. Juanillo and Mr. Durrett appeared at Mr. Van Dolsen's office and Mr. Juanillo explained that Mr. Bobreski was “a good technician and ... not an English major and possibly he hadn't said things in the proper manner.” Mr. Juanillo further told Mr. Van Dolsen that he was being “rash” and that he wanted him to “reconsider, that this was [a] really good employee and he shouldn't have to get rid of him.” Mr. Van Dolsen testified that he then told Mr. Juanillo “he was probably right” in that he was “probably being a little rash.” Mr. Van Dolsen then withdrew his direction. Tr. at 2172-2173, 2245.

Mr. Juanillo testified that Mr. Bobreski's FSRs associated with the RTD incident had all been signed off as satisfactory. Tr. at 2484. His understanding was that once Mr. Van Dolsen assigned Mr. Huffman to get the pump running for that short period of time, the situation was resolved. Tr. at 2484-2485. To his knowledge, WASA eventually implemented Mr. Bobreski's stated solution as to how to fix the recurring RTD problems at Pumping Station 2 after Mr.

⁶⁸ Mr. Arredondo clarified that the purpose of the ladder was to reach a cover to the RTDs. Tr. at 1734.

Bobreski was discharged. Tr. at 2485. He noted that it was part of Givoo's job, and therefore Mr. Bobreski's job, to provide engineering solutions as to how to repair recurring problems. Mr. Durrett conceded that fans were eventually installed as Mr. Bobreski had recommended, but said he disagreed with the decision to install them. Tr. at 2575.

On August 20, 1999, Mr. Bobreski had been conducting his rounds on the perimeter of the site when he heard the alarm sound at Chlorine Building No. 1 and smelled chlorine gas from about one hundred yards away. Tr. at 154-155. He called Mr. Juanillo to advise him of the situation and then went toward Chlorine Building No. 1, where he recalled seeing someone by the door. Tr. at 155. The alarms continued to sound as Mr. Bobreski went toward the building. When he arrived at Chlorine Building No. 1, Mr. Bobreski saw four people in the "coffee-break area," who appeared unaffected by the situation. He recalled asking: "[D]on't you hear the alarm?" to which someone responded: "[D]on't worry about it, we just had a little gas leak." Tr. at 155. Mr. Bobreski testified that even Mr. Durrett came down to the scene and acknowledged the odor.⁶⁹ The safety department was contacted later that day and Mr. Juanillo drafted a memo to Mr. Durrett documenting the incident. Tr. at 155-156; CX 22.

Mr. Juanillo's memo provides an account of the incident. CX 22⁷⁰; Tr. at 2429. It states that at approximately 10:37 a.m., Mr. Bobreski had been conducting a routine inspection when he heard the tanker car alarms. CX 22. Mr. Bobreski "cleared the alarm and within seconds it repeated with an alarm [sic]." He then called Mr. Juanillo to advise him of the situation. Mr. Juanillo contacted Mr. Durrett, who stated that he would check with the operators to find out what could have caused the alarm. After checking with the operators, Mr. Durrett advised that "the operators were changing rail cars and that it would take a little while for the sensor to clear itself and can be reset."⁷¹ CX 22; Tr. at 2430-2431.

⁶⁹ Mr. Bobreski testified that when he saw Mr. Durrett at the scene, he took the opportunity to point out the rusty input pipes from the chlorine tanker into the chlorine building." Tr. at 156. He emphasized that the pipe supports were bent. Mr. Durrett testified, however, that he did not recall Mr. Bobreski pointing out the pipes on the exterior of Chlorine Building No. 1 as being rusted at this time. Tr. at 2527. Moreover, he did not even recall seeing Mr. Bobreski there. Tr. at 972-973. The first time he ever recalled hearing anything about the piping structure was after Mr. Bobreski left Blue Plains. Tr. at 2527-2528.

Mr. Durrett admitted that there was "rust on some of the [schedule 80] piping" (i.e. the piping going from the tank cars to Chlorine Building No. 1). Tr. at 973. However, he was not aware that some of them were bent. Tr. at 973. He further stated that "those are schedule 80 pipes. If they had a little rust on the surface, that meant nothing whatsoever." Tr. at 973. He added that "schedule 80 pipe is an extremely thick pipe. It's designed for chlorine use. A little surface rust is not going to mean anything." Tr. at 973-974.

Mr. Juanillo testified that, although Mr. Bobreski had pointed out the condition of the pipes to him, this was not something that Mr. Bobreski or Mr. Juanillo "put down on paper." Tr. at 2310, 2429-2430.

⁷⁰ CX 22 bears a printed date of October 28, 1999, which has been crossed out, with August 20, 1999, written in. The parties stipulated that the memo found in CX 22 was drafted on August 20, but printed on October 28, and bore the latter date because the memo was "date-coded" by computer software. Tr. at 485-486.

⁷¹ Mr. Durrett explained that what had occurred on August 20, 1999 was not an accidental leak but something that routinely happens when the operators change chlorine tanker cars. Tr. at 2525-2526.

At 11:00 a.m., Mr. Durrett requested that Mr. Juanillo call the safety officer, since there was difficulty resetting the alarm and chlorine gas could be smelled in the area. CX 22; Tr. at 2431. Mr. Juanillo then headed to the scene himself by which point the safety officer had already arrived and the alarm had been cleared by “allowing the sensor that was located on top of the railcar to be refreshed by removing it from the hood and letting the fresh air remove the residue from the sensor.” After reinserting the sensor into the hood, Mr. Durrett requested that the system be rechecked for proper operation. CX 22; Tr. at 2431-2432. Specifically, Mr. Bobreski was instructed by Mr. Durrett to make sure that the chlorine sensor on the top rail car was in good working order after this incident. Tr. at 2431-2432. Mr. Bobreski was able to clear the sensor, test it, and validate that it was operating properly before he left the scene. CX 22; Tr. at 490, 2432. Mr. Bobreski reported no problems with the top rail car sensor to Mr. Juanillo after he put it back in service. CX 22; Tr. at 2432-2433. By 11:15 a.m. that morning, the problem had been corrected. CX 22; Tr. at 2432.

On September 2, 1999, Mr. Bobreski conducted another bi-weekly test of the chlorine sensors, which took him an hour. Tr. at 161; CX 63:28-29. The test results indicated that the sensors to the upper and lower rail cars were not responding. Tr. at 161. He spoke to Mr. Juanillo regarding the failing condition of the sensors, and was under the impression that Mr. Juanillo communicated the problem to Mr. Durrett. Tr. at 162. Mr. Juanillo advised Mr. Bobreski that the next order of business was to get two replacement sensors and that he would need to obtain them from Mr. Durrett. Mr. Bobreski proceeded to Mr. Durrett's shop to obtain the sensors, but was advised by Mr. Durrett that Givoo had them. He went back to Mr. Juanillo and told him what Mr. Durrett had said. Ultimately, Mr. Bobreski looked for the sensors himself because Mr. Juanillo claimed not to have them, and Mr. Bobreski did not want to get chastised for not finding them if they were indeed in the Givoo shop. Tr. at 162-163.

After looking and asking around, Mr. Bobreski never found the sensors. Tr. at 163. He went back to Mr. Durrett's shop and told him that he could not find the sensors. At that point, Mr. Durrett told Mr. Bobreski to wait outside and ultimately appeared with only one sensor. Mr. Durrett then instructed Mr. Bobreski to install the one sensor in the upper rail car. Mr. Bobreski questioned these instructions. He thought it advisable to install the sensor in the lower rail car because, even in a leak in the upper rail car, the weight of the gas would force it to “go to the bottom sensor” and would provide “a better warning.” Mr. Durrett reiterated, however, that he wanted the sensor “on the top,” advising that “[t]hat’s where you’re going to detect the most problems.” At that point, Mr. Bobreski ceased making further suggestions to Mr. Durrett and did not question the fact that he had been given only one sensor, even though he had identified two as being in the failed mode. Tr. at 163-164.

Mr. Bobreski returned to the rail cars where he retested and cleaned them. Tr. at 164. He testified: “It was windy and I had erred on the upper rail car. The previous day was also apparently windy, I didn't get a reading, and I didn't factor that into the fact that I didn't get a response.” Tr. at 164. Once he took it upon himself to take the wind problem into account, however, he determined that only the lower rail sensor was not responding and that the upper rail car sensor did indeed work.⁷² Tr. at 164, 166. He then “took it upon [himself], seeing that the

⁷² He noted that the work procedures did not address anything associated with wind conditions and how he was to test the rail car sensor in light of these conditions. Tr. at 165.

upper one worked” to put [the sensor] in the bottom, since that one “definitely did not respond.” Tr. at 164. He further stated that “on the bottom rail car ... the sensor itself had actually been loosened in its socket, and, again, this is something that is an intentional thing. It doesn't happen by itself.” Tr. at 164. He further stated that when he removed the “bottom one, it was apparent that the wires [had been] twisted inside the conduit that went back up to the module.” Tr. at 164. From this turn of events, he concluded that “somebody didn’t want [the sensor] to work.” Tr. at 165. He found the situation “highly suspicious” and figured that the current turn of events constituted sabotage.⁷³ Tr. at 166. He told Mr. Juanillo about the problem.

After completing the testing and determining that only the lower rail car sensor was not responding, he and Mr. Bernhardt attempted to calibrate the new sensor in the lower rail car. Tr. at 168. However, they experienced “great difficulty” in obtaining the material and test equipment needed to execute the calibration.⁷⁴ First, they went through every document in the shop to find the EIT manual until they eventually found it. Second, in search of calibration gas, they contacted Mr. Juanillo, who directed them to Mr. Durrett. Tr. at 168-169. Mr. Durrett claimed that Givoo was responsible for obtaining the gas. Tr. at 169. They then went back and reported this to Mr. Juanillo, who claimed once again that Mr. Durrett had it. Thereafter, they searched the Givoo shop to make sure it was not there.

Finally, they returned to Mr. Durrett, who ultimately produced a kit containing a plastic container from a locked cabinet that contained the gas. Tr. at 169. In the kit, they also found the digital multimeter and the thermometer.⁷⁵ Mr. Bobreski and Mr. Bernhardt then returned to the field to continue their calibration efforts, but found that there was not enough of the calibration gas to do so, and the gas had expired.⁷⁶ Tr. at 170; *see* RX 147. They thereafter stopped their calibration efforts and returned to the shop to explain the situation to Mr. Juanillo. Tr. at 170. As there was no other container of calibration gas available, Mr. Bobreski assumed that Mr. Juanillo would alert Mr. Durrett that more calibration gas needed to be ordered.

At the end of the day on September 3, 1999, Mr. Bobreski told Mr. Durrett that he had misdiagnosed the upper rail car sensor as non-responsive,⁷⁷ but that he had correctly diagnosed the lower rail car sensor as non-responsive. Tr. at 198. He also noted that it appeared as though

⁷³ In essence, he believed that after the August 20, 1999, leak incident, someone had decided to disable the sensor to preclude it from activating in the case of a subsequent leak from the tanker cars. Tr. at 166. I conclude that Mr. Bobreski was correct that the lower sensor had been tampered with, as it had been replaced on April 7-8, 1999, after failing on March 2, 1999. *See* CX 63:11, 13, 14-15; RX 116.

⁷⁴ In addition to the EIT manual, the other necessary equipment included chlorine gas, a digital thermometer, a multimeter, and calibration gas. Tr. at 168.

⁷⁵ Mr. Bobreski recalled that the thermometer had not been calibrated since approximately 1994. Tr. at 169. He further testified that typically on a measuring device, depending on the criticalness of it, the calibration periods are usually quarterly and do not go longer than a year. *Id.*

⁷⁶ They also noted the tank indicated that the available gas had expired. Tr. at 170.

⁷⁷ Due to having not taken the wind factor into account the first time.

the lower rail car sensor had been intentionally damaged. Tr. at 199. Mr. Bobreski testified that when he discussed his concerns regarding the sabotage of the sensor with Mr. Durrett, Mr. Durrett was “passive.” Tr. at 167. Finally, he told Mr. Durrett that he had replaced the bottom sensor and that he would need, at some point, to calibrate it. Tr. at 198. According to Mr. Bobreski, Mr. Durrett responded by saying “ok” and did not question what Mr. Bobreski had done. Tr. at 199. Moreover, according to Mr. Bobreski, at no time prior to his termination did Mr. Durrett ever approach him to raise any concern about which sensor he had replaced in this matter.

Also on September 3, 1999, Mr. Bobreski drafted a memo to Mr. Juanillo concerning the conclusions he drew from the rail cars at Chlorine Building No. 1.⁷⁸ Tr. at 167; CX 30. In his memo, Mr. Bobreski noted that the lower rail car sensor had been loosened from its original position and that this could only have been achieved “by intention.” CX 30. According to Mr. Juanillo and Mr. Bobreski, Mr. Juanillo passed the memo along to Mr. Durrett. Tr. at 167, 2312. However, Mr. Durrett testified that he had never seen a copy of the September 3, 1999 memo, though Mr. Juanillo had discussed with him the disconnected alarm on the lower rail car sensor before Mr. Bobreski left Blue Plains. Tr. at 2634-2635.

Mr. Durrett, for his part, also provided an account of the rail car sensor incident. He admitted that, while Mr. Bobreski did advise him of his conclusions regarding the wind vis-à-vis the upper rail car sensor, he did not have confidence in Mr. Bobreski. Tr. at 858, 2523. He also recalled Mr. Bobreski reporting that the reason the sensor in the lower rail car had failed was that it appeared to have been intentionally disconnected. Tr. at 860. Mr. Durrett testified that he did not believe Mr. Bobreski’s conclusions. First, regarding Mr. Bobreski’s contention that the wind had caused him to err when conducting the test, Mr. Durrett pointed out that there was a “large seal” around the dome where the sensor was located, which would prevent the wind from becoming a factor. Tr. at 2523. However, a 1993 recommendation by the EPA confirms that windy conditions could affect the detection of chlorine at the rail car. *See* CX 3:116; Tr. at 693-694.

Second, he did not believe that there had been intentional damage to the sensor because “nobody touches that equipment for any reason other than the technician working on it and had never done it for all the years that I’ve been down there. So I refused to believe, when [Mr. Bobreski] said that someone had damaged it, tampered with it, I believe that it was simply his, his work that had caused that problem.”⁷⁹ Tr. at 2524. Overall, however, Mr. Durrett clarified that his main problem with the manner in which Mr. Bobreski had handled the situation was that “he went to the job and installed the lower sensor instead of calling me or [Mr. Juanillo]” beforehand. Tr. at 2524-2525. Mr. Durrett articulated that he did not like “the idea of [Mr. Bobreski] making decisions that should have been left to WASA management people.” Tr. at

⁷⁸ Although this exhibit appears to refer to Chlorine Building No 2, this was a typographical error. It actually referred to Chlorine Building No. 1. Tr. at 167.

⁷⁹ I note that Mr. Durrett contradicts himself later in his testimony when questioned again about the lower rail car incident. He later states that he did believe the sensor had been disconnected. Tr. at 2634-2635.

2525. This testimony contradicts his testimony elsewhere that the contractors were responsible for such decisions.

Mr. Durrett testified that when Mr. Bobreski first reported that two sensors had failed, both Mr. Bobreski and Mr. Juanillo requested that two new sensors be ordered (one for the upper rail car and one for the lower rail car).⁸⁰ Tr. at 859. Since he had had only one sensor in stock at that time, Mr. Durrett instructed that it be placed in the upper rail car.⁸¹ Tr. at 859-861, 2522. He admitted that once Mr. Bobreski determined that the only failed sensor was located in the lower rail car, it made sense to put the available sensor there. Tr. at 859-860. Thus, in that sense, he admitted that Mr. Bobreski's decision to put the sensor in the lower rail car was indeed a good one. Tr. at 861. However, Mr. Durrett was still dissatisfied with how long it took Mr. Bobreski to advise him of this decision. Tr. at 861, 2524.

Finally, Mr. Juanillo also provided an account of the rail car sensor incident. He testified that Mr. Durrett had told him to direct Mr. Bobreski to replace the upper rail car sensor. Tr. at 2319. He thereafter directed Mr. Bobreski to do so and Mr. Bobreski "went with the work order out to the chlorine building and inspected it and found out that the lower sensor of the rail car area was intentionally disconnected." Tr. at 2319. Further, when Mr. Bobreski "went up to check the upper one, which he [had been] instructed to replace, that was still working . . ." Mr. Bobreski therefore "took it upon himself to change the lower sensor of the rail car." Mr. Juanillo testified that this was "a very good move" in his opinion because "if you ignored the lower sensor and did what Mr. Durrett [had] requested and changed the top sensor, you have no sensing device at the lower end if there was a chlorine leak." Tr. at 2319.

According to Mr. Juanillo, Mr. Durrett was "very upset about this because . . . [Mr. Bobreski] did not do what [he had] asked him to do. Irregardless [sic] of the situation of a broken sensor down at the bottom, all [Mr. Durrett] cared about was that somebody didn't follow his directions." Tr. at 2319-2320. It was Mr. Juanillo's belief that Mr. Durrett "wanted the top one replaced even though the bottom one was broken and inoperative." Tr. at 2320. Mr. Juanillo believed this to be "irrational and not the use of good judgment, not becoming -- personally not becoming of a supervisor." Tr. at 2320. Moreover, he testified that if he had been the technician in the field and had encountered the same set of circumstances, he would have done the same thing as Mr. Bobreski had done.

On September 8, 1999, Mr. Bobreski first uncovered the EIT Manual, in the record as CX 57. Tr. at 204, 589; CX 72:10. At that time, he went through the entire manual and observed

⁸⁰ Regarding the purchasing of additional sensors, he testified that when Mr. Juanillo advised him originally of two failed sensors, Mr. Durrett had instructed him to order two more sensors. However, Mr. Durrett could not remember when he saw a purchase order for the sensors. Tr. at 863.

⁸¹ Specifically, Mr. Durrett testified that he had instructed Mr. Bobreski to put the one spare in the top "because that's the critical location, that's where the valves are, if you have a leak in that tank, that's where it's going to come from." Tr. at 861.

that the “go-no-go test” was “clearly defined” as using a “different testing standard”⁸² and a “much reduced response time” than the one that Blue Plains was using. Tr. at 205-206. Under the heading “*Quick Check Procedure*” the EIT manual advised that a small amount of calcium hypochlorite (i.e. dry form chlorine) should be placed in a small plastic bottle. Tr. at 206; CX 57:18. To check the chlorine sensor, it instructed to hold “the mouth of the bottle under the gas sensor.” *Id.* The sensor should respond within five seconds, and all the alarms should be activated in the alarm module. The manual advised that this procedure should be done every other week to ensure sensor response. Tr. at 206-207; CX 57:18. The manual also set forth an annual calibration procedure pursuant to which the sensor is to be exposed to a known concentration of chlorine gas for five minutes. CX 57:18-20.

Mr. Bobreski testified that he became concerned at this point because the “go-no-go test” being used at Blue Plains was not compatible in either standard or response time with the test outlined in the EIT manual. Tr. at 207. After making this discovery, he raised his concerns with Mr. Juanillo two or three times. According to Mr. Bobreski, Mr. Juanillo informed him that “all they care about is does the sensor respond.” Tr. at 208. Mr. Bobreski countered that, of course, the sensor would eventually respond, but that there had to be a time limit. He recalled that during one conversation, Mr. Juanillo stated that the test procedure delineated in the EIT manual had never been performed at Blue Plains and that Blue Plains did not even possess the standard for that procedure (i.e. calcium hypochlorite). In addition to his conversations with Mr. Juanillo, Mr. Bobreski also raised his concerns with each Givoo I&C technician.⁸³ He received various passive responses from them.⁸⁴ The work orders consistently referred to testing the sensors with a “test solution” rather than “compound,” Tr. at 590, CX 63, as did the Standard Maintenance Procedures, CX 12 at 6 (“Verify sensor response with a solution of bleach and vinegar.”).

On September 10, 1999, Mr. Bobreski drafted another memo to Mr. Juanillo because he kept finding that the alarms were being disconnected. Tr. at 200-201; CX 31. He drafted the memo to “best outline” the recurrence of the disconnection, which “based on his experience” was “clearly intentional.” Tr. at 201. In the memo, he stated, “This is the third time in 4 weeks that an audio alarm has been disconnected. The chlorine building is one building that should have all its alarms functional at all times.” Under the heading “Recommendation,” he said:

Alarms should be reported to the proper personnel if they cannot solve the problem on a local level. If the alarm is a nuisance alarm then perhaps a provisional switch to silence it until repairs can be initiated.

⁸² The word “standard” as it is used here refers to the substance used to test the sensors. Tr. at 127-128. While Mr. Bobreski had been advised to use a solution of vinegar and bleach, the manual recommended the use of calcium hypochlorite. CX 57:18.

⁸³ Specifically, he raised his concerns with John Bernhardt, Robert Cruz, Art Schroder, and Rick Dudley. Tr. at 209.

⁸⁴ Mr. Dudley’s response was: “Welcome to Blue Plains.” Mr. Bernhardt’s response was: “You’ve got to work with what they give you.” Mr. Cruz’s response was: “I can’t help you.” Mr. Schroder’s response was: “What do you want me to do about it?” Tr. at 209.

However disconnecting alarms is not a way to correct the problem. Failure to correct this problem could lead to death or serious injury along with certain legal liabilities.

CX 31. After drafting the memo and giving it to Mr. Juanillo, Mr. Bobreski recalled that Mr. Juanillo faxed it to Mr. Van Dolsen. Tr. at 203. Mr. Bobreski knew that it had been faxed to Mr. Van Dolsen because he was in the office when Mr. Juanillo called Mr. Van Dolsen to verify receipt of the fax. Mr. Bobreski was standing in close proximity to Mr. Juanillo and could hear Mr. Van Dolsen shouting on the other end of the line. Tr. at 204, 574. He thought it was Mr. Van Dolsen because he heard a loud voice, and Mr. Durrett was usually more subdued than Mr. Van Dolsen. Tr. at 574. After that phone call, Mr. Juanillo advised Mr. Bobreski that Mr. Van Dolsen did not “want a memo outlining problems.” Tr. at 204. Mr. Juanillo testified that he faxed this memo to Mr. Durrett, not to Mr. Van Dolsen. Tr. at 2312-2315. As Mr. Juanillo was in a better position to know to whom he faxed the memo, I conclude that Mr. Bobreski was mistaken on this detail, but otherwise truthfully testified to his recollection of the phone call. Mr. Durrett’s testimony that he discussed the memo with Mr. Juanillo supports this conclusion.

Mr. Durrett testified that he discussed the contents of the September 10, 1999 memo with Mr. Juanillo on or about that date. Tr. at 966-967. He recalled that Mr. Juanillo explained the “sum and substance” of the memo to him but that he did not actually see a copy of the memo until sometime in November 1999. Tr. at 967. After this discussion, Mr. Durrett went over himself to see if it was out of service. Although he could not recall whether it was disconnected at that time, he stated that he would have generated a work order to get it fixed if it had been disconnected. Tr. at 968. However, he further stated: “I don’t have any enforcement power if what he said was actually true, and someone was disconnecting it, I don’t have any power to do anything to anybody.” Tr. at 967.

Mr. Juanillo testified that as he began faxing Mr. Bobreski’s memos regarding the problems in Chlorine Building No. 1 to Mr. Durrett, Mr. Durrett started to get “a little bit irate” and “a little upset about seeing some of these memos.” Tr. at 2318. In short, Mr. Durrett “didn’t like what he was seeing.” Tr. at 2318. Mr. Juanillo testified that Mr. Durrett’s reactions bothered him as Mr. Durrett began to get irritated with Mr. Bobreski. Mr. Juanillo stated: “He got irritated with [Mr. Bobreski] and it seemed to me at that time frame that it looked like everything he did, Mr. Durrett was not happy with and it also seemed that at that point in time things were starting to go against Mr. Bobreski on a regular basis. It kind of seemed to me that he could have been set up for something.” Tr. at 2318. He further stated: “Mr. Durrett was that way. He was just really making things really difficult for Mr. Bobreski no matter what and not listening to him, seeing what he’s doing that was properly correct. So to me it sounded like all the signs of something being set up here and I didn’t like that.” Tr. at 2318-2319.

After writing the September 10, 1999 memo and speaking with his co-workers, Mr. Bobreski testified that he felt “helpless.” Tr. at 210. He contacted *The Washington Post* as he believed there to be dangerous conditions out there and “nobody was listening.” Tr. at 210. He placed the first call shortly after he wrote the September 10, 1999 memo, and called back a few times subsequently. Tr. at 211. He ultimately received a return telephone call from a reporter named Eric Lipton. Tr. at 211, 495-497. Mr. Bobreski sought out Mr. Lipton because of an article he had written about water leaks in the District Water Supply which appeared in *The*

Washington Post on August 29, 1999, RX 112. Tr. at 494. Mr. Bobreski met with Mr. Lipton several times over the next few weeks, and eventually gave him copies of the memos he wrote about problems with the sensors and alarms. Tr. at 585, 596.

On September 15, 1999, Mr. Bobreski conducted another biweekly inspection, which took him one hour. Tr. at 212; CX 63:32-36. Again, he discussed the testing parameters with Mr. Juanillo and sought some direction in that regard. Tr. at 212. Mr. Juanillo again advised him: “All they care about is does the alarm come on.” Tr. at 212. Mr. Bobreski then advised Mr. Juanillo that “from here on in” he planned to record the response times. Tr. at 212. To that end, Mr. Bobreski prepared a form to attach to each work order where he would record the various response times of the sensors (*see e.g.* CX 63:35). Tr. at 213. For the September 15, 1999 bi-weekly test, he indicated that “the upper block, the channel 2 downstairs sensor had slow reaction time” of approximately two minutes. Tr. at 214. Mr. Bobreski attached this form to the September 15, 1999 work order on which he indicated that he had “tested the sensors as per procedure” and that “all sensors provide detection; however, 2 sensor [sic] show a greater reaction time than others. See attachment.” CX 63:33.

Mr. Juanillo testified that he and Mr. Bobreski had discussed the fact that it took too long for the sensors to generate an alarm based on the information in the service manual. Tr. at 2330. Mr. Juanillo testified: “We determined it should be five seconds and ... two minutes is way too far for it to sit there for its annunciation time.” Tr. at 2331. Although he and Mr. Bobreski were in agreement that the sensors were inadequate, nothing was done because “we were trying to tell Mr. Durrett we need to order some [sensors] to replace these [sensors], and that's all we could do at this point.” Tr. at 2331.

Mr. Durrett admitted that when Mr. Bobreski reported the sensors as taking longer than two minutes to respond in September of 1999, he did not replace the sensors. Tr. at 1025. Rather, he spoke with Mr. Juanillo and indicated to him that there could be a problem with the electronics associated with the sensor system and that it should be checked out. He admitted that when he signed off on the September 15, 1999 work order, he did not know precisely why the sensors were taking two minutes to respond, though he knew of some possible reasons. Tr. at 1026-1027. He indicated that, while the sensors themselves may have been defective, that “wasn’t the only answer.” Tr. at 1027. On the September 15, 1999 work order, he indicated “Failure Code 18,” which meant that there was no problem diagnosed. Tr. at 1025-1026. He had indicated as such because there was “no positive evidence that we [had] bad sensors. We could have something requiring a little adjustment of an electronic circuit with a screwdriver. Do that and it's all finished.” Tr. at 1027. Finally, Mr. Durrett testified that he could not recall ever getting any feedback from Mr. Juanillo regarding why the sensors were taking two minutes to respond. Tr. at 1025-1026.

On September 24, 1999, Mr. Bobreski and Mr. Bernhardt were involved in a work order regarding the magnetic (“mag”) flow meter at the G-House.⁸⁵ Tr. at 219-221. That day, however, Mr. Durrett decided to reassign Mr. Bernhardt to work with a different employee, Mr.

⁸⁵ The G-House was located in the east primary field. Tr. at 2529. Its function was to remove “scum and sludge from the process before sending it to secondary for further treatment.” *Id.* Inside the G-House was a magnetic flow meter used to measure the flow of the primary sludge. Tr. at 2529-2530.

Dave White. Tr. at 223, 2322. According to Mr. Bobreski, this was the first time that Mr. Bernhardt had ever been reassigned during their partnership. Tr. at 223. Not only had Mr. Bernhardt been reassigned, but he had also been instructed to take the truck that he and Mr. Bobreski usually used to travel between stations. This left Mr. Bobreski to work on the G-House assignment with no truck.

Mr. Juanillo also provided testimony regarding the reassignment that day. He testified that Mr. Bernhardt and Mr. Bobreski had both been working on that particular work order, which involved replacing or troubleshooting a magnetic flow meter ("mag flow meter"), and that it indeed required two people. Tr. at 2322. While they were working on the assignment, Mr. Durrett, for some reason, "took [Mr. Bernhardt] off the job and put him on the east side primary and also took the truck away that Bobreski was using." Tr. at 2322. This left Mr. Bobreski by himself to do the job of two people with no truck. Mr. Juanillo testified that Mr. Durrett's decision made no sense to him and that he could not fathom why Mr. Durrett would "do that when he knew full well you needed two people to do this particular job." Tr. at 2322-2323. He further stated that this decision "reaffirmed . . . that this guy is getting set up for something, and I really didn't like that. It's a safety thing that I didn't appreciate." Mr. Juanillo stated that as a result of the reassignment, he had to "go down there [himself] to try to see if [he] could come up with some way to get another person to help Mr. Bobreski work in there [but he] couldn't." According to Mr. Juanillo, there was no situation in east primary that required Mr. Bernhardt's immediate attention as there had been no emergency work order generated. Tr. at 2323. Prior to this time, Mr. Bernhardt had never been reassigned from working with Mr. Bobreski.

In any event, Mr. Bobreski set out to complete the assignment by himself. He waited for the maintenance men to physically remove the 150-pound mag flow sensor at which time it became Mr. Bobreski's responsibility. Tr. at 223. With no truck, Mr. Bobreski was expected to walk it back to the G-house, about a quarter of a mile. He testified that at that point, he went to the Givoo shop where there was a hand truck, which he carried down the stairs and walked to the G-house. Tr. at 223-224. The maintenance men who were working on the removal were there, and they helped Mr. Bobreski take it up the stairs. Tr. at 224. They then loaded the mag flow sensor onto the hand truck and Mr. Bobreski walked it to the Givoo shop. He then carried it up two flights of stairs by himself.

Mr. Bobreski brought the mag flow sensor over to a work table where he proceeded to clean out the inside of the sensor and test it. Tr. at 224. He then carried it back downstairs and walked it back to the G-house. He notified the maintenance men that it was back in place and that they could reinstall it.⁸⁶ After the mag flow sensor was reinstalled, Mr. Bobreski "redid the wiring between the transmitter, the electrode and the power supply hook up to the mag flow sensor and reestablished contact back to the programmable logic controller (PLC)." Tr. at 225. After performing these functions, it was approximately 2:30 p.m. or 2:45 p.m., and Mr. Bobreski did not get a reading. Tr. at 226. It was getting near the end of the day, he had paperwork to file,

⁸⁶ Mr. Bobreski clarified that the purpose of cleaning and reinstalling it had been to verify that the sensor itself was working and that it was not the cause of the no flow reading. Tr. at 224-225. He testified: "That was only one part of the total transmitter package if you will." Tr. at 225.

and he had to go back to the shop. He told someone called Smitty, who was present at the G-House station at that time, that he could not get it operational. Smitty replied that it was “no problem” as it had “been off for several weeks.” Tr. at 226. Mr. Bobreski returned to the shop and advised Mr. Juanillo of what was going on. Mr. Juanillo was distressed by the situation. Mr. Bobreski testified that there was nothing he could do as he needed a manual to calibrate, which he and Mr. Bernhardt had requested in July but never received.⁸⁷

The following Monday, Mr. Bobreski learned that there had been a localized power disruption with the G-house being one of the recipients of that power outage. Tr. at 229. He explained that in the event of a power outage, there was a battery backup in place to trigger the alarms to go on instantly. Tr. at 230. Thus, as a result of the power loss over the weekend, the alarms were triggered. Mr. Bobreski testified that he was in no way responsible for the alarms having been triggered. Mr. Juanillo provided a similar explanation of the incident. He stated that the power failure that affected the G-House triggered an alarm to the pump house control. Tr. at 2324. Mr. Durrett was called in since he was the supervisor of that area. Ultimately, the power came back on and everything was running.⁸⁸ Mr. Juanillo testified that Mr. Durrett was “not happy” about the incident and tried to blame Mr. Bobreski for the power failure. However, Mr. Juanillo pointed out, “You can’t blame somebody because the power goes out just because that one section there lost its power and blame somebody for that [sic].” Tr. at 2324. He testified that Mr. Bobreski was in no way responsible for causing the alarm.

Mr. Durrett opined that the reason the alarm had been triggered over the weekend was that “the system read a no signal” due to the fact that the “loop was open.” As to whether the alarm went off because the loop was open *and* there had been an electrical failure, Mr. Durrett stated that he “did not know of any electrical failure.” Tr. at 2700-2701.

On September 24, 1999, Mr. Durrett signed off on a controversial FSR regarding Mr. Bobreski’s work at the G-House. Tr. at 234; CX 24:12/RX 68. Mr. Bobreski testified that, while originally the FSR indicated that his work had been completed satisfactorily, Mr. Durrett later changed the FSR to unsatisfactory.⁸⁹ Mr. Bobreski approached Mr. Durrett once he learned of the change, who advised him that the reason for the change was that he had learned that Mr. Bobreski had transposed the wires from the output at the G-house. Tr. at 234. Mr. Bobreski replied that he “had wired it as found, whatever way it was wired was the way it was returned to service.”⁹⁰ Tr. at 236.

⁸⁷ He also believed that a password, which he did not have, was necessary. Tr. at 227.

⁸⁸ Mr. Juanillo explained that to reset the alarm at the pump station all that was required was the push of a button. Tr. at 2325.

⁸⁹ This was the first time that Mr. Bobreski’s FSR had been rated as unsatisfactory. Tr. at 2581.

⁹⁰ Mr. Juanillo, who was present during this altercation, made what to Mr. Bobreski seemed like a condescending remark, questioning whether he knew the difference between the two wires at issue. Tr. at 236. Mr. Bobreski replied that it varied from plant to plant, and system to system as to whether the black or white wire is positive or negative from the output of a transmitter. He further stated that generally this is established in the plant’s manual. *Id.*

Mr. Juanillo, for his part, testified that he confronted Mr. Durrett regarding the September 24, 1999 FSR at which time Mr. Durrett stated that he was “not too happy” with how long it had taken Mr. Bobreski to complete the job at the G-house. Tr. at 2325-2326. According to Mr. Juanillo, Mr. Durrett “was upset to the point that he actually told Mr. Van Dolsen that he should have Mr. Bobreski removed from the plant because he wasn't happy with his performance ... especially with the G-house incident.” Tr. at 2325-2326. Mr. Juanillo explained to Mr. Durrett the ramifications of his having taken Mr. Bernhardt off the job, leaving Mr. Bobreski to do the job by himself. Tr. at 2326, 2464. To that end, Mr. Juanillo explained that “naturally [the job is] going to take longer, a lot longer.” Tr. at 2326.

After Mr. Juanillo's explanation of the situation, Mr. Durrett “came to the realization that maybe he was a little hasty in doing what he did by telling Mr. Van Dolsen that he wanted [Mr. Bobreski] off the plant.” Tr. at 2326. Mr. Juanillo suggested that they explain the situation to Mr. Van Dolsen. They thereafter went to Mr. Van Dolsen's office, where Mr. Durrett “did most of the talking” and explained that he had been “a little hasty in making that decision and/or request of him.” *Id.* According to Mr. Juanillo, Mr. Van Dolsen's reply was: “Okay, fine. Everything's back to normal.”⁹¹ *Id.* Mr. Juanillo further testified that, between the time of this meeting and Mr. Bobreski's testing of the sensors on October 22, 1999, there had been no indication whatsoever from any WASA manager that they were dissatisfied with Mr. Bobreski's performance. Tr. at 2327.

Regarding the September 24, 1999, FSR, Mr. Durrett testified that, although he had marked Mr. Bobreski's work as satisfactory at the outset, he changed it to unsatisfactory after he learned of the change in wiring and the fact that the meter was allegedly not working.⁹² Tr. at 2539. Mr. Durrett originally marked the FSR as satisfactory on a Friday and did not change it to unsatisfactory until the following Monday. Tr. at 2581. That Monday, during a routine morning meeting where Mr. Durrett, Mr. Juanillo, and Mr. Van Dolsen were present, Mr. Durrett advised Mr. Juanillo that he had been at the plant over the weekend because “there were alarms going off, the operators aren't happy.” Mr. Durrett testified that at that point it was no longer his “direct responsibility.” Rather, it was Mr. Juanillo's “responsibility to get his contractors to solve the problem.” He further stated: “If I remember what ended up happening was additional people were put on that job. I asked Eric Dorr because he's pretty good with mag meters and he's pretty good at solving emergency problems anyway. So I asked Eric Dorr to check it out.” Tr. at 2535-2536. Mr. Durrett testified that he also recalled Mr. Juanillo asking two other technicians to help out with the job and that Mr. Bobreski was no longer on the job at that point. He specified that it had been Mr. Juanillo's decision to take Mr. Bobreski off the job. Tr. at 2536-2537. Mr. Bobreski testified that he was not notified that he had been taken off the job. When he went back to the G-house on September 27, he found Mr. Dorr working on the transmitter with the help of a manual which had never been available to Mr. Bobreski and Mr. Bernhardt. Tr. at 712-713.

⁹¹ Prior to his meeting with Mr. Van Dolsen regarding the G-House incident, Mr. Juanillo had never had any meeting face to face with Mr. Van Dolsen concerning Mr. Bobreski. Tr. at 2327.

⁹² Mr. Durrett noted that he had indicated that Mr. Bernhardt's work had been unsatisfactory on his FSRs because “he was still working on the G-House” and this was a “routine, basic job” that seemed to have “developed into a major problem.” Tr. at 2543-2544; RX 82.

Mr. Durrett testified that he had learned Mr. Bobreski raised the issues of the G-house transmitters not being grounded and that he chose to disbelieve him because he knew that they were grounded. He admitted that the fact that Mr. Bobreski raised this issue caused him to question Mr. Bobreski's competence as it was not "very hard to figure out whether they were grounded." Mr. Durrett clarified that the manual demonstrates that in most cases "they don't have to be grounded because they come from the factory with grounding controls built into them which you can't see that from outside." He further admitted, however, that he made a "political decision" to send Mr. Dorr to the G-House to "make sure they were all grounded" in the manner that Mr. Bobreski raised because "there was so much time being wasted by Mr. Bobreski's claim about grounding. I knew they were grounded internally and you'll know it too as soon as you read that manual." Tr. at 2582-2585. Shown the manual for the meter in question, CX 17, however, Mr. Durrett conceded that it contained a warning regarding grounding consistent with Mr. Bobreski's position. Tr. at 2605-2609, CX 17: DCW002588.

Mr. Durrett testified that he never did "anything deliberately" to prevent Mr. Bobreski from completing the G-house assignment properly and timely. Tr. at 2546-2547. Specifically, he denied having pulled Mr. Bernhardt off the job, stating that it was Mr. Juanillo's responsibility to "shift people around." Tr. at 2547. Mr. Durrett testified that he did add people to the job, noting that he asked Mr. Dorr, a CIC employee, to help out. Mr. Durrett also denied ever taking away Mr. Bobreski's truck in order to impede his ability to do a job. He stated that he "had absolutely no control over the equipment or the materials used by Givoo." He testified: "I couldn't take a truck away from anybody if I wanted to. I couldn't assign one to anybody." He believed that the truck belonged to Givoo. *Id.*

Mr. Dorr has worked at WASA on and off since 1987. Tr. at 1767-1769. He testified about two different occasions on which he worked with Mr. Bobreski; he could not be precise about the dates. Tr. at 1854. On the first occasion, at the G-house, he said that he thought he was asked to assist Mr. Bobreski and Mr. Bernhardt because he had installed several meters of the particular type involved, and because Mr. Durrett had some concerns whether Mr. Bobreski was up to the job. Tr. at 1771, 1796. He thought the vagueness of the original work order was part of the problem. Tr. at 1772. He eventually determined that there was a bad main control board, and some incorrect loop configuration for other devices, which were also not in working order. *Id.* Mr. Dorr said that when the meters and associated devices were installed in the mid-1990's, standard color coding of the wiring had not been followed. Tr. at 1772-1773. His impression after this occasion was that Mr. Bobreski was not as familiar with instrumentation and controls as he was, and did not know what he was doing. Tr. at 1780, 1994, 2029-2030. Mr. Durrett also asked him to assist Mr. Bobreski a few weeks later, working on another flow meter in the D-house. Tr. at 1782, 1784. The flow meter had to be replaced. Tr. at 1782. The problem appeared to be caused by water getting into the conduit, a problem Mr. Bobreski identified. Tr. at 1783, 1790. Mr. Dorr disagreed with Mr. Bobreski's idea that grounding was one of the reasons that the flow meters were "frying." Tr. at 1786, 1790-1791, 2009. He said that Mr. Bobreski's idea about grounding would solve other issues with the flow meters. Tr. at 1791. Mr. Dorr observed that there was some friction between Mr. Bobreski and Mr. Durrett. Tr. at 1786-1787. At some point he had a conversation with Mr. Van Dolsen, who asked about

reports he had been getting that someone else was having to complete some of Mr. Bobreski's work. Mr. Dorr confirmed that he had "had to go out and bail him out." Tr. at 1799, 1844, 2036.

The following week, in an FSR dated September 30, 1999, Mr. Bobreski received another unsatisfactory rating from Mr. Durrett. Tr. at 237; CX 24:13; RX 82. At hearing, it became clear that the reason for the unsatisfactory rating was that Mr. Bobreski had not filled out the form properly. Tr. at 237-238. However, according to Mr. Bobreski, Mr. Durrett had never explained this to him. Mr. Bobreski testified that he only learned of this reason through the course of the litigation. Tr. at 238.

Mr. Durrett testified that there were two reasons that he signed off on the September 30, 1999 FSR as unsatisfactory. First, he saw that Mr. Bobreski was "still having issues with the G-house transmitter but he didn't indicate any work done on the 29th and the 30th but he put himself down for eight hours." Mr. Durrett's concern was that on the one hand, he did not want to hold up the FSR because the office would get "antsy" if he did so, but on the other hand, he wanted it known for future reference that Mr. Bobreski didn't write anything down for having done anything on the 29th and the 30th, and in fact he got paid for those days. Thus, he marked the FSR as unsatisfactory in case someone later raised the issue that Mr. Bobreski had gotten paid for two days of work when he hadn't indicated that he had done any work. In other words, Mr. Durrett believed that Mr. Bobreski had indeed worked but did not fill out the form properly. Tr. at 2545, 2548.

Mr. Durrett testified that Mr. Juanillo asked him to change his assessment of Mr. Bobreski's performance on the September 24, 1999 FSR and September 30, 1999 FSR to which Mr. Durrett replied that these weren't an "evaluation of the man's work performance on that particular day. This was to indicate for future reference that a job he did was not acceptable or not satisfactory so that if down the road there were issues, they wouldn't come to me and said [sic] you said the man did a good job when he really didn't." Tr. at 2548.

During the first week of October, probably October 5, 1999, about 7:00 a.m., the reporter from *The Washington Post*, Mr. Lipton, accompanied Mr. Bobreski to Blue Plains. During Mr. Lipton's visit, Mr. Bobreski showed him the conditions at the plant that concerned him. Tr. at 497, 537-544. Mr. Bobreski did not tell anyone from WASA or Givoo about Mr. Lipton's visit. Tr. at 537. Mr. Bobreski did not know of any work rule prohibiting him from escorting Mr. Lipton onto the plant. Tr. at 682-683. The guard at the gate waived him through. Tr. at 683. WASA did not establish that there was any rule which prohibited Mr. Bobreski's action.

On October 6, 1999, Mr. Juanillo held a meeting with his staff "to discuss how they could better stay out of trouble." Tr. at 2327-2328. Specifically, he addressed "what should and should not be reported to WASA." Tr. at 239. Mr. Juanillo recalled making the following statement to his staff at the meeting: "The less you do the better off you are. The more problems you report, the harder they will come down on you. They don't want the truth. You know you must lie if you want to stay here without hassles."⁹³ Tr. at 2328. Mr. Juanillo testified that he

⁹³ A similar statement by Mr. Juanillo was recorded in Mr. Bobreski's diary entry of October 6, 1999. Tr. at 239-240, 2328; CX 72. I admitted those portions of CX 72 that are referred to in the testimony but excluded those portions which were not. Tr. at 242-243.

made this statement because he wanted to inform his staff that “this is what will happen if you continue to be the way they [sic] were ... trying to get everything done and accomplished properly and report things.” Tr. at 2328-2329.

On October 22, 1999, Mr. Bobreski conducted what would be his final biweekly testing of the chlorine sensors. Tr. at 251-252. He began this test at about 1:00 p.m. and finished at approximately 2:00 p.m. On the work order dated October 28, 1999, Mr. Bobreski wrote:

Performed test as per instructions. 4 sensors did not alarm after exposed to solution for a period of 5 minutes. All basement located sensor [sic] failed to respond in 5 minutes. Solution was fresh for each test. Sensor for module s/n [serial number] 122 failed. There are 7 sensors total for CL2. This w/o [work order] only requires six to be tested. For details refer attachments [sic].

CX 63:41. Mr. Bobreski also prepared attachments to the work order in which he delineated the response times for each of the sensors and the testing methods that he used. CX 63:48-51.

After completing the test, Mr. Bobreski proceeded to the D-House to work on a transmitter. Tr. at 252. He remained there for about an hour. He next reported to the Givoo shop, where he advised Mr. Juanillo that he was going to fail four of the sensors and that he would hand in a report indicating the times and methods used. Mr. Bobreski testified that Mr. Juanillo’s reaction was as follows: “I remember him shaking his head and [saying], ‘This is not going to be well received, you know that.’” *Id.* Mr. Bobreski handed the FSR as well as the attachments over to Mr. Juanillo. Tr. at 252-253.

Mr. Bobreski then brought a copy of the attachments to Mr. Durrett’s shop.⁹⁴ Tr. at 253-254. Once at the shop, he handed the documents to Mr. Durrett. Tr. at 254. After perusing the documents, Mr. Durrett said: “[Y]ou’ve got four failed sensors here ... What happened? Did they just go bad all at once?” *Id.* Mr. Bobreski responded that he had given Mr. Durrett this information a number of times since the middle of September. Further, Mr. Bobreski pointed out that he had never been given a document stating specifically what the testing procedure involved and that he had never been provided any standard as to the testing of the chlorine sensors. Accordingly, he had documented his findings based on what he had been told verbally [by Mr. Bernhardt], which was a two minute break. Mr. Bobreski further stated that Mr. Juanillo had showed the EIT manual to Mr. Durrett after Mr. Bobreski found it, and that Mr. Durrett never responded to the information in the EIT manual, which reflected the five second test with calcium hypochlorite. Finally, Mr. Bobreski recapitulated that the “turn on times” had been increasing, that the manual indicated an entirely different set of testing standards, and that he “could not let this go on.” *Id.*

Mr. Durrett’s response was that Mr. Bobreski had abandoned his post and misprioritized his duties. Tr. at 255. He also questioned why Mr. Bobreski had waited until the end of the day to advise him of this information. Mr. Bobreski responded that this had been going on for

⁹⁴ It was not typical at the end of the day for Mr. Bobreski to go alone to do something of this nature. Tr. at 254.

months and it was not a surprise. He further offered to go test the sensors with Mr. Durrett at that very moment. However, Mr. Durrett declined, stating that he “should not have to go check somebody else’s work.” *Id.* Mr. Bobreski also voiced his concerns about how the calibration gas did not arrive until six or seven weeks after it was ordered, about the G-house incident, and other matters. Tr. at 255-256. After this meeting, Mr. Bobreski feared that he would be discharged, though Mr. Durrett never explicitly stated that this was going to happen. Tr. at 256.

Mr. Durrett admitted that he initially signed off on Mr. Bobreski’s October 22, 1999 FSR as fully satisfactory;⁹⁵ however, he did so before Mr. Bobreski reported four failed sensors. Tr. at 850-851. Once Mr. Bobreski showed up at his office⁹⁶ and advised that four of the seven sensors had failed, Mr. Durrett felt that Mr. Bobreski had not carried out his obligations. Tr. at 851. He testified specifically that he was displeased that Mr. Bobreski had discovered the problem at 10:00 a.m., but had waited until the end of the day to advise him of the situation. Tr. at 851, 987. At that point, Mr. Durrett decided that Mr. Bobreski was “not a good technician.” Tr. at 851-852. Mr. Durrett admitted that but for the fact that Mr. Bobreski had reported the four failed sensors, he would have marked his work assignments as fully satisfactory for that week. Tr. at 853.

Mr. Juanillo, for his part, also provided an account of this incident. He testified that sometime during the day, on October 22, 1999, Mr. Bobreski conducted a bi-weekly test pursuant to a standard biweekly work order.⁹⁷ Tr. at 2332, 2447; CX 63:39. Mr. Bobreski returned to Mr. Juanillo’s office at approximately 3:10 p.m. with a completed work order and attachments stating that four sensors had failed. Tr. at 2447. Mr. Bobreski then proceeded to tell Mr. Juanillo “right off the bat” about the failures. Tr. at 2333. At that point, Mr. Bobreski and Mr. Juanillo had a discussion about the results and how it had taken the sensors an excessive amount of time to respond to the testing. Tr. at 2448. Mr. Juanillo advised Mr. Bobreski: “[Y]ou know, this is not going to go well, four sensors dying like this. [Mr. Durrett’s] not going to be happy.” Tr. at 2448-2449. However, Mr. Juanillo also stated that he could not “hide the fact that [they] failed.” Tr. at 2333. Mr. Juanillo then told Mr. Bobreski: “I’ll go ahead and get a hold of [Mr. Durrett], see if he’s still there, fax him this information.” Tr. at 2333, 2448-2449.

Mr. Bobreski then left Mr. Juanillo’s office, since he was “running late” and had to leave to go speak with Mr. Durrett. Tr. at 2448. Meanwhile, Mr. Juanillo called Mr. Durrett to make sure he was still there and then faxed him the information. Tr. at 2334. Later that day, at approximately 4:00 p.m., Mr. Durrett showed up at Mr. Juanillo’s office after having received the fax and was “very upset about the fact that the four sensors [had] failed.”⁹⁸ Tr. at 2334,

⁹⁵ He signed off on the report as being fully satisfactory at approximately 3:20 or 3:25 PM. Tr. at 851.

⁹⁶ Mr. Bobreski advised Mr. Durrett of the failures at about 3:35 or 3:40 PM.

⁹⁷ Mr. Juanillo did not know when in that time period the testing took place. The first time he saw or heard from Mr. Bobreski on that day was at about 3:10 p.m. Tr. at 2447.

⁹⁸ In terms of the sequence of events, it is important to note that Mr. Juanillo had already been to see Mr. Durrett once that day at some point before 3:00 p.m. (i.e. before he saw Mr. Bobreski that day). Tr. at 2333-2334, 2454. At that time, Mr. Juanillo was going to Mr. Durrett’s office to report, turn in paperwork, and get signatures from Mr.

2455-2456. He stated that he was going to change Mr. Bobreski's FSR from satisfactory to unsatisfactory. Tr. at 2334, 2456. Mr. Juanillo did not think that four sensors failing constituted "unsatisfactory work by an individual" but he "couldn't change the [FSR] change [Mr. Durrett had] made." Tr. at 2334. Not too long after this encounter, Mr. Durrett called Mr. Juanillo and stated that he was still at the plant and that he wanted to "add on the fact that he also was not happy about the tank car situation in Chlorine Building No. 1 where Mr. Bobreski did not follow his direct order." *Id.*

At some point, Mr. Juanillo drafted a memorandum about the incidents in which Mr. Bobreski replaced the lower rail car sensor, and failed the four sensors. RX 155. It is unclear from Mr. Juanillo's testimony when he prepared this memo.⁹⁹ The tone appears critical of Mr. Bobreski. For example, the memo says Mr. Bobreski "took it upon himself" to change the lower rather than the upper sensor, and recounts that Mr. Bobreski did not calibrate the new sensor or use the manufacturers recommended testing method when he tested it for responsiveness. Mr. Juanillo testified that he wrote the paragraph about replacing the lower rail car sensor because he felt it necessary to "put down what really happened. I had to write it down as it was." Tr. at 2450. At the same time, he testified that he did not reprimand Mr. Bobreski for doing what he did as he believed that he had done "the right thing." *Id.* He further stated: "When you have a safety issue involved here on chlorine, you have a twofold sensor on a chlorine tank car area, you have a sensor on top which is a removable sensor that goes -- it fits inside the dome of the tank car. You have another sensor down below, okay. That sensor will detect low levels of chlorine." *Id.*

Counsel for WASA suggested that at the time Mr. Juanillo wrote the memo, he agreed with Mr. Durrett that Mr. Bobreski had failed to follow orders and proper procedures, and should be fired. Counsel also suggested it was a "CYA" memo he wrote because he was concerned he himself would be fired. Mr. Juanillo denied both suggestions.¹⁰⁰ Tr. at 2455-2458. The content of the memo suggests that Mr. Durrett was the primary source on whom Mr. Juanillo relied when he wrote it. For example, Mr. Juanillo asserted in the memo that Mr. Bobreski had the manual with him when he changed the sensor, and failed to calibrate it, but when Mr. Bobreski installed the sensor on the lower rail car, the manual had not yet been located, and the sensor could not be calibrated because there was no calibration gas available. Thus, the memo reflects criticisms by Mr. Durrett which were not well-founded. Moreover, despite the apparently critical tone of the

Durrett. Tr. at 2454. He also learned that Mr. Bobreski had advised Mr. Durrett he had completed the testing at 2:00 p.m. However, Mr. Juanillo did not learn by this point that Mr. Bobreski had failed four sensors. Tr. at 2454.

⁹⁹ At first, Mr. Juanillo testified that he prepared the memorandum before his second meeting with Mr. Durrett, claiming that whatever information he included in the memorandum concerning the events of that day he had learned from Mr. Bobreski only, and that he gave the memorandum to Mr. Durrett. Tr. at 2418, 2449, 2453. Later, on cross examination, however, he seemed to admit that he prepared the memorandum after his second meeting with Mr. Durrett. Tr. at 2455. Mr. Durrett said he had never seen the memorandum, though he had heard about some of the comments. *Id.* The last paragraph of the memo, in which Mr. Juanillo stated, "I was not made aware of all that happen [sic] that day until Mr. Durrett called me and informed me ...," suggests that it was written sometime after his second meeting with Mr. Durrett on October 22.

¹⁰⁰ Mr. Juanillo was terminated from Blue Plains in May 2000 under circumstances which were not made clear in the record. Tr. at 2274. By the time of the hearing, he was represented in an unspecified claim of his own by the same counsel who represent Mr. Bobreski. Tr. at 2358.

memo, I find that the evidence as a whole supports Mr. Juanillo's testimony at hearing that replacing the lower sensor was a prudent choice. The facts recited in the memo and in Mr. Juanillo's testimony at hearing are consistent. Moreover, because the memo was written closer to the events, it lends credence to Mr. Bobreski's testimony that he did not complete the sensor tests until 2:00 p.m.

Mr. Durrett, for his part, provided an account of the events of October 22, 1999. He testified that Mr. Juanillo came to his shop at approximately 3:15 or 3:20 p.m. as usual to report on the daily activities and turn over documentation. Tr. at 2549. Mr. Juanillo did not mention anything about any problems in the chlorine building. Mr. Durrett signed all of the FSRs as satisfactory. Later, at approximately 3:35 or 3:40 p.m., Mr. Bobreski arrived at Mr. Durrett's office and reported the failure of four sensors in the chlorine building. Mr. Durrett admitted having gotten "excited" upon hearing this news and asked Mr. Bobreski when he learned of these failures. Mr. Bobreski responded that he had uncovered this information at 10:00 a.m. Tr. at 987, 2549. When Mr. Durrett asked why Mr. Bobreski waited so long to report the failures, Mr. Bobreski replied that he had had other assignments to complete. Tr. at 2549. Mr. Durrett testified that "it wasn't the fact that four sensors were out [that bothered him], it was again [Mr. Bobreski's] poor judgment that was at issue ..." *Id.* Mr. Durrett felt that if Mr. Bobreski had found out about the problem at 10:00 a.m., then he should have called both him and Mr. Juanillo down to the job site. Tr. at 2549-2550; *see also* Tr. at 987. When confronted with notes from Mr. Dick, retained later to investigate Mr. Bobreski's allegations, however, Mr. Durrett eventually conceded that Mr. Bobreski told him he tested the sensors at 2:00 p.m., rather than 10:00 a.m. Tr. at 2631-2632; CX 80:2. He also conceded that even if Mr. Bobreski had reported the sensor failures at 10:00 a.m., there was nothing he could have done differently. Tr. at 2721.

Mr. Durrett testified that Mr. Bobreski then left his office at which time Mr. Durrett called Mr. Juanillo and said "[T]his is a problem. Bobreski just told me we have four sensors down. There's almost nothing we can do at this time. I said but what I want you to do is to generate a quotation, call Northeast Technical Sales on the phone, that was the rep for the EIT sensor equipment. I said call them on the phone and get a quotation. If somebody starts to raise heck Monday about this, somebody more than likely in operations, then we will have evidence that we are doing something about it, we just didn't sit on it the weekend [sic]. And I believe, I'm pretty sure I called the general foreman whoever that was, they rotate on a 24 hour basis, to let them know what the situation was." Tr. at 2550. Afterwards, Mr. Durrett went over to Mr. Juanillo's office and got back the FSR for Mr. Bobreski, whited out the "yes" in the satisfactory column and checked no, not because Mr. Bobreski failed the sensors, Mr. Durrett said, but because he waited until the end of the day to report it. He took no further action, and left the plant at 4:00 p.m. Tr. at 2629, 2637-2638. The following week, he directed Mr. Juanillo to confine Mr. Bobreski to the shop, and refused to speak to him again. Tr. at 2697.

Mr. Durrett's assertion that Mr. Bobreski waited over five hours to report the failed sensors is central to the Respondent's defense. As I have determined that Mr. Bobreski finished testing the sensors at 2:00 p.m., corroborated by Mr. Juanillo's contemporaneous memo, and Mr. Dick's notes of interviews taken a short time later, I conclude that Mr. Durrett is not credible on this point, especially as he has embellished upon it as the reason he was upset with Mr. Bobreski. As I find that the tests did not finish until 2:00 p.m., I do not agree with WASA that Mr.

Bobreski's report to Mr. Durrett after 3:00 p.m. was unduly delayed, especially when considered in context, i.e., his previous reports of problems with the sensors and alarms had not resulted in any urgent response on WASA's part.

Mr. Bobreski believed he would be fired because of Mr. Durrett's reaction to his report that the four sensors had failed. Tr. at 621. During the week of October 25, 1999, Mr. Bobreski taped various conversations that had taken place at the plant. Tr. at 257, 2459; CX 74 and 74A. Mr. Bobreski taped a conversation that he had with Mr. Juanillo on Monday, October 25, 1999, wherein Mr. Bobreski confronted Mr. Juanillo about the fact that the sensors were not responding properly. Mr. Juanillo responded:

Oh about the chlorine thing. It's something they [WASA] don't want fixed. There are certain things that, yes, needs [sic] to get fixed, like the chlorine building. But they [WASA] know about it, they knew about it, they've already written it off many times. Fine. We know that things are not responding properly, but they did respond regardless how long it took, it was fine. O.K., Fine. We made a mention about that, about how long it took. Now, all of a sudden, four of them do not work at all.

CX 74:1. Mr. Bobreski pointed out that one of the sensors he tested only gave a danger alarm after two minutes had passed and that he could have forced all of the sensors to work if he "upped" the solution, but that this was not the proper way to conduct the testing. Mr. Juanillo agreed that this was not proper and further stated "[i]n fact this thing has never been the right way of doing it, and you know that." *Id.* Mr. Juanillo further stated:

But we can't tell them [WASA] that because they don't want to hear it. Know why, I'll tell you why. Why they don't want to hear it, because if you say it's never been right then they're gonna, they're gonna, WASA's gonna look back and say all these f** years with all these other people have done it and it hasn't been right, and yet they're showing on their report that they did it and it was fine. Somebody's in the wrong. What we're saying here is we're stirring up a can of worms, that's gonna f**-up somebody somewhere, and somebody's going to pay for it. And what we're looking at is Givoo right now. That's what we're looking at. And this person in Givoo is pointing his finger at us. That's the first thing they're looking at.

CX 74:1-2.

Mr. Durrett testified that the first time he told Mr. Van Dolsen about what was going on with these sensors would have been on Monday or Tuesday. He admitted that he did not take the EIT manual home with him over the weekend to read, nor did he ask to read it on Monday morning. Although he did not check the sensors himself on Monday, he did go out in the field with technicians who checked them on October 25, 1999. He specified that nothing happened with the sensors insofar as work orders were concerned until Mr. Bobby Cruz, a technician, repaired and calibrated them. However, "as far as going out there period," Mr. Durrett testified that he went out there that Monday. He further stated that he was "pretty sure" Mr. Juanillo was out there that Monday. The sensors did not get purchased (i.e. the purchase did not get approved by Mr. Van Dolsen) until Wednesday, however, Mr. Durrett insisted that Mr. Juanillo was

responsible for purchasing the sensors.¹⁰¹ Mr. Durrett explained that he went out to check the sensors on Monday, instead of the previous Friday, because there were no technicians available on Friday. However, he dodged the question when it was raised that he could have gone out there on Friday with Mr. Juanillo, a trained I&C technician, right then. With regard to whether the sensors identified by Mr. Bobreski as failed were actually failed, Mr. Durrett testified:

...Bobby Cruz and the other guy spent some time calibrating and repairing that equipment before the new sensors came in. So I can't say for sure that all of them was still in what Mr. Bobreski identified as a failed state by the time the sensors came in. They were all replaced but whether or not any of them were restored to proper operation due to calibration of the electronics, I'm not sure. It was a long time ago. Had I known what I know today, all these questions, I assume you I [sic] would have everything written down, and there would be no question but at the time, there was a major concern and it was like I said two and a half years ago.

Q Well, if these could be returned to operation with calibration, these failed sensors, there would be paperwork on that if that's what happened, right?

A There should be, yeah.

Q There was no calibration paperwork to get these up and running, right?

A I believe the work orders had calibration notations on them.

Q For the new sensors?

A No, for the existing ones. The new sensors, I'm pretty sure they had calibration information on them when they were installed.

Tr. at 2638-2642.

Comparing WASA records to Mr. Durrett's testimony, it appears that he was correct that a purchase order for four sensors was issued on Wednesday, October 27, 1999. Tr. at 2640; CX 40. The parties stipulated (Stipulation No. 3) that Joint Exhibit 1 consists of maintenance records pertaining to the chlorine sensors associated with Chlorine Building No. 1, covering from October 22, 1999 through November 22, 1999. A work order received on October 27, 1999, numbered 99-84341-00, stamped as completed, designated repair and calibration of six (not seven) sensors, cross-referenced to six individual work orders (numbers 99-84414, 415, 416, 513, 514, and 515). The lower tank dome (lower rail car) sensor (which Mr. Bobreski had replaced on September 3) was tested and calibrated on October 29. Work order 99-54515, JX 1:13-14. The tank dome (upper rail car) sensor was replaced and calibrated on November 1. Work order 99-84414, JX 1:3-4. The sensor in upper chlorination room 1 was replaced and calibrated on November 2. Work order 99-84415, JX 1:5-6. The sensor in the basement under chlorination room 1 was replaced and calibrated on November 4. Work order 99-84416, JX 1:7-

¹⁰¹ After Mr. Van Dolsen approved the purchase order, it was up to Mr. Juanillo to process it.

8. A system test on November 6 was satisfactory, except the lower rail car sensor was “very slow to react and reset.” Work order 99-85069, JX 1:15-16. The sensor in the basement under chlorination room 2 was replaced and calibrated on November 8. Work order 99-84514, JX 1:11-12. The sensor in chlorination room 2 was replaced and calibrated on November 9. Work order 99-84513, JX 1:9-10. On November 9, 1999, Richard Dudley wrote a note to Dan [Juanillo] that he had replaced the lower railcar sensor that Mr. Bobreski had installed with another, because the old sensor was unreliable; the note said the system was “now working properly.” JX 1:17. There is no work order in the exhibit pertaining to that change. On November 22, the sensor in upper chlorination room 1 was replaced and calibrated a second time. Work order 99-85850, JX 1:18-20. Finally, also on November 22, the tank dome sensor was replaced and calibrated a second time. Work order 99-85848, JX 1:21-23. Nothing in these records supports Mr. Durrett’s suggestion that the failed sensors were calibrated and returned to service before they were replaced.

With respect to Mr. Bobreski’s removal, Mr. Durrett testified that he also discussed Mr. Bobreski’s actions with respect to the sensors with Mr. Van Dolsen after the weekend. Mr. Durrett asked that Mr. Bobreski be transferred to another section as had happened before with other employees; he did not expect Mr. Bobreski to be fired. Tr. at 2556, 2558, 2720. Mr. Van Dolsen testified that on a Monday morning in October 1999, Mr. Durrett appeared in his office by himself and stated that he did not want Mr. Bobreski to work under his direction anymore. Tr. at 2174. Based on Mr. Durrett’s testimony, it appears that this conversation may have occurred on Tuesday, October 26, rather than on Monday, October 25. Tr. at 2638. According to Mr. Van Dolsen, Mr. Durrett stated that the preceding Friday afternoon, Mr. Bobreski had appeared after normal working hours, when all of Mr. Durrett’s technicians had left, and told him that there were four failed sensors in the chlorine building. Mr. Durrett was “incensed that he didn’t know anything of this problem until after the workweek had ended and his people who would have responded had all left to go home. And he didn’t want him to work for him anymore.” Tr. at 2174-2175, 2251. Mr. Van Dolsen specified that Mr. Durrett did not tell him that he wanted Mr. Bobreski off the plant; he just did not want him working under his direction anymore. Mr. Durrett was “ok” with Mr. Bobreski being transferred to Mr. Redd, who is the other foreman that has the other half of the instrumentation work at Blue Plains. However, Mr. Van Dolsen was not “ok” with this because, as he stated, “I’m the man who had already almost ordered this man off the plant six weeks or eight weeks before and if he wasn’t good enough for [Mr. Durrett], swing[ing] him over to the other instrumentation crew was not going to cure the situation.” Rather, it would “give me an irate instrumentation foreman who says [Mr. Durrett] is dumping his problems on me and I don’t appreciate it.” Mr. Van Dolsen stated: “If he’s been on your crew and you can’t use him and I already had questions about him because he came in conditional, and then we had this problem about the pump, it’s time for him to go.” Tr. at 2213-2214, 2251.

Mr. Van Dolsen testified that it was his decision for Mr. Bobreski to be taken off the contract and that he had the authority to do so. Tr. at 2174-2175. After Mr. Durrett reported that Mr. Bobreski had waited until the end of the day on that Friday to report four of the seven sensors had failed, he determined that Mr. Bobreski was unqualified to work on the contract and should be removed from the contract. The main basis for this determination was that he did not feel that “waiting until the end of the day showed the proper level of cooperation that [he]

expected in the contract.” Tr. at 2213, 2252. Other incidents that influenced his decision were that Mr. Bobreski had not done a proper job in August in pumping station 2, and he had been brought in on a conditional basis. Tr. at 2213-2214. Mr. Van Dolsen agreed that he had the overall responsibility to assure that the chlorine sensors were being properly tested, but that he had never met with Mr. Bobreski to discuss how he tested the sensors. Further, he never discussed with Mr. Bobreski what he felt might have been the cause for multiple failures. Tr. at 2216. Mr. Van Dolsen testified that Mr. Durrett and Mr. Redd had the responsibility for ordering the sensors. Tr. at 2217-2218

Mr. Van Dolsen admitted that at the time he took action which resulted in the termination of Mr. Bobreski’s employment from the Blue Plains facility, he was under the impression that it was “highly likely” that the test procedure employed by Mr. Bobreski caused the sensors to fail. Tr. at 2231. However, he also admitted that he was not aware of any deficiencies in the testing procedures being used to test the chlorine sensors in Chlorine Building No. 1 during the time that Mr. Bobreski was employed at Blue Plains. Further, he assumed that the testing procedure employed by Mr. Bobreski was the procedure authorized by WASA. Mr. Van Dolsen also admitted that had he had no information whatsoever that Mr. Bobreski engaged in any testing procedure that he was not supposed to use at the time he took action to have him terminated from the contract. Mr. Van Dolsen admitted that by the time Mr. Bobreski’s last days of employment rolled around, it had been reported to him that the four sensors were in fact “bad.” Tr. at 2233. It was never reported that Mr. Bobreski’s testing was wrong and that the sensors were actually good; the viable understanding at the time Mr. Bobreski left the site was that the sensors were in a failed condition. Tr. at 2231-2234.

Mr. Van Dolsen also testified that he had not been aware that there were no sensors available to be installed in the chlorine alarm systems on October 22, 1999. Tr. at 2235. He said he did not know when he first became aware that there had been no sensors available to install in the alarm system (i.e. whether it was before or after Mr. Bobreski was removed from the site). He did not recall Mr. Durrett having told him that there were no sensors available. He had assumed that had Mr. Bobreski talked to Mr. Durrett sooner, he would have been in a position to install new sensors that same day. Mr. Van Dolsen admitted that it possibly would have impacted his decision to remove Mr. Bobreski had he known that there had been no sensors available when he spoke with Mr. Durrett. Tr. at 2236. Mr. Van Dolsen also testified that there were measures other than replacing the sensors which could have been taken had the failures been reported earlier on Friday, Tr. at 2252-2253, but admitted that none of those measures were taken the following week while awaiting delivery of new sensors, either, Tr. at 2256. Mr. Van Dolsen testified that other than the fact that Mr. Bobreski reported four sensors being failed at the same time, he (Mr. Van Dolsen) had no other reason (either prior to the time Mr. Bobreski was removed from the site, or at hearing) to believe that Mr. Bobreski was responsible for having caused the failure of the sensors. Tr. at 2236-2237.

According to a memo to file drafted by Mr. Juanillo on October 27, CX 39,¹⁰² he requested an appointment with Mr. Van Dolsen to discuss the decision to remove Mr. Bobreski from his employment at Blue Plains. Mr. Van Dolsen would not meet with him, and said, in

¹⁰² A second copy of the same memo dated October 28, 1999, appears at CX 84.

effect, if Mr. Bobreski were not removed from the plant, he (Van Dolsen) would cancel the Givoo contract. Mr. Juanillo then notified Mr. Bobreski he would be terminated from the Blue Plains facility effective October 29, 1999. Mr. Van Dolsen confirmed that Mr. Juanillo asked for a meeting, and that he declined. Tr. at 2259.

On October 29, 1999, Givoo notified Mr. Bobreski that it did not have any other projects where he could be placed. His employment with Givoo was therefore terminated. He was told that he would be considered for rehire if there were future openings. CX 41.

On Friday, November 5, 1999, an article about Blue Plains by Mr. Lipton appeared on the front page of *The Washington Post*. The headline was “Plant Warnings Go Unheeded, City Ignores Lapses in Handling Toxic Chemical at Blue Plains.” CX 42. The article detailed alleged pervasive deficiencies in the plant’s handling of chlorine, including Mr. Bobreski’s allegations, identifying him by name, and stating, “In all, the technicians say, it is a disaster waiting to happen.” CX 42:1. According to Mr. Bobreski, whether the article was going to be published was

always up in the air until the last day.¹⁰³ Pretty certain we had approval for the article, and the issue came down to talking to the people at WASA, and that was the day I had my car packed and left ... Alexandria. I called him, and then he called them, and I asked him not to notify anybody at WASA because I feared for my life.

Tr. at 606; *see also* Tr. at 676-680. Mr. Bobreski thought Mr. Lipton called Mr. Johnson, WASA’s top manager, about the story, and identified Mr. Bobreski as a source, after he had cleaned out his apartment on October 29. Tr. at 606. He believed Mr. Lipton also talked to Mr. Marcotte. Tr. at 680. Mr. Lipton told Mr. Bobreski that WASA’s official response was that Mr. Bobreski was incompetent and had created the problem with the sensors himself. Mr. Bobreski testified that Mr. Lipton requested his permission to use his name in the story. The day after the first story appeared, the *Post* reported that emergency repairs were being undertaken, including replacement of four sensors, installation of new breathing equipment, repair of an audible alarm system, “beefed up” plant security, and the addition of nighttime supervisors. The *Post* also reported that replacement of the liquid chlorine treatment system with a new, less dangerous system would be sped up.¹⁰⁴ CX 83. Mr. Bobreski testified that sometime later Mr. Lipton told him that WASA had threatened to sue the *Post*, and that WASA discounted everything Mr. Bobreski had said. Mr. Bobreski stood by his allegations. Tr. at 681. Mr. Lipton was not called as a witness by either party, and there is no evidence in the record that anyone at WASA knew of Mr. Bobreski’s collaboration with Mr. Lipton until after Mr. Bobreski was gone from Blue Plains.

As a result of news coverage raising concerns of a potential threat to the safety and health of WASA employees and nearby residents of the District of Columbia, the D.C. Emergency

¹⁰³ Mr. Bobreski later clarified that here he was referring to the last day before publication. Tr. at 624.

¹⁰⁴ According to Mr. Marcotte, the changeover was completed by December 2002, and chlorine is no longer used at Blue Plains. Tr. at 1542.

Management Agency undertook an initial assessment on November 5, 1999, concluding that there was not an imminent threat to public health or safety at the plant. *See* CX 51:9. In addition, the EPA conducted a Clean Air Act “general duty clause” inspection on November 9-10, 1999, and apparently reached a similar conclusion.¹⁰⁵ *See* CX 51:85. WASA commissioned its own study by an attorney, James Dick, of the firm Squire, Sanders & Dempsey, and Stone & Webster Engineering Corp. Mr. Dick’s resume appears at RX 160, his notes at CX 80, and his bill detailing his activities at CX 86. Their preliminary report issued November 16, 1999, also concluded that there was no imminent threat, as they found there were no fundamental problems with the chlorine detection and alarm system. RX 104. The results of these studies were reported in a follow-up story in *The Washington Post* on November 19, 1999. CX 82. After reading Mr. Dick’s report, Mr. Lipton questioned Mr. Bobreski’s credibility, which made him angry and upset. Tr. at 2844.

Thereafter, the Office of the Inspector General for the District of Columbia government undertook a management review of WASA. In his report issued November 8, 2000, CX 51, the Inspector General concluded that WASA did not have a viable safety program, was not in compliance with safety and health requirements, and continued to have previously reported safety and health violations. CX 51:9-10. The report stated, “During the course of the audit, we found the climate of management to be defensive and nonresponsive.” CX 51:12. The audit confirmed the existence of previously reported chlorine-related safety issues, including disconnected alarms and inoperable chlorine detection sensors, and assessed corrective action to be taken by WASA which resolved some but not all problems. CX 51:15-18. The report also noted that despite multiple audits and other reports of safety problems since 1995, WASA had taken little action to correct known deficiencies. EX 51: 18-24. The report also criticized the information and documents provided by WASA officials during the audit as “misleading or incomplete,” and gave specific examples. CX 51:51-53. WASA took issue with the Inspector General’s negative conclusions. CX 51:68-86. In a follow-up report issued January 7, 2002, the Inspector General concluded that WASA had implemented some recommendations from the prior report, and was making ongoing efforts to address others, while still other recommendations remained open. The tone of this report was generally more positive than the earlier report, acknowledging the progress WASA had made. CX 91.

II. DISCUSSION

The Complainant maintains that when he reported that chlorine sensors and alarms at Blue Plains were not functioning properly, he was engaging in activity protected by six environmental statutes. According to the Administrative Review Board, “protected activities under the environmental whistleblower provisions are limited to those which are grounded in conditions constituting reasonably perceived violations of the environmental statutes.” *Johnson v. Oak Ridge Operations Office, U.S. Dept. of Energy*, USDOL/OALJ Reporter (HTML), ARB

¹⁰⁵ The general duty clause, Section 112(r) of the Clean Air Act, added in 1990, “requires that owners and operators of stationary sources identify hazards, and prevent, and minimize the effects of accidental releases” of hazardous substances at their facilities. CX 50:5. The report of the inspection, RX 102, is not in evidence, as the Respondent was allowed to withdraw it over the objection of the Complainant during a telephone conference held January 10, 2003. *See* Order Canceling Supplemental Hearing and Setting Schedule for Further Proceedings issued January 13, 2003.

No. 97-057, ALJ Nos. 95-CAA 20, 21 and 22, at 8 (ARB Sept. 30, 1999). The Clean Air Act (“CAA”) was enacted to create incentives and uniform regulation for control of unregulated pollutants and unregulated sources of air pollution. The Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) was enacted to create incentives and uniform regulation for disposal of hazardous waste. The Federal Water Pollution Control Act (Clean Water Act) (“FWPCA” or “CWA”) was enacted to further coordinate efforts between the Federal and State governments to prevent, control and abate water pollution. The Safe Drinking Water Act (“SDWA”) was enacted to establish criteria and quality control testing procedures to insure a safe supply of drinking water to protect the public welfare. The Solid Waste Disposal Act (Resource Conservation and Recovery Act) (“SWDA” or “RCRA”) was enacted to provide assistance for recovery of energy and resources from discarded materials and safe disposal of solid waste, and to regulate disposal of hazardous waste. Finally, the Toxic Substances Control Act (“TSCA”) was enacted to protect human health and the environment by requiring testing and use restrictions on chemical substances. Mr. Bobreski offered several exhibits which reference the applicability of the various statutes and implementing regulations to Blue Plains.¹⁰⁶ I find that the proper use, storage and disposal of chlorine at the plant, including the chlorine detection and alarm system, implicates all six of the alleged statutes.

The employee protection sections of these statutes prohibit employers from discharging, discriminating against, or otherwise penalizing their employees who initiate suits, testify against their employers or otherwise involve themselves in administrative or legal proceedings under the Acts.¹⁰⁷ As another administrative law judge succinctly stated:

¹⁰⁶ As to the CAA, *see* CX 50 generally; CX 51:13; CX 90:3; CX 91:4. As to CERCLA, *see* CX 3:13; CX 50: 9, 26, 30. As to FWPCA (CWA) *see* CX 50:28; CX 51:13; CX 90:14; CX 91:4. As to SWDA (RCRA), *see* CX 50:27-28; CX 90:14. As to SDWA, *see* CX 50:28. As to TSCA, *see* CX 50:14, 27, 28-29.

¹⁰⁷ CAA, SDWA and TSCA provide, in almost identical language:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his [the employee’s] compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) --

- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this [sub]chapter {CAA and SDWA: or a proceeding for the administration or enforcement of [CAA: any requirement imposed under this chapter or under any applicable implementation plan] [SDWA: drinking water regulations or underground injection control programs of a State]},
- (2) testified or is about to testify in any such proceeding, or
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

CERCLA, FWPC and SWDA provide, in almost identical language:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has [CERCLA: provided information to a State or to the Federal Government,] filed, instituted, or caused to be filed or instituted any proceeding under this chapter [SWDA: or under any applicable implementation plan], or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter [SWDA: or of any applicable implementation plan].

Whistleblower provisions are intended to promote a working environment in which employees are free from threats of employment reprisals for publicly asserting company violations of statutes protecting the environment ... [*Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, 992 F.2d 474, 478 (3rd Cir. 1993)]. Such provisions are intended to encourage employees to aid in the enforcement of such statutes through protected procedural channels. *Id.* With this purpose in mind, “protected activity” has been broadly defined as a report or internal complaint of an act which the complainant reasonably believes is a violation of an environmental act. The complainant need not prove that an actual violation occurred. Rather, he must prove only that his complaint was “grounded in conditions constituting reasonably perceived violations of the environmental acts.” *Ilgenfritz v. United States Coast Guard Academy*, 1999-WPC-3 (ALJ Mar. 30, 1999).

Internal complaints are specifically recognized as protected activity because the employee is encouraged to first take environmental concerns to the employer to allow the perceived violation to be corrected without governmental intervention. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec’y Apr. 27, 1987) (Order of Remand). Such complaints also afford the employer an opportunity to justify or clarify its policies where the perceived violations are a matter of employee misunderstanding. *Ilgenfritz*, 1999-WPC-3, at p. [46].

Bostwick v. Springer and Associates, Inc., 2003-WPC-9 (ALJ Oct. 16, 2003). Moreover, as the judge went on to state in the same passage from *Ilgenfritz*, “The report may be made to a supervisor, or through an internal complaint or quality control system, or to an environmental staff member.” (Citations omitted.) In other cases the Secretary of Labor and the Administrative Review Board have held that threats to contact the press, or actual participation in television or newspaper reporting of alleged violations of environmental statutes, is also protected activity. *See Dobreuenaski v. Associated Universities, Inc.*, 96-ERA-44 (ARB June 18, 1998) at 9 (providing an interview and video tape to a television station was protected activity); *Diaz-Robainas v. Florida Power & Light Co.*, 92-ERA-10 at 7 (Sec’y Jan. 10, 1996) (ERA protects an employee who is about to reveal nuclear safety concerns to either the NRC or the press); *Carter v. Electrical District No. 2 of Pinal County*, 92-TSC-11 at 12 (Sec’y July 26, 1995) (contact with the press was protected activity under the whistleblower statutes).

The Administrative Review Board has articulated several basic principles regarding which activities fall into the category of “protected activity.” *See Williams v. Mason & Hanger Corp.*, ARB No. 98-30, ALJ No. 1997 ERA 14 (ARB Nov. 13, 2002). First, safety concerns may be expressed orally or in writing. Second, the concern expressed must be specific to the extent that it relates to a practice, condition, directive or occurrence. Third, a whistleblower's objection to practices, policies, directives or occurrences is covered if the whistleblower reasonably believes that compliance with applicable safety standards is in question; it is not

Each of the Acts also provides that its protections do not apply to an employee who deliberately violates the Act without direction from his employer or its agent. CAA, 42 U.S.C. § 7622(g); CERCLA, 42 USCA § 9610(d); FWPCA, 33 USCA § 1367(d); SDWA, 42 USC § 300j-9(i)(6); SWDA, 42 USCA § 6971(d); TSCA, 15 U.S.C. § 2622(e).

necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards. Electronic slip op. (PDF) at 18. Also of note, Mr. Bobreski need not show that he correctly asserted a violation on the part of WASA; he need only show that he possessed a reasonable belief of such a violation. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992); *Stephenson v. NASA*, ARB No. 98-25, ALJ No. 94-TSC-5, electronic slip op. (PDF) at 14-15 (ARB July 18, 2000) (“The complainant must ‘have a reasonable perception that [the respondent] was violating or about to violate the environmental acts.’ ... [T]he key to coverage of a CAA whistleblower complaint is potential emission of a pollutant into the ambient air.”).

Mr. Bobreski testified that the conditions he found at Chlorine Building No. 1 caused him great concern about his own safety and the safety of the public:

Q With respect to the chlorine piping or chlorine building no. 1, did you reach any conclusion with respect to whether there existed an unreasonable risk of injury to either health or the environment?

A Yes.

Q And what was your conclusion?

A It was very unsafe -- I felt unsafe and every time I went up the stairs, I was just nervous that -- I had no faith in -- everything I did I did with extreme caution after seeing this. I just didn't have any faith in any of the operations at the plant. It was just one thing after another after another, the leak with the operator sitting there, a combination of all the things I saw made me extremely apprehensive for my personal safety, for the safety of others and the safety of the public.

Q With respect to the chlorine being used in chlorine building no. 1, did you reach any conclusion as to whether the procedures in place at Blue Plains were adequate with respect to managing the risk of the release of chlorine?

...

THE WITNESS: No, they were not adequate. They were grossly inadequate.

Tr. at 189-190. On cross examination, Mr. Bobreski said he failed the sensors on October 22, 1999, because the situation was dangerous, and getting worse. Tr. at 621-623. I find that his concern was reasonable. Moreover, when he tried to apprise WASA of his concerns through his memoranda to Mr. Juanillo, Mr. Durrett's responses were dismissive at best. For example, Mr. Durrett testified that he simply did not believe Mr. Bobreski when he suggested that alarms had been disabled intentionally. I note, however, that Mr. Bobreski was not the only person who pointed out this potentially very dangerous practice, as Mr. Huffman had written a memo to Mr. Durrett advising him of an arguably similar incident¹⁰⁸ as recently as June 30, 1999. CX 20.

¹⁰⁸ Mr. Huffman's memo described a leak at the supply line fitting which was unusually loose, and a propped open door which short-circuited the positive ventilation system.

Other technicians had also reported problems with the sensors at various times. *See, e.g.*, Work Order No. 96-28336-02 and 05, from 1996, reporting slow sensor response and long reset time, and disconnection of a sensor due to nuisance trips, CX 63:2-5. However, the record demonstrates that only Mr. Bobreski repeatedly advised Mr. Juanillo and Mr. Durrett that alarms were being intentionally disabled, wrote memoranda above and beyond required documentation of his work to bring his safety concerns to WASA's attention, and failed multiple sensors.

WASA asserts that none of Mr. Bobreski's actions rose to the level of protected activity because he relied on "routine maintenance reports" to establish his claim. Response brief filed August 1, 2003, at 27. The principle that "merely performing ... assigned job duties" does not constitute protected activity was recently affirmed by the Sixth Circuit in *Sassé v. U.S. Department of Labor*, 409 F.3d 773, 779-780 (6th Cir. May 31, 2005) (Court held Assistant U.S. Attorney could not state a whistleblower claim premised on his investigation and prosecution of environmental crimes, his assigned area of work). However, I find that when Mr. Bobreski drafted and forwarded memoranda advising his supervisors that the alarm system had defects which had not previously been reported (*see* memo dated September 1, 1999, CX 27), and had been intentionally disabled on several occasions (*see* memos dated September 3, 1999, CX 30, and September 10, 1999, CX 31), as opposed to simply performing the inspections and filling out required paperwork, Mr. Bobreski became a whistleblower "who risk[ed his] job security by taking steps to protect the public good." *Sassé*, 409 F.3d at 780. When his concerns were ignored, he also engaged in protected activity when he reported that four sensors had failed. Finally, Mr. Bobreski also engaged in protected activity when he contacted the reporter from *The Washington Post*. As there is no evidence in the record that this contact was known to any WASA officials until October 29, sometime after his removal, however, I cannot find that it contributed to his removal from Blue Plains.

WASA contends that it had several legitimate, nondiscriminatory reasons for removing Mr. Bobreski from Blue Plains. Throughout the hearing and in its briefs, WASA accused Mr. Bobreski of incompetence, and of deliberate misconduct in his actions respecting the chlorine alarm system, and other matters. WASA also impugned his motives in contacting *The Washington Post*. Considering the record as a whole, I conclude that WASA's accusations are not true. Mr. Bobreski is an ISA certified technician. Although Blue Plains was his first assignment at a wastewater treatment plant, his education and experience as an instrument technician in other types of plants qualified him for his assignment at Blue Plains. The record suggests that his "by the book" approach to his work caused some conflicts with WASA employees used to making "seat of the pants" repairs to old equipment subject to frequent breakdowns. Although the assessments by the D.C. Emergency Management Agency and Mr. Dick, performed in response to the article in *The Washington Post*, found no "imminent threat" to the public health or safety, the report from the Inspector General supports the testimony from Mr. Bobreski and Mr. Juanillo that the conditions at Blue Plains were, in fact, "deplorable," and that Mr. Bobreski's concerns about the safety of the chlorine at the plant were well founded.

Turning to the specific reasons offered by WASA for terminating Mr. Bobreski from participation in the contract, WASA gave several reasons why he was removed. *See* the answer to interrogatory number 16, CX 70:21-22. WASA relied specifically on the "unprecedented" failure of the four sensors, alleging, erroneously, that Mr. Bobreski had not previously reported

them as malfunctioning. I construe WASA's answer to the interrogatory about the reasons Mr. Bobreski was terminated, as well as the testimony by Mr. Durrett and Mr. Van Dolsen, to be admissions that reporting the failed sensors was a contributing factor in the decision to remove Mr. Bobreski. Some of the other reasons offered by WASA concerned his performance on matters unrelated to the testing of the chlorine sensors, including the incidents involving the control panel in Pump Station 2 and the G-House transmitter. WASA also alleged that Mr. Bobreski was accessing computer terminals and the WASA information network without authorization, despite direct orders to stop, a reason not offered by Mr. Van Dolsen in his testimony. Nor was it established that Mr. Bobreski did so at the hearing. The record is compelling, however, that the precipitating event for the termination was his failing the four sensors on the afternoon of October 22, 1999. The record is also clear that Mr. Van Dolsen made the decision to terminate Mr. Bobreski, based on Mr. Durrett's report of that event. I must therefore address the credibility of these two key witnesses for WASA in deciding whether the reasons given by WASA are true, or a pretext for discrimination.

Mr. Durrett was defensive and argumentative, and took no responsibility for problems with the chlorine detection system, the testing procedure, the unavailability of appropriate manuals, or the failure to have calibration gas or sensors on hand. He insisted that the contractors were entirely responsible for all of those matters. *See, e.g.,* Tr. at 846, 849-850, 862-866, 1021-1027. On the other hand, he also faulted Mr. Bobreski for deciding to replace the bottom railcar sensor. Mr. Van Dolsen testified, however, that Mr. Durrett was responsible for ensuring that the testing procedures were complete and accurate. Tr. at 1064. Mr. Dorr testified that Mr. Durrett had always been the person with access to the standards for testing the chlorine sensors. Tr. at 1824. Mr. Durrett testified that he knew that the response time for the sensors should be less than ten seconds, Tr. at 1018, so once Mr. Bobreski began reporting specific response times for the sensors, Mr. Durrett should have known, and, indeed, admitted that he did know as early as September 15, 1999, that the "system was not functioning as it should." Tr. at 1019. When Mr. Bobreski reported response times for the sensors which were clearly excessive, Mr. Durrett took no action. When Mr. Bobreski reported that the sensors had failed, Mr. Durrett concluded that Mr. Bobreski "didn't know his job." Tr. at 852. Mr. Durrett refused to concede that when the sensors Mr. Bobreski failed were later re-tested by another technician, they failed again, at first only stating that they were all replaced, Tr. at 852; later conceding that re-testing confirmed Mr. Bobreski's results, but then saying "The question is how it got that way, who knows?", Tr. at 874; and later still backtracking, saying the decision to replace the sensors was a "political decision," Tr. at 901.¹⁰⁹ He also refused to concede that the visual alarm had been sabotaged. Tr. at 927-928. Mr. Durrett claimed never to have received most of Mr. Bobreski's memos, but testified:

... Mr. Bobreski never did his job. His job was to repair the equipment. He never did that. He was good at writing reports but he never did what his job was ... He was there as an instrument mechanic. He was supposed to repair problems. He couldn't repair problems. He could talk about them. He could not repair them.

¹⁰⁹ WASA argued that the sensors had not failed on re-testing, based on the reconciliation codes assigned to the work orders by Mr. Durrett when the sensors were replaced. Response brief filed August 1, 2003, at 16. Based on comparison of witness testimony, the work orders in Joint Exhibit 1, and the list of reconciliation codes in CX 72, however, I reject this argument.

Tr. at 902. I find that Mr. Durrett's criticisms of Mr. Bobreski, and his testimony generally, lack credibility.

Mr. Van Dolen's testimony also lacked credibility. In an affidavit completed in March 2000, Mr. Van Dolen stated that he decided to exclude Mr. Bobreski from further participation in the contract because he "determined that Mr. Bobreski over exposed the sensors and caused four of the seven sensors to fail." Tr. at 1077. Similar allegations were made in WASA's answers to interrogatories 15 and 17 (CX 70:20, 22-23), which Mr. Van Dolsen signed on behalf of WASA. An allegation that Mr. Bobreski deliberately (as opposed to negligently) disabled the sensors, if proven, might have removed him from the protection of the Acts. At the hearing, however, Mr. Van Dolsen conceded that before Mr. Bobreski was fired, he had no knowledge that Mr. Bobreski was using any inappropriate procedure while testing the sensors. Tr. at 1072. He also conceded that he had no idea how the sensors function. Tr. at 1078. Mr. Durrett denied that he was aware of any attempt to find out what caused failure of the sensors. Tr. 949-950. In fact, the method of testing the sensors with a bleach/vinegar solution was the procedure set forth in Blue Plains' plant manual of Standard Maintenance Procedures, CX 12. Neither the plant manual nor the work orders specified the proportions for the solution or any details of how it should be used, or gave any warning that using the wrong solution would adversely affect the sensors. The bleach/vinegar test was the method taught to Mr. Bobreski by his predecessor responsible for testing the sensors at Chlorine Building No. 1. The EIT manual did not call for use of a bleach/vinegar solution at all, and the manual itself was only found due to Mr. Bobreski's efforts. Moreover, I credit Mr. Bobreski's testimony that it is not possible to "fry" the sensors by overexposure to chlorine, Tr. at 621, because if that were so, then the sensors would not function in a true emergency caused by a chlorine leak. *See also* Mr. Kinsey's testimony, Tr. at 1208-1215; CX 57:11 ("... sensors recover quickly to short duration exposure to high gas concentrations"). Mr. Van Dolsen's lack of credibility on this central issue casts doubt on his testimony generally, especially insofar as he sought to cast doubt on Mr. Bobreski's motives or his competence.

As noted above, Mr. Bobreski's failing the four sensors on Friday, October 22, 1999, was the incident that precipitated his discharge. I make the following findings and conclusions regarding the sequence of events surrounding his discharge:

1. Mr. Bobreski failed the chlorine sensors because they did not respond quickly enough to meet the requirements in the EIT manual, CX 57.
2. Mr. Bobreski completed his testing of the sensors at about 2:00 p.m., and reported the failure in a timely manner under the circumstances.
3. There were insufficient sensors in stock to replace the failed sensors; new sensors were not ordered until the following Wednesday, October 27.
4. Mr. Durrett declined to confirm that the sensors had failed on October 22, but later tests by other technicians confirmed Mr. Bobreski's results.

5. I do not credit Mr. Durrett's testimony that he was angry because Mr. Bobreski finished testing the sensors at 10:00 a.m., and did not report the failures until after 3:30 p.m.

6. I find that Mr. Durrett was angry at Mr. Bobreski, changed his work order report to "unsatisfactory," and requested that Mr. Bobreski be removed from his supervision, because of Mr. Bobreski's protected activities in reporting unsafe conditions at Blue Plains.

7. Mr. Bobreski reasonably believed the conditions he reported violated safety and environmental laws.

8. Mr. Van Dolsen made the ultimate decision to remove Mr. Bobreski from working at Blue Plains.

9. Mr. Van Dolsen based his decision primarily on Mr. Durrett's request that Mr. Bobreski be removed from his (Durrett's) supervision.

10. Mr. Van Dolsen would not have removed Mr. Bobreski had Mr. Durrett not complained to Mr. Van Dolsen about Mr. Bobreski's reporting that the sensors had failed.

11. The allegation that Mr. Bobreski deliberately or negligently disabled the sensors is not true.

12. Even were I to credit Mr. Van Dolsen's testimony that he also took Mr. Bobreski's "conditional" hiring and incidents other than the failed sensors into account in making his decision to remove Mr. Bobreski, WASA has failed to show by a preponderance of the evidence that Mr. Bobreski would have been fired had he not engaged in protected activities.

13. I find that Mr. Bobreski was removed from his position at Blue Plains by Givoo at the direction of WASA, because he engaged in activity protected by the statutes on which this claim is based.

14. Discrimination by WASA in violation of CAA, CERCLA, FWPC, SDWA, SWDA and TSCA caused Givoo to discharge Mr. Bobreski.

15. Mr. Bobreski is entitled to remedies in accordance with these statutes, and WASA is liable for those remedies.

III. REMEDIES

All six statutes invoked by the Complainant provide that if a violation has occurred, the person or party who committed the violation should be ordered to take affirmative action to abate the violation; to reinstate the complainant to his former position with compensation (back pay, benefits, and other terms, conditions and privileges of employment); and, if the complainant so requests, to pay the complainant's costs and attorney fees. In addition, the Clean Air Act, the Safe Drinking Water Act, and the Toxic Substances Control Act, allow an order to pay compensatory damages. Finally, both the Safe Drinking Water Act and the Toxic Substances

Control Act, also allow an order to pay exemplary damages. CAA, 42 U.S.C. § 7622(b)(2)(B); CERCLA, 42 USC § 9610(b) and (c); FWPC, 33 U.S.C. § 1367(b) and (c); SDWA, 42 U.S.C. § 300j-9(i)(2)(B)(ii); SWDA, 42 U.S.C. § 6971(b); and TSCA, 15 U.S.C. § 2622(b)(2)(B).

There is no evidence in the record relating to remedies after December 2001, and the evidence regarding the status of WASA's contract with Givoo or any successor is contradictory and incomplete. The parties are therefore ORDERED to supplement the record with evidence and argument as to all elements of relief the Complainant seeks, including attorney fees to the date of the Complainant's supplemental filing. By agreement or request of either party within 30 days of the date this recommended decision and order, the parties may conduct discovery and/or request a supplemental hearing (limited to issues and evidence relating to remedies arising after December 2001). Absent a request for discovery and/or supplemental hearing, the Complainant shall have 60 days from the date this order is issued to supplement the record, and the Respondent shall have 30 days to respond.

This recommended decision and order is an interlocutory order. There is no appeal of right until a final order assessing remedies is issued by the Office of Administrative Law Judges. *See Welch v. Cardinal Bankshares Corp.*, USDOL/OALJ Reporter (PDF/HTML) ARB No. 04-054, ALJ No. 2003-SOX-15 (ARB May 13, 2004), and the cases cited therein. For this reason, no Notice of Appeal Rights has been appended to this recommended decision and order.

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ALICE M. CRAFT
Administrative Law Judge