U.S. Department of Labor

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

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

Issue Date: 05 December 2008

Case No. 2006-ERA-24

In the Matter of:
DONALD VAN WINKLE,
Complainant,

v.

BLUE GRASS CHEMICAL ACTIVITY/
BLUE GRASS ARMY DEPOT,
Respondent.

APPEARANCES:

Paula Dinerstein, Esq.
Adam Draper, Esq.
Pubic Employees for Environmental Responsibility
2000 P Street, NW, Suite 240
Washington, D.C. 20036
For the Complainant

Kevin Bennett, Esq.
Blue Grass Army Depot
Office of Counsel, Building 219
2091 Kingston Highway
Richmond, KY 40475
For the Respondent

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

RECOMMENDED DECISION AND ORDER

This proceeding was originally initiated under the employee protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C. Section 5851, and consequently bears the above Case No. 2006-ERA-24, which remains unchanged. The Occupational Safety and Health Administration (OSHA) investigator of the original complaint, acting under applicable provisions of 29 C.F.R. Part 24, found: (1) that the whistleblower evidence presented by the Complainant was not applicable to the ERA; (2) that it could be properly considered under the provisions of Section 322(a)(1-3) of the Clean Air Act (CAA), 42 U.S.C. § 762, and/or Section

7001(a) of the Solid Waste Disposal Act (SWDA)[1], 42 U.S.C. § 6971,[2] and that it was insufficient and without merit to support a violation of those statutes. Following the timely submission of a request for a *de novo* hearing, evidence submitted has been considered under the provisions of the CAA and the SWDA by the undersigned in accordance with August 10, 2007 amendments to the applicable provisions of 29 C.F.R. §§ 24.103(e), and 29 C.F.R. §§ 24.107 - 24.109, which grant the relevant authority to the Administrative Law Judge to hear and decide this appeal.

The implementing regulations that govern the hearing, decision and order in this matter appear at 29 C.F.R. Part 18, (§ 18.1, *et. seq.)* and 29 C.F.R. Part 24, (29 C.F.R. §§ 24.100 – 24.103 and §§ 24.106 - 24.109), except for those sections of Part 24 particular to the ERA, 29 C.F.R. § 24.102(c) and 24.103. These provisions derive from statutes enacted to protect employees from employers taking adverse personnel actions against them that would affect their terms and conditions of employment for engaging in protected activities, in retaliation for attempting to carry out the purposes of those applicable environmental statutes.

A hearing on this matter was held on November 27-29 and December 4, 2007 in Lexington, Kentucky at which the parties were represented by counsel. They presented testimony and documentary evidence, and timely filed briefs, and supplemental briefs and motions, all of which have been carefully considered in this recommended decision and order.

STATEMENT OF THE CASE

Mr. Van Winkle ("Complainant" or "Van Winkle," herein) filed his initial complaint of discrimination with OSHA against Blue Grass Chemical Activity (Respondent or BGCA, herein), under the employee protection provisions of the ERA, on September 2, 2005, under 29 C.F.R. § 24.3[3] which was investigated under 29 C.F.R. §24.4 (a) – (c). In the investigation report issued under 29 C.F.R. §24.4 (d)(1) on June 2, 2006, the investigator found that the nature of the allegations fell under the provisions of the CAA and SWDA, rather than the ERA. The investigator also found that the allegations did not have merit under those provisions, and/or the statutory regulations, and that they were superseded in whole or in part by the provisions of the Chemical Personnel Reliability Program (CPRP) Rules and Regulations of the United States Army (AR 50-6), pursuant to determinations of the United States Supreme Court in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) and *Hall v. Dept of Labor*, 476 F. 3d 847 (10th Cir. 2008.) *cert. den*., 76 U.S.L.W, 3224, and judicial and administrative determinations stemming from that precedent.

On July 14, 2006 the Complainant filed a timely appeal of the OSHA determination, and requested a formal hearing addressed to the Chief Administrative Law Judge, U.S. Department of Labor, 29 C.F.R. §24.4 (d)(3).

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[1] Also known as the Resource, Conservation and Recovery Act (RCRA).

[2] I note that a motion for summary judgment is processed as a motion for summary decision under 20 C.F.R. §18.41 governing this matter.

[3] This was before the August 10, 2007 amendments to 29 C.F. R Part 24, which, in addition to its substantive regulations, changed its decimal numbering system from a single to three numbered system.

ISSUES

1. Whether the complaint in the above matter was timely filed with OSHA. [4]

2. Whether the allegations of the complaint are subject to the jurisdiction of this court under the provisions of the ERA, the CAA and/or the SWDA, as alleged herein, and/or are superseded in whole or in part by the provisions of the Chemical Personnel Reliability Program (CPRP) Rules and Regulations of the United States Army, and the judicial and administrative determinations affirming the application of certain United States military application, stemming from that precedent.

3. Whether the respondent is an "employer" under the CAA and/or SWDA.

4. Whether complainant engaged in protected activity under the CAA and/or the SWDA.

5. Whether the respondent knew or had knowledge that the complainant engaged in protected activity.

6. Whether respondent committed adverse action against complainant.

7. Whether the actions taken against the Complainant by Respondent were motivated, at least in part, by Complainant's engagement in protected activity subject to the jurisdiction of this court.

8. What, if any, damages the Complainant is entitled to, as a result of alleged retaliatory adverse actions determined to have been taken by Respondent as a result of protected activity, outside of the scope of Respondent's CPRP regulations.

FINDINGS OF FACT

Stipulations:

1. The Office of Administrative Law Judges, U.S. Department of Labor, has jurisdiction over the parties and the subject matter of this proceeding.

2. Respondent is an employer subject to the Solid Waste Disposal Act (SWDA), 42 U.S.C. Section 7001(a) and 6971, and the Clean Air Act (CAA), 42 U.S.C. Section 7622 (a) ("the Acts" herein).

3. Complainant is now, and at all times material herein, a "person" and/or an "employee" as defined in the Acts.

4. Donald Van Winkle was an employee of Blue Grass Chemical Activity/Blue Grass Army Depot (BGAC & BGAD), during the applicable periods that he was employed as a Monitoring Systems Operator/Mechanic.

[4] In their Stipulations, the parties stipulated that, "The original complaint filed with the Secretary was timely." (Stipulation No. 6, JX 1)

5. Pursuant to 29 C.F.R. Part 24, Complainant filed a complaint on September 6, 2005 with the Secretary of Labor alleging that Respondent discriminated against him in violation of the Acts.

6. The original complaint filed with the Secretary was timely.

7. Following an investigation, the Regional Administrator, Occupational Safety and Health Administration, issued his findings on the complaint on June 2, 2006.

8. Complainant received those findings shortly thereafter.

9. Complainant mailed an appeal and request for hearing to the Chief Administrative Law Judge, U.S. Department of Labor, Washington, D.C. on July 14, 2006.

10. The appeal of the complaint satisfied the time constraints provided by the Acts.

Unless otherwise stated, I find that these stipulations constitute factual findings for all purposes in this matter.

Background:

Overview of Van Winkle's Hire through His Temporary CPRP Decertification, From October 1999 to August 3, 2005

In October 1999, Van Winkle was hired as a civilian employee of Respondent, Blue Grass Chemical Activity, U.S. Army, Richmond, Kentucky[5] as a GS-5 Security Guard. In August 2002, he was hired into a WG-9 Toxic Materials Handler/ Explosive Inspector position in a separate BGCA tenant agency at that facility. In August 2003, he was promoted to a WG-10 Monitoring Systems Operator Mechanic.[6]

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[5] The U.S. Army's public website, **http://www.cma.army.mil/bluegrass.aspx**, states the following description of Respondent's facility: "Blue Grass Chemical Activity (BGCA) is a tenant at the 14,600-acre Blue Grass Army Depot, a subordinate installation of the **Joint Munitions Command**. BGCA reports to the U.S. Army Chemical Materials Agency and is responsible for the safe, secure storage of the chemical weapons stockpile. Blue Grass Army Depot is one of seven Army installations in the United States that currently store chemical weapons. The Blue Grass stockpile of chemical weapons comprises 523 tons of nerve agents **GB** and **VX**, and **mustard agent**." I take administrative notice of this description as a succinct summary of activities performed at BGCA, relevant to this case, unless otherwise modified by other materially relevant evidence admitted herein.

[6] Since August 2002, and through his annual evaluation reports of 2003 and 2004, Van Winkle received ratings of "Meets Success" in all categories rated for 2002; "Excellence" in three of four categories, and "Meets Success" in the fourth category rated for both of the years 2003 and 2004, (JX 80-82) and "Meets Success" for all four categories rated for 2005, with a note that: "Mr. Van Winkle has been temporarily disqualified from the Personnel Reliability Program (PRP) since August 3, 2005. He has been unable to perform his regular duties." (JX 83) In addition, Shuplinkov complimented by Van Winkle for raising the issue of the placement of the V to G Pads on the monitoring equipment for interior of the igloos.

In the latter, Van Winkle operated a Real Time Analytical Platform (RTAP) truck with air–monitoring equipment, for "igloos" (45 underground bunkers) containing stockpiled U.S. military chemical weapons such as sarin (GB) and a mustard agent (VX), pending destruction. To perform these duties, Complainant's position required a "secret" clearance as well as certification under the Chemical Personnel Reliability Program (CPRP).

Van Winkle and others with such clearances operated a chemical gas detection device, called a "mini-cam" (a gas chromatograph). It contained a pad, called the "V to G pad" upon which the molecules of the VG (mustard gas) were collected to test the air for chemical leakage before entering and working within the igloos. Teflon tubes with air intakes located throughout the igloos were strung to the outside. These connected to the mini-cams within the RTAP truck for testing air samples from within the igloos before entry by employees, members of the military or visitors.

In February 2005, Van Winkle and several of the other mini-cam operators attended a five-day mini-cam maintenance training course sponsored by its manufacturer, OI Analytical, in Alabama. There they discovered that the "V to G conversion pad" had been ineffectively placed, potentially leaving a leaking chemical agent exposure for those entering the igloos.

The BGCA attendees then met to discuss the condition. They agreed that the situation was urgent and that their superiors at the BGCA should be notified of the problem before any other entry was allowed into the igloos. Van Winkle's co-worker, Carole Hunter, placed the call to her supervisor to explain the situation as it was revealed in the training.

Upon return the following week, Van Winkle raised the V to G pad issue to his supervisor, as other attendees had also done with their respective supervisors. BGCA witnesses contested any significance in Van Winkle's report that would separate his from the reports of the others. However, as a result of their complaints, inquiries and reports, a meeting was called by his immediate supervisor Gary Stanfield to discuss the V to G Pad issue. It included BGCA Commander Lieutenant Colonel Shuplinkov ("Shuplinkov" herein) and his Executive Assistant, Jim Rooney, Supervisory Chemist Bonnie McCoy, BGAD Union President Jimmy Bowling, Van Winkle and several of the other training attendees. Shuplinkov directed that the igloos be immediately closed; that upon re-entry to the igloos, personnel protective gear be of the highest order; that Deputy Rooney and Supervisor McCoy investigate the matter and issue a report to him; that the BGCA's reporting authority, the U.S. Army Chemical Munitions Agency (CMA), be notified of these activities and that a CMA Chemical Quality Assurance Team (CQAT) be authorized by the CMA to conduct an audit to review the V to G pad issue.

Two weeks later, a CQAT team conducted its evaluation and ordered the changes to the V to G pad configuration necessary to conform to that of the training session. Tom Bilyeu, who was Director of Chemical Operations and Van Winkle's Supervisor, as well as the Certifying Officer of the CPRP program, was ordered by Shuplinkov to oversee the conversion, which was completed in October of 2005.

As concern spread about effects from possible exposure for the time period prior to "conversion" or corrective action in October of 2005, Van Winkle decided to seek advice regarding possible legal action based upon the possible effects of the exposure to himself and to others. His first contact was unsuccessful with the lawyer citing difficulty in bringing such a case lacking evidence of severe symptoms from VX or other gas exposure as a result of the incorrect mini-cam location. His second contact bore fruit, when Craig Williams, Director of the Chemical Weapons Working Group, referred him to Richard Condit of the Pubic Employees for Environmental Responsibility (PEER). One of PEER's requirements was that Complainant substantiate his case in writing by gaining support from his co-workers. As a result, Van Winkle wrote his own statement about his July 2005 meetings regarding the mistaken placement of the mini-cam V to G pads and Supervisory Chemist Bonnie McCoy's admission that her action had resulted in their mistaken placement, as confirmed by tests proving their ineffectiveness. Van Winkle then asked other co-workers to sign the statement authored by him. Evidence establishes that he contacted approximately seventeen employees to sign the statement, most indicating that they were unwilling to participate in the mini-cam incident litigation. Three, however, informed BGCA superiors that they had received such contacts.

When Wiley Flynn refused to sign Van Winkle's statement, he asked Flynn to write his own account of what had happened, stating that if the matter was litigated, resulting in a trial, that he could be subpoenaed.

Likewise, Carole Hunter, the training conference trainee who placed the call to BGCA from the conference regarding what the trainer had stated about the mini-cam pad placement, also refused to sign Van Winkle's letter.

Van Winkle also showed his statement to Archie Babb, but did not ask him to sign it. Apparently, Archie Babb did not do so.

Union President Bowling did sign a modified version of Van Winkle's letter dated July 14, 2005. (CX 13) In it, he verified McCoy's admission that she was the one who made the decision to remove the pads from the distal end of the Teflon tube and to place them where they were rendered "ineffective" to pick-up VG agent, and that the tests showed that she "got nothing when the tests were performed," thus "admitting that she knowingly jeopardized" his and co-workers' lives in the process. While Bowling struck language stating that he was "extremely concerned" about exposure and cover-up, if examined by an outside source in the letter, he signed a hand printed statement, added to the bottom of the letter, that he was present at the meeting with McCoy, as stated, and that he did hear her statement, as above stated. Bowling's letter was forwarded to representatives of PEER by Van Winkle and served as a basis for their agreement to take Van Winkle's case.

In addition to the findings of the certifying and reviewing officials, Respondent also advanced the defense that those contacted by Van Winkle had either been asked to sign, or were "threatened" with a subpoena if they did not sign a statement regarding their knowledge of Van Winkle's mini-cam complaints and BGCA's response to them.

Reports of Van Winkle's solicitation of employees to sign statements or to help him in his objections to the toxic exposures or to help him with his legal action were reported to Director of Chemical Operations Bilyeu early in the summer of 2005. These occurred after a report from Shuplinkov's, Executive Assistant, James Rooney, regarding complaints by an employee of BGCA to Field Operations Supervisor, Gary Stanfield, Van Winkle's immediate supervisor. As a result, Shuplinkov directed an informal inquiry involving the question of whether Van Winkle had "threatened coworkers," in telling them that they might be subpoenaed in a legal action against the Respondent, and other issues regarding the possible long-term agent exposure, itself. This would be carried out by Bilyeu, along with Supervisory Chemist McCoy, Chemical Surety Officer, Coleen Sydor, and Union Representative Denver Begley, apparently utilizing Army Regulation 15-6 procedures to do so.

Mr. Bilyeu formed a "board" or "investigation committee" consisting of himself, Stanfield, Sydor and Begley. It defined its scope by choosing four questions that had to be answered to do so. They were: (1) whether Van Winkle initiated a legal action against Respondent regarding its mistaken configuration of the mini-cams; (2) whether he solicited co-workers to discuss workplace activity in this matter; (3) whether he attempted to get questioned employees to sign an affidavit concerning this matter, and/or (4) whether he threatened employees with a subpoena if they refused to cooperate with his inquiry.

When questioned, Van Winkle did not deny that he was called by the investigation committee. He confirmed that he answered the first question, refused the others, and left. [7]

In its report to Shuplinkov, the investigation committee concluded that Van Winkle contacted 17 employees, of which three gave the responses set forth above. They found that he engaged in conduct that was creating an uncomfortable environment of mistrust and fear within the workplace, and that he had refused to talk to them and to answer their questions. For this, the investigation committee recommended that Van Winkle's CPRP be temporarily suspended. Shuplinkov's accepted their recommendation and approved his temporary CPRP certification suspension.

In Bilyeu's August 3, 2005 "Temporary Disqualification" letter to Van Winkle, Bilyeu concluded that Van Winkle had been temporarily disqualified from the CPRP (Program) and from chemical surety duties. His report stated further that it was:

> based upon allegations of suspect quieries (sic) to crew members. Also your contemptuous and arrogant behavior and attitude toward your certifying Official [himself.] Your attitude has been disruptive to the work environment, causing unease and uncertainty to crew members with threats of future subpoena action. (JX 8)

[7] In his testimony, Begley credibly confirmed that he advised Van Winkle that he did not have to answer Bilyeu's questions if he was uncomfortable with a question. Van Winkle credibly confirmed that a legal action over BGCA's mistaken configuration of the mini-cam was initiated by him; that he did request support from co-workers regarding the action; that he did "inform" some of the co-workers that they could be subpoenaed to testify in it, regarding the mini-cam incident; that most refused to cooperate, and that he was not "threatening" them with such action. He asserted a legal right to make inquiries necessary to form his defense regarding the temporary and permanent revocation of his CPRP certification.

Consequently, Shuplinkov issued an interim decision to suspend Van Winkle's CPRP certification, which necessarily resulted in his loss of access to the igloos at the heart of his air monitoring duties. While he had not been officially "disciplined," "terminated" and/or had his pay and benefits adjusted, suspended, docked or discontinued, and his "Secret" military clearance had not been otherwise affected, at the direction of Shuplinkov, Van Winkle was "detailed" to other duties at the Depot, outside the Chemical Limited Areas (CLA) that did not require the CPRP.

Overview from Van Winkle's Temporary CPRP Decertification through His Permanent Decertification and His Resignation; From August 3, 2005 Through October 13, 2006

Interim AR 15-6 Investigation(s) between the "Temporary" and "Permanent" Decertification of Complainant's CPRP

The same day as Bilyeu's August 3, 2005 report and notice of Van Winkle's CPRP decertification, Shuplinkov ordered Jim Hancock to conduct an informal AR 15-6 investigation of Van Winkle's CPRP disqualification, concerning Van Winkle's solicitation of co-workers to participate in a legal action against the government and the use of the word "subpoena" to them. On August 23, 2005, Hancock, Begley and Sydor met with Van Winkle. Hancock credibly testified that Van Winkle first denied using the word "subpoena," but "recanted" and "admitted" it when told that Babb's reply was that he did not want to be involved, to which Van Winkle responded that he might have to subpoena him, and that he was "going to make them [BGCA] pay for his breathing that igloo air." Sydor's notes of the meeting confirm discussions concerning Van Winkle's denial and recant on whether he used the word "subpoena," [8] and other issues that he raised concerning the V to G mini-cam conversion, safety issues with unsatisfactory replies, and acts of retaliation including lack of training, failure to promote him, and being verbally abused by Bilyeu. (JX 105) Van Winkle maintained that this all related to demonstrating support for such a case to PEER and was not to intimidate co-workers. Hancock's

[8] This isolated, credibility on the use of the word "subpoena," did not adversely affect my overall, favorable credibility evaluation of Van Winkle's testimony at the present hearing. Based upon my observations and evaluation of Van Winkle's demeanor, consistency and direct responses with little or no hesitation, throughout his two appearances on the witness stand at the hearing, I found him to have been straightforward and truthful. In terms of his "recant" and "admission" of using the word "subpoena," in response to the Hancock's inquiry, while not present at that meeting my self, my impression was that Van Winkle cured the credibility issue raised by it, by immediately, acknowledging use of the word "subpoena," when he was reminded of Babb's testimony. Even in Babb's questioning, he stated that upon refusal to sign Van Winkle's written statement, Van Winkle's reply was that he "might have to subpoena him," while adding that Van Winkle then said that "he was going to make them [BGCA] pay for his breathing that igloo air." In an apparent immediate reaction, this specific statement had an obvious effect upon Van Winkle, and he not only acknowledged that he had used the word "subpoena," but did not argue about it, when in an apparent "one-on-one" conversation, he could have, or said Babb was wrong. I conclude that Babb's account was a legitimate reminder that Van Winkle had utilized the term "subpoena," and, rather than trying to deny it, he admitted it and, apparently, did not deny the rest of the statement. I find that his overall testimony was consistent with this testimony regarding the use of subpoena, and that he needed to enlist support for his legal action which he finally obtained for PEER. This is consistent with my observation and my conclusions regarding the overall truthfulness of his testimony.

August 26, 2005 report supported Bilyeu's August 3rd determination and also recommended Van Winkle's CPRP permanent termination.

The evidence shows that Babb testified that when he told Van Winkle that he did not want to be involved, that Van Winkle replied that he might have to subpoena him, and that Van Winkle responded that "he was going to make them [BGCA] pay for his breathing that igloo air." (JX 7, p. 10) Van Winkle has maintained that this all related to his attempt to demonstrate to PEER that he had support for such a case; that this had been referred to, in the initial AR 50-6 investigation, and that he did not intend to intimidate his co-workers.

Van Winkle's Alleged AR 50-6 Procedural Violations

Concluding his August 26, 2005 investigation report, Hancock recommended permanent termination of Van Winkle's CPRP.

Van Winkle testified in the present proceeding, (1) that neither he nor Union Steward Begley saw the report until the April 2006 discovery in the present matter; (2) that he was not present for the interviews of coworkers and managers, and (3) that he was not allowed to see their statements, or to either rebut them or present his own witnesses. I credit this denial.

A significant October 19, 2005 meeting, with Van Winkle, Bilyeu, Stanfield, Begley, Rooney, Sydor and Hancock in attendance, was called by Shuplinkov, concerning Bilyeu and Rooney's recommendations to permanently disqualify Van Winkle's CPRP status, that lasted about 15 minutes. It followed meetings in August, first between Rooney, Begley and Van Winkle regarding Bilyeu's recommendation and Van Winkle's rebuttal, and another between Shuplinkov, Begley and Van Winkle regarding Van Winkle's rebuttals; Rooney's review approving Bilyeu's recommendation on all the same matters, for all the same reasons.

This October meeting concerned Shuplinkov's attempt to get Van Winkle and Bilyeu "to make amends," and "to change Van Winkle's attitude toward Bilyeu and management" so that Van Winkle could stay in the PRP. According to Stanfield, Shuplinkov first asked if Stanfield trusted Van Winkle, who said no; then asked Van Winkle if he trusted Stanfield, and said "he would." He then asked Bilyeu if he trusted Van Winkle and he said no. Then upon asking Van Winkle if he trusted Bilyeu, Van Winkle jumped up, turned a deep red, pointed his finger at Bilyeu and said, "Absolutely not …. I would never trust that individual, ever." (T 535)

On Shuplinkov's ending question to Van Winkle as to whether he trusted him, his ending response was that if Shuplinkov told him to "jump off a bridge" he would because he "would expect him to be there to catch" him, Shuplinkov ended the meeting by stating that this was all he could do. (T 387)

Shuplinkov testified that at that point the trust relationship between the certifying official and the individual being in the program was "broken;" that it was a regulatory requirement, and that the temporary disqualification had been validated as to the

"coercion piece." Shuplinkov explained that if Van Winkle lost his head like that with Bilyeu, that he could see supervisors and individuals having disagreements, but that he "had crossed the line" and that "being in the stockpile and being a hothead is being a hothead, period." (T 535-536) Admitting his anger at Van Winkle, Shuplinkov was ready to allow Bilyeu to proceed with his permanent CPRP disqualification recommendation. After thinking about it, Shuplinkov said that the "root cause" for Van Winkle's anger was that Van Winkle was not selected for one of the open positions in the organization and that Bilyeu was the official involved in the selection. (T 537)

However, Shuplinkov went on to testify that he thought that when Van Winkle had "crossed the line," and was later interviewed by Hancock on the August 23rd, Van Winkle "panicked and did the affidavit." This affidavit, dated August 24, 2005 and its PEER cover of the same date, was attached to a new complaint and position letter filed by PEER, dated September 2, 2005, and submitted to OSHA. In it, Van Winkle discussed a number of his complaints regarding administration of the V to G pad problem, through more recent maintenance and certification of the air monitoring equipment problems. He tied this into being denied the opportunity for training to advance in his position, to being given faulty equipment, and to his being denied overtime - all in "reprisal" for his complaints. (JX 93) On September 9, 2005, OSHA acknowledged the receipt of the September 2nd complaint. (JX 76) (All of this was, of course, protected activity.)

Returning to Hancock's August 23rd AR 15-6 meeting with Van Winkle, the August 26th determination, and the meeting of October 19th, Shuplinkov testified that he had thought about the matter; that he still liked Van Winkle and that he still felt some loyalty to him, notwithstanding Van Winkle's August 25th release of his affidavit to the news which did not bother him. He knew of his large family, and that Van Winkle "felt abandoned." Shuplinkov knew that he was within "a 30 day timeline" to keep extending" Van Winkle, without completing the permanent CPRP disqualification; that he was "trying to figure a way to bridge Mr. Van Winkle's … make the attitude through compassion succeed for the organization, where he could come back through some rehabilitation programs," which were "already approved" from his headquarters; that he then would, "not only have the RTAP operator" but "I get to get him, eventually, through rehabilitation, back into the organization, as well." (T 538) He testified that Van Winkle "was a valuable asset to the Army;" that they "had just lost two toxic material handlers or RTAP operators" and that another had changed jobs, so he had three empty RTAPs, and … I had Mr. Van Winkle's temporary disqual. I was down to 50 percent or less of my monitoring capability, but all my requirements were still 100 percent." (T 537-538)

Feeling that Van Winkle "felt betrayed in some ways," and that he had "lost his cool," Shuplinkov wanted to find a way for him to "come back and be professional." He told this to Bilyeu, who expressed "some apprehension" about it. However, as Shuplinkov put it, "Tom Bilyeu is a professional individual and he salutes the flag when he's told what to do." (T 539) Meaning, I must conclude, that Shuplinkov felt that Bilyeu would go along with his plan to rehabilitate Van Winkle.

Surety Representative Sydor testified regarding Shuplinkov's reading of AR 50-6, particularly Par. 2-29, regarding permanent CPRP disqualification, particularly with Van Winkle's allegations regarding due process rights. In particular, she testified that in Par. 1-9(d), there is no provision requiring that the individual be supplied with a copy of the investigation, (T 798) nor of the evidence uncovered. (T 799) She also testified that in June 2006, an AMC Surety Management report of a May 2006 investigation revealed that there were "no discrepancies." (T 799)

Sydor further testified that Shuplinkov's "rehabilitation plan" for Van Winkle did not come-up until after his permanent disqualification (T 800). She stated that she did not agree with it; that there is no provision for it, and that "if you have an employee that you do not trust, you get him out the door." (T 803)

Summarizing the above, I concur with the statement in Respondent's Closing Argument Brief (p. 9) relating Shuplinkov's thoughts after the October 19, 2005 meeting. He was, at first, "disposed to direct Mr. Bilyeu to commence permanent disqualification of complainant's CPRP status," and that he elected, however, to defer that decision for an additional period in the hopes that the passage of time might result in the situation being resolved.

However, no action took place until January 30, 2006, after Shuplinkov directed Bilyeu to take whatever action he deemed appropriate in the AR 15-6 investigation regarding Van Winkle's CPRP in December of 2005. On January 30th [9] Bilyeu did so, and issued his recommendation that Van Winkle be permanently disqualified. In his report, Bilyeu stated:

> There is a lack of trust between you and myself (your certifying official) and the crew (your peers). You made threats to coerce the chemical [sic] crew members. You show signs of behavior of a disgruntled employee and display a lack of positive attitude; both are security concerns. Overall, your attitude and observed actions displayed in the workplace towards management and peers are unacceptable and places the stockpile in jeopardy.
> (JX 19; Att.. #2, CX 15. Emphasis added.)

On March 9, 2006, Van Winkle and Begley met with Jim Rooney, Bilyeu's Reviewing Authority in the matter regarding Van Winkle's disqualification. Rooney gave him his "Permanent Disqualification from Assignment to BGCA Chemical Personnel Reliability Program (CPRP)" memorandum, which stated in two relevant paragraphs:

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[9] I note that, in a chronologically related matter that has not otherwise been tied to Bilyeu's January 30th report except in its timing, and, as otherwise discussed below, on January 25, 2006, Mr. Van Winkle filed a DA Form 4755, "Employee Report of Alleged Unsafe or Unhealthful Working Conditions," regarding the water in use at the laundry, and its chance of being tainted. I find that there is insufficient evidence to determine that, while such a complaint did constitute protected activity that was clearly filed within the time frame of Van Winkle's notice of his permanent CPRP disqualification, that this adverse personnel action was motivated by the filing of that complaint, or Respondent's implied knowledge of it. No independent evidence has been presented that its filing had even reached the level of its consideration or discussion as an active matter, in the meetings that were held, even with Begley's presence at those meetings.

1. I have completed my review of the issues regarding your Permanent Disqualification from assignment to the Blue Grass Chemical Activity (BGCA) Chemical Personnel Reliability Program (CPRP). Personal Reliability is a vital part of the Personnel Reliability Program. Your Certifying Official (Mr. Bilyeu) has determined that you do not meet the high standards required in the CPRP, due to lack of trust, attitude and observed actions and are no longer eligible for the CPRP.

2. I concur with Mr. Bilyeu's recommendation for permanent disqualification. This action is not punitive toward you as an individual. If you have any questions regarding my final decision, please feel free to contact me. Your permanent disqualification requires your removal from chemical duties. Your certifying official will inform you of further actions, as required. (JX 16)

They reviewed Rooney's determination; Bilyeu's January 30th recommendation, and Van Winkle's February 3, 2006 rebuttal thereto. This was attached to a February 3, 2006 letter from PEER to Laura M. Roenker, Esq., an attorney at BGCA, which set forth a number of specific "protected" actions that Van Winkle had taken, after Bilyeu's recommendation, and of objections to Mr. Bilyeu's January 30th recommendation, sometime before the March 9th meeting. (JX 17) In that meeting, Rooney, Van Winkle and Begley went over the PEER response to Bilyeu's action. They also reviewed Rooney's reasons for his own recommendation as set forth above, which was Van Winkle's CPRP be permanently disqualified.

The February 3rd letter stated Van Winkle's objections to the AR 50-6 procedures employed by Respondent, in reaching its conclusion to decertify him from the CPRP. The letter stated that PEER attorneys and Van Winkle "are unable to discern sufficient specifics in order to enable us to rebut Mr. Bilyeu's alleged concerns," and repeated this objection with various offshoots of terminology expressing that same objection. It cited such conclusory characterizations regarding unacceptable allegations and documentation such as "lack of trust," "non-specific 'alleged threats'," "lack of positive attitude," etc. (p. 2, JX 17) The letter then charged these as procedural due process violations, as though they were being alleged solely under legal development under the environmental whistleblower provisions, rather than the Army's AR 50-6 procedural provisions. It could only argue that procedural due process violations are implied by the Army Regulations. [10]

Nothing happened immediately regarding Rooney's approval of Bilyeu's January 30th recommendation concerning Van Winkle's job status, since he was already in disqualified status. However, in April 2006, still another meeting was held with Shuplinkov, Van Winkle, Bilyeu, Rooney, Sydor, and union representative Begley was present. During the meeting, Shuplinkov examined Bilyeu's AR 15-6 investigation report "point by point" with Van Winkle and his union representative. On March 9th, Rooney verified that he reviewed with Van Winkle and his union

[10] However, as much as I might be inclined to agree with some of these due process deficiencies that otherwise might arise as specific due process obligations under the environmental whistleblower provisions, for the time being, additional due process procedures are exactly what the U.S. Supreme Court and the Administrative Review Board are protecting in the *Egan/ Hall* progeny. Simply stated, they exceed the procedural protections prayed for, here.

representative the investigation report information and issues and Van Winkle's February 3, 2006 rebuttal to Bilyeu's recommended, permanent disqualification report. (Reply Brief, 24). None of the requests in the letter were granted, and no minds were either reconsidered or changed.

Shuplinkov's stated his understanding that, "anything that occurred in the organization had to go through me." Therefore, he made the rehabilitation plan. (T 539) He sent out a letter to the union representative that he "was going to do that," and gave one, he believed, to Van Winkle, as well." (*Id.)* Shuplinkov stated that he "was trying to watch, to make sure the stockpile was safe and secure … all the Army requirements were met, and also people who make the mission happen at Blue Grass were taken care of." (T 538) He testified that he maintained that position until, "I left command in July of '06." (T 540) He then stated that he saw the matter, "as marriage counseling," and was going to use the Army employment program … to help do some of the facilitation and counseling, to get that going." *(Id)*

Shuplinkov felt that, "since they were doing construction outside the fence," of the chemical limited area, Van Winkle "could do some of the monitoring outside the fence line …to get him back into practice, reporting to certain supervisors." He emphasized that he "had options" open to him that he "was templating (sic) out." (T 540)

It is apparent to the undersigned that Shuplinkov had a clear plan to do two things: (1) that he decided to allow the permanent CPRP disqualification to proceed without any further interruptions or delay, even if any other such avenue was open to him, and (2) that he clearly had a rehabilitation plan in mind to bring Van Winkle back, that he had discussed it with various staff members and some of them, including Bilyeu and Sydor, were not sold on the plan. However, at the end of April 2006, Van Winkle fell at his home and suffered a serious back injury, and a broken leg. The back turned out to have also been broken, and Shuplinkov was told that it was possible that Van Winkle "probably … may not walk again." At that point, Shuplinkov stated that, with regard to his rehabilitation plan, he "really ceased doing that." (T 540)

Van Winkle's Allegedly Encouraged Medical Disability Application

Van Winkle's broken back was one of two significant incidents that occurred after the October through March discussions. After a somewhat complicated series of events, in which union representative Begley advised Van Winkle that he should consider applying for a disability retirement, Van Winkle thought that Begley had consulted with BGCA management in order to get him to leave Respondent's employment. In effect, he was alleging that Begley had entered into a conspiracy with BGCA's management, in what would constitute a constructive discharge, as another adverse personnel action, motivated by his protected activity.

I have spent considerable time reviewing the evidentiary circumstances surrounding this allegation. I have concluded that the only pieces of evidence supporting this contention are its timing and the fact that Begley was in close proximity to the events

related to the facts and circumstances concerning this contention. I say this due to my crediting of Begley's testimony, based upon his demeanor, in which he credibly displayed a controlled expression of disappointment and anger over Van Winkle's accusations against him, consistent with all of Begley's and other accounts,[11] of his raising the matter directly to Van Winkle without having consulted anyone in management. At some time, Begley did consult with individuals in Respondent's benefits office, and verified Van Winkle's claim that Begley felt that it would be wise for him to take a permanent medical disability. Begley also felt that Respondent management would find some way to get rid of him without his CPRP.

I have concluded that Begley consistently displayed support for Van Winkle during this proceeding, and that, while expressing differences with some of his positions, was always in a professionally protective position regarding Van Winkle's rights throughout the hearing. I felt that Begley could not have artificially constructed the change in his reaction and demeanor regarding his questioning and testimony on this matter, in reaction to the implication that he had cooperated with BGCA management in some sort of a conspiracy to get Van Winkle to leave the employ of Respondent for such reasons; and that this was personally offensive to him. In short, I find that Van Winkle recognized that Begley's advice to submit an application for medical disability to the Office of Personnel Management (OPM) was a wise course of action that he had to pursue, which he did, and pursued to protect a right that he could not afford to bypass, for reasons totally unrelated to the allegations of his complaint. I do not infer that this constituted sufficient evidence to have established, by a preponderance of the evidence, that Begley's support of this option somehow constituted a conclusion that Respondent constructively discharged Van Winkle, or that it had engaged in a conspiracy between Begley and Respondent in that such action constituted a constructive discharge.

Consistent with Begley's testimony, not a shred of contrary evidence has been produced in the face of his denial that he even discussed the matter with affected management officials, until he had approached the discussion with Van Winkle regarding his accident and long term recovery, when he suggested the possibility to Van Winkle of applying for such a permanent medical disability. It is, therefore, my conclusion that this allegation was unfounded and should be dismissed.

Van Winkle's Allegation Regarding His Possible Hatch Act Violation [12]

Van Winkle decided that if he lost his employment at BGCA, he would run for office in the Kentucky State Legislature. He appears to infer that actions taken by Respondent regarding

[11] This particularly includes that of Shuplinkov, whom, contrary to any attempt to get Van Winkle to leave, I have credited with trying to salvage his CPRP and RTAP employment at BGCA through the utilization of BGCA's Family Services' rehabilitation program, and as a result, in "one-fell-swoop" he nearly managed to alienate two of his strongest supporters.

[12] The Hatch Act, codified at 5 U.S.C. §§ 7321-7326, governs the political activity of federal civilian executive branch employees. The Act permits most covered employees to actively participate in partisan political management and partisan political campaigns. However, an employee covered by the Act may not, among other things, be a candidate for public office in a partisan election.

his candidacy for the Kentucky State Legislature might have been motivated by his protected activity.

In the spring of 2006, "faced with the decision to take the medical disability and at least leave" BGCA with "some form of restitution" for his service there, or leave without anything in four to six weeks," Van Winkle was left with a feeling of inevitability. He "knew" that he was either going to have to take medical disability or be fired; that either way, he "was looking at unemployment;" that "[t]he opportunity to run for office was there;" that he knew he would "be gone from federal service way before the election, and so that his name should be "thrown in the hat." (T 238). Based on Hatch Act information gathered by himself and his attorney, and the fact that the election was not until November, when he anticipated by then being "an unemployed government worker" and that he was content not to campaign and just have his name on the ballot, he planned that "once [he] received the medical disability, then [he] would actually start campaigning…." (T 239)

He testified that the medical disability process had slowed down and went past the usual four to eight-weeks to reach a decision. While concerned about the passage of time, he felt that nobody at BGCA knew about his candidacy, that he had not told anybody and that he did not campaign. Van Winkle speculated, but did not cite to any specific evidence produced at the trial, that an unnamed co-worker, or possibly Tom Bilyeu, had discovered his name while seeking candidate information on the internet and reported it to the U.S. Office of Special Counsel, alleging violations of the Hatch Act. (T 240)

Ana Galindo-Marrone, Chief of the Hatch Act Unit of the Office of Special Counsel, sent Van Winkle an October 25, 2006 letter, stating that he was being given "an opportunity to come into compliance with the law;" that he had the option of either withdrawing his candidacy or resigning from his employment with the federal government; that if they prosecuted, it would become part of his permanent record; and that if he ever decided to return to employment with the federal government it "would be a black mark against [his] record." (T 240-241; JX 84). "Failure to pursue one of these options could result in disciplinary action charges being brought against [him] before the Merit Systems Protection Board." (JX 84). He went to the personnel office, testifying that "one of the determining factors" for him was, as told by a personnel representative, that a decision to resign would not affect the outcome of his medical disability. (T 242). He testified that he would not have resigned if he thought there was a prospect of continuing employment at Blue Grass. (T 244).

On October 27, 2006, Van Winkle submitted a memorandum to Chasteen at BGCA, resigning his position with an effective date of October 31, 2006. (JX 101). Erica Stern, Hatch Act Unit Attorney, followed this with a November 1, 2006 letter confirming Van Winkle's resignation from federal government employment and stating the Office of Special Counsel was not going to pursue disciplinary action.

I am unable to infer or conclude that there has been any evidence produced in this matter that anyone connected with the Respondent participated in the notice given to the Hatch Act Office of the Special Counsel, or that Respondent violated any related acts or regulations set forth herein, in the charges or disposition of the Hatch Act allegations as set forth herein. They

have not been shown to have any direct relationship to the allegations set forth in Van Winkle's complaint in the present matter.

Other Events Occurring During Complainant's Temporary Suspension [13]

During his temporary suspension, Van Winkle alleges that, in addition to the alleged misplacement of the V to G pads, the following issues were raised involving protected activity, and subsequently that they resulted in discrimination or retaliatory actions by Respondent: (1) life-span of the V to G pads; (2) Standard Operating Procedure complaints; and (3) questioning of Chemistry Lab Management's competency as presented to the Kentucky Department for Environmental Protection-Division of Waste Management ("KDEP-DWM").

Life-span of the V to G Pads

Van Winkle questioned the life expectancy of the V to G pads. In his complaint, Van Winkle alleges that nobody knew the correct length of time that the V to G pads were operable. In their site inspection report, the KDEP-DWM noted that BGCA should ensure that the replacement schedule is followed and that the V to G replacement occurs for each of the pads on at least a three-month interval. Although KDEP-DWM noted that BGCA was in compliance with the V to G pad duration length, they did note that the original investigation commenced on September 29, 2005 with BGCA releasing the results of the study on August 30, 2007.

Standard Operating Procedure (SOP) Complaints

In his claim, Van Winkle alleges that BGCA omits several integral steps that are essential to SOP's. After investigating this allegation, BGCA noted there were no substantial deficiencies found in their inquiry. Because there was a lack of specificity concerning SOP's or specific steps that were missing, BGCA took no further action.

Chemistry Lab Management's Competency

In its investigation of Van Winkle's allegation that the Toxic Chemical Laboratory (TCL) Supervisor lacked a degree in a science field, KDEP-DWM concluded that the TCL Supervisor has had numerous training courses from the instrument manufacturer in addition to periodic refresher courses, and on-going operator proficiency applicable to site-specific training. Moreover, KDEP-DWM opined that the TCL Supervisor had met the requirements listed in BGCA's training plan in addition to holding all permit related training requirements.

[13] Van Winkle raised several additional issues which are secondary to his primary concerns involving discriminatory or retaliatory actions by Respondent. These additional secondary issues allege that Respondent: (1) incorrectly performed monitoring at the suit laundry; (2) improperly maintained and certified monitoring equipment; (3) adopted inadequate emergency preparedness procedures; (4) maintained problematic drinking water; and (5) improperly required the signing of a non-disclosure order. I find that regardless of the merits of additional issues raised or complaints made by Van Winkle and whether they constituted protected activity under the provisions of the CAA or SWDA, he provided insufficient evidence to establish that his exchanges with BGCA management contributed to a pattern or practice of unlawful, adverse discrimination or retaliatory action in relation to any of his protected activity.

Although KDEP-DWM found the TCL Supervisor to be competent, they did note that decisions were being made subjectively in regards to the employee certification process which did not ensure the protection of human health and the environment from releases of chemical warfare agents. Furthermore, because BGCA had no plan or specific training requirements available for those members of management performing the certification of employees, KDEP-DWM found the refresher training program to be inadequate and violative of the Hazardous Waste Storage Permit issued on October 30, 2005, part GST04, permit condition T-17.

With regard to these three matters, assuming that they are factually correct and would have constituted protected activity under the CAA and the SWDA, Van Winkle has presented insufficient evidence to have established that they were related to any act or omission subject to the AR 50-6 procedures to find a violation of the CAA or the SWDA.

Van Winkle's Resignation: October 27, 2006

On October 27, 2006, Van Winkle submitted a short resignation letter to Chasteen at BGCA, simply stating that he was resigning his position with an effective date of October 31, 2006. (JX 101) He testified that the resignation occurred after receipt of the October 25, 2006 letter from the Hatch Act Special Counsel. It stated that if he did not either withdraw his candidacy for the Kentucky State Legislature, or resign from BGCA, there would be disciplinary action on the matter. He testified that he would not have resigned if he could not get his medical disability, which he learned that he would receive.

DISCUSSION AND CONCLUSIONS OF LAW

Code of Federal Regulations –

29 CFR Part 24, Environmental Regulations:

The most relevant sections of 29 CFR Part 24 related to this case, in addition to the list of statutes in 29 C.F.R. § 24.100(a), including, *inter alia*, the CAA and the SWDA, covered by them, state:

> **§ 24.102 Obligations and prohibited acts.**
>
> (a) No employer subject to the provisions of any of the statutes listed in § 24.100(a), … may discharge or otherwise retaliate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in this section.
>
> (b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has:
>
> (1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the statutes listed in § 24.100(a) or a proceeding for the administration or enforcement of any requirement imposed under such statute;

(2) Testified or is about to testify in any such proceeding; or

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

§ 24.109 Decisions and Orders of the Administrative Law Judges

(a) * * * * In cases of the other six statutes listed in § 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity was the motivating factor in the **unfavorable personnel action** alleged in the complaint.

(Emphasis added.)

Relevant Administrative Review Board (ARB) judicial development, particularly related to concepts of "unfavorable personnel action," "adverse personnel action" and "material adverse action" will be discussed in relevant CPRP decertification or disqualification sections.

Army Regulation (AR) 50-6 Procedures:[14]

[14] AR 15-6 Procedures Utilized in AR 50-6 matters: Shuplinkov appears to have frequently utilized the Army's "informal" fact-finding "investigation procedure," under AR 15-6 to gather facts for more serious matters arising such as those set forth in AR 50-6 for certification and decertification in the CPRP process. Section 1-1 states as its "Purpose," it "establishes procedures for investigations and boards of officers not specifically authorized by any other directive." (JX 58) The only specific due process limitations regarding a named Respondent includes prohibitions against questioning in violation of its Section 31, the Fifth Amendment's protection against self incrimination, and questioning a civilian employee without a the presence of a bargaining unit representative, if requested. Otherwise the "primary function" of the investigator is to "ascertain facts," including the purpose, seriousness and complexity of the matter, the need for documentation and, if necessary, the desirability for a more comprehensive hearing at a higher level, where more serious elements of due process are required. Section 1-8 (a) provides that the investigation's "findings and recommendations may be used" in a subsequent "administrative action." Subsection 1-8(b) refers to the Federal Personnel Manual (FPM), as establishing the "required procedural safeguards" for actions against civilian employees. [I note that the FPM has been abolished and is being rewritten. The Office of Personnel Management (OPM) is issuing a final rule to remove all references to the FPM, with these references no longer in effect. (66 Fed. Reg. 66709 (Dec. 27, 2001.) Adverse actions, based upon misconduct, unacceptable performance, or a combination of both, are governed by government wide regulations at 5 CFR Part 752 which implement the law. (U.S. Office of Personnel Management, Adverse Actions, *available at* https//www.opm.gov/er/adverse.asp.)] AR 15-6 Subsection 1-8 references included notification to the affected employee's proper personnel agency before notifying the employee; minimum safeguards, including written notification of the proposed adverse action, findings and recommendations and supporting evidence; a reasonable opportunity to reply and submit rebuttal material, and the reporting authority's review, evaluation and reply to the employee's response.

A review of the post-hearing briefs reveals no specific allegation of an AR 15-6 procedural violation. In response to Respondent Agency's claim that Van Winkle had not alleged any specific violation of procedural rules for the disqualification process, Complainant cited only an alleged violation of AR 50-6, §2-29. (Complainant's Post-hearing Reply Brief, 24). Complainant disputed that he received adequate procedural protection because Shuplinkov and Rooney only reviewed the AR 15-6 report with him. He claimed that he was not afforded an opportunity to confront or cross examine witnesses, which was not a specific requirement of the 50-6 section. Significantly, however, Complainant's union steward testified at the present hearing that the process went very fairly and that "everything was by the book." (Respondent's Closing Argument Brief 21, citing TR 478).

I find that where Shuplinkov invoked the AR 15-6 investigative procedures, that its procedures were either not invoked by Van Winkle (*i.e.,* Fifth Amendment protections), or were followed without objection from him. (*i.e.,* The presence of a bargaining unit representative.)

The Army's CPRP Certification and Decertification Process Under AR 50-6

The following summary of the United States Army's Chemical Personnel Reliability Program (CPRP) certification and decertification process, as set forth in Chapter 2 of Army Regulation 50-6 (JX 59), is provided for purposes of understanding the scope of its potential interaction and conflict that exists with the purposes, policies and provisions of the United States environmental whistleblower statutes and regulations. These military regulations proscribe policies regarding the "reliability" of military, civilian and contractor personnel to function appropriately when dealing with such biological warfare toxic substances on a daily basis. They include the qualification, certification, internal investigation, decertification and sanctions set forth in its own "CPRP" certification processes.

Certain personnel shortcomings that could lead to CPRP disqualification, such as drug and alcohol abuse, criminal, or other such activity, clearly raise reliability issues worthy of decertification or other adverse personnel action, under virtually any employee standard, are obvious and will not be addressed in detail.

Other personnel actions involving policies of military agencies and/or contractor actions, might be considered objectionable under AR 50-6 CPRP standards and subject individuals to CPRP decertification, even though such actions may arise out of employee actions that would otherwise be protected by U.S. environmental whistleblower statutes at issue in this proceeding. This might be the same as similar conduct that could arise under other statutes such as those involving objections to employer policies regarding race, religion, creed, national origin, sexual identification or preference, age and disability related actions, veteran's preference actions and union activity. While these other workplace matters may not be at issue here, because AR 50-6 provisions state "any display of poor attitude or lack of motivation as evidenced by aberrant attitude (arrogance, inflexibility, or suspiciousness), impulsiveness, destructiveness, or suicide threats), or mood (unusual happiness, sadness, or agitation)," they might otherwise cause similar problems requiring more peacetime and/or stateside harmony between military and non-military public policy consideration.

For instance, seeking publicity for employer actions believed by personnel to be harmful to the health and safety of the public, as well as themselves, their co-workers, including both non-military civilian and contractor employees, as was raised in the present matter, might be deemed to be an action rendering the individual "unreliable" and subject to CPRP decertification. As will be seen below, CPRP certification may ultimately lead to placing jobs of such individuals in jeopardy as a result of CPRP decertification. Therefore, such action is deemed an "adverse action" under the U.S. environmental acts, regulations and standards, but by regulatory definition it is not considered "adverse personnel actions" under military statutes, regulations and standards.

Chapter 2 of AR 50-6 covers Chemical Surety, as it relates to its Nuclear and Chemical Weapons and Material. It establishes and governs the Personnel Reliability Program (PRP) as required by the Department of Defense (DOD) in its Directive (DODD) 5201.65, Chemical Agent Security Program. This Program ensures that all personnel "who perform duties involving

chemical agents meet[s] the highest possible standards of reliability …. through initial and continuing evaluation of individuals assigned and PRP duties," including "citizens who are active duty military personnel, DOD and civil service employees and DOD contractor personnel.". (Para. 2-1, 50-6)

Provisions of Section I, Chapter 2, Reg. 50-6, direct Commanders and Directors to designate "certifying official(s) to certify individuals' suitability for the PRP;" and/or to "delegate" such duties, such that "certifying officials become reviewing officials" in "large organizations." (Para. 2-3(c)) That section also provides that certifying officials "are supervisors, team leaders, laboratory managers or department heads that maintain close personal contact with the individual being certified …." It finally states that "the decision to qualify an individual for, or to disqualify an individual from the PRP, is the responsibility of the certifying official, subject to review by the reviewing official." (*Id.* Emphasis added.)[15]

Certifying officials "[d]etermine PRP suitability and ensure" their qualification, training and proficiency before any chemical duty assignment; continuously evaluate them, and promptly remove "any individual whose reliability becomes suspect." (Para. 2-3(d)) They "identify each position required to accomplish chemical duties," according to a number of identified and described positions (Para.2-4(a)(1)-(13), (b) and (c)), and establish and maintain Chemical Duty Position Rosters (CDPR's), along with ensuring the "technical proficiency" before authorizing individuals to perform chemical duties. (Para. 2-4(a) & (b))

Under Section II, Chapter 2, Reg. 50-6, Reliability Standards, the certifying official is directed to "make a judgment on the reliability of an individual," evaluating his or her "security eligibility, physical and mental capability, personnel and medical records, and a personal interview," considering "all relevant facts on … current and past duty performance and recommendations …in the … security … and medical evaluation[s]," including other agencies," etc., (Para. 2-7) as set forth in Paragraph 2-8.

Chapter 2, Paragraph 2-9 spells out "Disqualifying" factors/ [which include] actions on detection, including traits, diagnosis, conditions or conduct related to alcohol, alcohol related, drug abuse, negligence or performance of duty, conviction of a serious incident, medical condition, hypnosis, serious progressive illness, suicide attempt, cannot wear protective clothing, and poor attitude or lack of motivation. The latter includes, "any display of poor attitude or lack of motivation as evidenced by aberrant attitude (arrogance, inflexibility, or suspiciousness), impulsiveness, destructiveness, or suicide threats), or mood (unusual happiness, sadness, or agitation)…." [16]

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[15] All underlining of Army Regulation 50-6 denotes the undersigned's emphasis to those provisions. All bold emphasis constitutes elements of my opinion regarding my perceived effects of the military regulations on the enforcement of U.S. environmental whistleblower protective acts.

[16] In the case of a civilian employee whistleblower on a military installation, an inherent, potential "conflict-of-interest" looms, when it comes to cause for "blowing the whistle" on a situation in which the alleged violation involves the complainant's own "supervisor," "team leader," "department head" or "laboratory manager" (par. 2-3(c), AR 50-6) who would also be either the "certifying official" or the "reviewing official," responsible for such a complainant's CPRP "disqualification" or "decertification" when specific job prerequisites are at stake, as is the case in the present matter. That supervisor/ certification/ decertification officer is then in the position to affect a complainant's ability to continue in that position, from what otherwise would be two separate and possibly

The next applicable section, Section IV, Certifying Official's Screening, repeats the verification of "personnel reliability" summarized as screening that demonstrates "no evidence of unreliability." While admitting to the "absence of a test for reliability," [17] it states that the PRP "provides a process" starting with the "initial screening" through a "continuing evaluation of an individual's health, attitude, behavior and duty performance …." (Paragraph 2-10) It directs the collection of reports from prior transferring organizations and related forms. (Form 3180) (Para. 2-11). To initiate the process, Paragraphs 2-12 and 2-13 detail the certifying officer's initial interview to include an inclusive checklist covering virtually all of the above requirements, then the details of the personnel security investigations (PSI) and other clearance requirements. This also involves timelines that provide for interim certification status, and actions required for certain delays, such as travel limitations, and/or clearance to do so.

Paragraphs 2-14 through 2-20 specify the details for each step needing completion in the screening process on the various subjects set forth above. Once challenged as having a disqualifying factor, then the certifying official's screening requires verification of "personnel reliability" and, as a part of that test, that there is "no evidence of unreliability." The certifying official is once again caught in the web of the English liveryman, Thomas Hobson, who directed an "equestrienne" (a woman who rides a horse) "to take the horse nearest the stable door or none at all" - the apparent free choice with no actual alternative. [18]

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competing considerations. Such situations are, by their very nature, invitations to create abuses of authority, as the supervisor attempts to "thread-the-needle" of examining and protecting both the rights of the whistleblower, and his own position within the chain-of-command, as must be the case when that supervisor may be involved, directly or indirectly, in the perceived WBA offense. Recognizing that "exigent circumstances" may require immediate action in military situations by such supervisors, and that CPRP decertification and/or removal action mandated, such temporary action could be accommodated by Section 2-3(d) of 50-6, along with geopolitical considerations. However, in fairness to the interest of both parties, particularly those involved in the present proceeding, whom, I find were both victims of the failure to separate these functions to avoid the predictable strong personality clash that gave rise to the present proceeding, it is my professional opinion that these two functions should, of necessity, be separated at all steps, notwithstanding such urgency. In any case, instances of such "exigent circumstances," should be subject to review, at the most immediate, independent level. At this point in the present matter, they are not; and it would appear by the authorities cited herein, that as long as the procedures set forth within AR 50-6 are followed as they are presently written, that an environmental whistleblower Administrative Law Judge's jurisdiction ends with a determination that the AR 50-6 procedures have or have not been followed. Here, they have.

[17] While "reliability" is not defined in AR 50-6, a common definition in Webster's New Riverside University Dictionary, The Riverside Publishing Company, One Beacon Street, Boston, MA, 02108, begins with "reliable" as one "that can be relied upon: Dependable," and "reliance" as "Confidence: trust." "Trust" was the key word used by Van Winkle's supervisor and certifying official, Bilyeu, in his testimony, in which he stated that trust had been lost in Van Winkle in the present matter. Van Winkle then testified to an equal loss of "trust" in Bilyeu.

[18] Certifying Officer Bilyeu's testimony verifies his perception of AR 50-6, Chapter 2, that the certifying officer, upon finding that the whistleblower has taken his knowledge of the matter complained of "outside" the agency - which at times is what whistleblowers feel that they have to do to protect the public, while rendering him or her self "unreliable," under qualification standards set forth above. As a result, the above "Hobson's Choice" emerges: to find that Van Winkle was not reliable, thus virtually mandating a WBA complainant's CPRP "decertification" or "disqualification" and clearly jeopardizing his job position due to the fact that he has disclosed potential environmental dangers resulting from the possible loss of biological warfare components into the atmosphere. Since allegations of "poor attitude" may include virtually anything with which the certifying/decertifying officer does not agree, within the mandate of disqualifying "any display of poor attitude ... aberrant attitude (arrogance, inflexibility, or suspiciousness), impulsiveness, destructiveness … or mood (unusual happiness, sadness, or agitation)…," and, therefore, evidence for qualifying or disqualifying an individual of any factor affecting his or her employment, such as Van Winkle's CPRP, "disqualification" or "decertification" is, virtually, a foregone conclusion.

Section V, Paragraphs 2-21 through 2-25, emphasizes the certifying officer's obligation that the PRP process must be one of continuing evaluation, mandating the continued involvement of all related agency officials and supporting activities.

Section VI, Paragraphs 2-26 through 2-30, cover Temporary and Permanent Removal From PRP Duties. Most important is the admonition in Subparagraph *a.* to Paragraph 2-26, which states:

> When making a reliability determination, the issue is not an individual's guilt or innocence of some particular offense; rather, the issue is whether the individual will be retained in a PRP position.

It continues, stating that the investigation need not be completed, nor is disciplinary action required. It ends with: "Determination of an individual's reliability rests with the certifying official." (Paragraph 2-26 (b))

Paragraph 2-26 (c) then states that "Permanent disqualification from the PRP is neither an adverse personnel action nor the basis for disciplinary action," but "may be adverse and warrant action" under military or civil law, or other personnel action.
(Underlined emphasis added throughout this AR 50-6 section.)

Application of the AR 50-6 Procedures

While Respondent's Surety Official, Sydor, testified that all procedural processes were followed in accordance with AR 50-6, Complainant argues in his post-hearing brief that he (1) was not permitted to confront the witnesses against him or cross-examine them, (2) was not permitted to see BGCA's statements after the fact in order to formulate his rebuttal, and (3) was not given adequate reasons to enable him to make a meaningful response. I have credited Van Winkle's denial stating that he had never seen the Hancock report until discovery; that he did not know of Hancock's speaking to ten other witnesses out of Van Winkle's presence, or of Hancock's offering to speak to Van Winkle's witnesses; or even if he did, how that might be the procedure that had been invoked to permanently disqualify him from his CPRP. The basis for the matters included in the due process objections have been confirmed by the Complainant's testimony.

While these objections may seem to be at odds with such a lengthy "procedure" set forth in AR 50-6 for so doing, a close reading of the decertification procedures simply states: (1) that the certifying official promptly remove "any individual whose reliability becomes suspect;" (Section I, par. 2-3(c)); (2) that he or she "[d]etermine PRP suitability and ensure" their qualification, training and proficiency before any chemical duty assignment; (3) that that he or she continuously evaluate them, and promptly remove "any individual whose reliability becomes suspect." (Section Para. 2-3(d)); (4) that, "[w]hen making a reliability determination, the issue is not an individual's guilt or innocence of some particular offense; rather, the issue is whether the individual will be retained in a PRP position;" (Section VI, Par. 2-26); (5) that, the certifying official's "[d]etermination of an individual's reliability rests with the certifying official," (Section VI, Pa. 2-26 (b)), but is "subject to review by the reviewing official," – (Section I, par.

2-3) which is Jim Hancock here, and (6) that "[p]ermanent disqualification from the PRP is neither an adverse personnel action nor the basis for disciplinary action," while the reason for it "may be adverse and warrant action" under military or civil law, or other personnel action, (Section VI, 2-26 (c)). As I have indicated, above, Bilyeu as the Certifying Officer, and Rooney as the Reviewing Officer, have both followed the above limited procedures of AR 50-6. There is no room for implying or otherwise construing that language to infer other "due process" obligations within that limited language.

It is obvious that, since AR 50-6 does not set forth any other "due process" procedures, even for including specific review investigation or command order obligations on higher levels of command, it does explain Shuplinkov's use of AR 15-6 to conduct investigations for factual matters that he wanted covered with whatever procedures that might be available to him. However, in the case of AR 15-6, it only contains two additional, formal procedural requirements for so doing. These are to allow the presence of a union representative if requested and to permit a refusal to answer a question if the CPRP qualified individual invokes the Fifth Amendment and/or an AR Section 31 protection. It imposes a strong obligation on the certifying official without much specific reference to due process obligations. (See, discussion on Section VI, par. 2-26, AR 50-6, and Footnote 14 at p. 20, *supra.)*

The procedures of AR 15-6 were also followed by Shuplinkov, with no other "due process" obligations implied in the process, and those that were included, were also followed, despite Mr. Begley's mistaken advice to Van Winkle in the first AR 15-6 investigation if he felt uncomfortable with questions, he did not have to answer them. While such an error could not constitute a waiver of Van Winkle's Fifth Amendment rights on behalf of the whole Army, and it certainly was not a statement that Van Winkle could also just leave the meeting without some effect, Begley's misstatement might have been considered, or even given some weight when considering the consequences imposed on Van Winkle at that point, but there was no obligation to do so, and there is no evidence of it having been raised.

Authorities Establishing an Administrative Law Judge's Jurisdiction in a United States Military Environmental Case

***Egan*, *Romero* and *Hall*:**

In their respective arguments, Complainant and Respondent cite to *Dep't of Navy v. Egan*, 484 U.S. 518 (1988), *Romero v. Dep't of Defense*, No. 2007-3322 (Fed Cir. June 2, 2008), and *Hall v. Dep't of Labor*, 476 F. 3d 847 (10th Cir. 2007) *cert. denied*, 76 U.S.L.W. 3224 (U.S. October 29, 2007) (No. 07-5472), in determining whether an Administrative Law Judge has the jurisdiction to adjudicate over matters of security clearances. I find that, in sum, all three authorities agree with the proposition that the judge may review whether an agency has complied with its procedures for revoking a security clearance, although it may not review the substance of the revocation decision. Moreover, as held in *Romero*, the judge is correct in refusing to hear or rejecting an argument that, as with a secret clearance, a CPRP certification clearance revocation is "retaliatory" as such arguments go to the merits of an agency's determination.

The *Romero* Court vacated the Board's decision and remanded "for the Board to determine whether Mr. Romero can show harmful error resulting from any failure by the

Department to follow its own procedures." *Romero v. Dep't of Defense*, 527 F.3d 1324, 1326 (Fed. Cir. June 2, 2008) *vacating and remanding* 106 M.S.P.R. 397 (M.S.P.B. July 20, 2007). Furthermore, the Court stated that "when an agency action is challenged under the provisions of chapter 75 of title 5, the Board may determine whether a security clearance was denied, whether the security clearance was a requirement of the appellant's position, and whether the procedures set forth in section 7513 were followed, but the Board may not examine the underlying merits of the security clearance determination." *Id.* at 1328 (citing *Hess v. Dep't of State*, 217 F.3d 1372, 1376 (Fed. Cir. 2000)). Moreover, "[i]n the event that an agency does not follow its own regulations…an adverse action decision may not be sustained by the Board if the employee can show 'harmful error in the application of the agency's procedures in arriving at such decision.'" *Romero,* 527 F. 3d at 1328.

Therefore, it is apparent to the undersigned, based on the various cases, that attention be given only to procedural due process issues. Did the Army follow its AR 15-6 and AR 50-6 procedures? Based on the record, it is apparent that relevant due process procedures were followed. Even the argument advanced by Complainant that he was not provided enough information to make an informed reply (citing *Cheney v. Dep't of Justice*, 479 F. 3d 1343) is without merit. Van Winkle had the opportunity to respond with a rebuttal to the final decertification, and both Rooney and Shuplinkov reviewed the AR 15-6 with him. Furthermore, Van Winkle did himself a real disservice by storming out of the October 19, 2005 meeting. As such, I find that Van Winkle had notice and the opportunity to be heard prior to his decertification, which constitutes appropriate "due process" under current precedent.

The procedures followed in this case by the Respondent to ensure proper action was headed by Sydor. As the Chemical Surety Officer for BGCA, Sydor's position was to ensure that the procedures were correct in addition to assisting with the AR 50-6 paperwork. As above stated, while Ms. Sydor testified that all procedural processes were followed in accordance with AR 50-6, Complainant argues in his post-hearing brief that he (1) was not permitted to confront the witnesses against him or cross-examine them, (2) was not permitted to see BGCA's statements after the fact in order to formulate his rebuttal, and (3) was not given adequate reasons to enable him to make a meaningful response.

Pursuant to paragraph 2-29 of AR 50-6, permanent disqualification mandates a strict guideline concerning procedures used, time frames entailed, and the requirements for proper termination. Although both sides are in opposition as to whether BGCA procedural due process was followed, Sydor testified that no regulation in AR 50-6 requires an employee to be provided with evidence from which BGCA's action was based upon. In addition, she testified that BGCA's procedures were externally audited by DAIG and SMR. In her testimony, she stated that two independent inspections of BGCA procedures and of the specific Van Winkle matter resulted in no discrepancies being found with procedural process. Ultimately, however, on cross-examination Complainant neither disputed nor questioned Sydor on BGCA's external audits revealing efficient procedural due process being followed.

Although an Administrative Law Judge has jurisdiction over a security clearance involving procedural due process issues only, I find no prior or post-investigation, hearing or

decision deficiencies present in Van Winkle's temporary[19] or permanent disqualification from the CPRP, in that the above three reasons given in his post hearing trial were "internal" or within the CPRP investigation process. For instance, I find that it would be necessary for Respondent to give Complainant notice that a CPRP proceeding had been initiated and that the ground rules necessary for such a proceeding would be available to him - how to obtain them and how to proceed.

However, as mentioned during trial, there is a major overlap between the whistleblower allegations concerning Van Winkle's work assignments related to his CPRP position and his allegations regarding his assignments after his temporary disqualification. Specifically, it must be resolved whether Van Winkle's primary allegations relating to the V to G pad, SOP complaints, and Management competency, constituted "protected activity" under the CAA and/or the SWDA. Therefore, I must find that this case may proceed regarding his whistleblower allegations in order to address whether Van Winkle can even establish an element required to determining retaliatory action under the CAA or SWDA, and I must, therefore establish whether there is any "protected activity" has been established by Complaint.

"Protected Activity"

It is significant that, at the hearing, Respondent confirmed that upon appointment to proceed with the investigation of the issues raised by Bilyeu as Complainant's supervisor and the person charged with administration of the CPRP program, he appointed Sydor, the person who originally designed the V to G mini-cam system at issue when Complainant and the other trainees learned that it was not correctly installed for its operation. The system, first, had to be shut down, and then reconfigured to fit the specifications taught at the training sessions, concerning which Van Winkle raised significant issues. [20]

Van Winkle took one more significant step in expressing his concern with co-workers that actions taken did not deal with possible after-effects of Respondent's having allowed the condition to exist for a period of time. It could have affected the safety and health of both employees of BGCA and the surrounding members of the public. Consequently, as stated in the findings of facts, he decided to investigate initiation of litigation and eventually teamed-up with PEER to assist in this pursuit. PEER informed him that he would need backing from others, including co-workers. He set out to find out whether he had backing for such an undertaking, resulting in facts at issue here. These actions resulted in complaints from several co-workers that he approached, resulting in the Shuplinkov-ordered, AR 15-6/Bilyeu investigation.

[19] I find that BGCA's action in temporarily suspending Van Winkle's CPRP was an internal matter, and that he was given adequate notice, and he continued to work with no less pay. His refusal to respond to questions was reason enough to move the matter to consideration for a permanent suspension of his CPRP.

[20] Regarding the seven or eight trainees that had Hunter call BGCA and report the deficiency to Bilyeu, I have considered that they continued to follow the matter until the pad was reconfigured, and that no evidence was offered that they made any complaints about being retaliated against for so doing.

"Adverse Personnel Action" - Judicial Authority

AR 50-6 , par. 2-26 states: "Permanent disqualification from the PRP is neither an adverse personnel action nor the basis for disciplinary action," but the reason for it "may be adverse and warrant action" under military or civil law, or other personnel action.

A key component in establishing coverage and a violation of one or more of the environmental whistleblower acts listed under 29 CFR § 24.100, as set forth in 29 CFR § 24.102(a) and (b) (1) – (3), *et seq.,* is that the complainant establish that he or she has been discriminated against, by a person or employer who takes a "material," "adverse" discriminatory or retaliatory "action" against the complainant, such as discharge, discipline, and other "adverse actions," or others set forth in 29 CFR § 24.102(a) and (b) (1) - (3), quoted above, and cases cited below. There appears to be a "dead-head" collision between AR 50-6 and 20 C.F.R. § 24.102 (a) and (b) at this point, so environmental whistleblower determinations concerning "adverse action" under the CAA and SWDA, and related statutes must be considered in this evaluation.

In *Williams v. American Airlines*, ALJ No. 2007-AIR-00004 (Oct. 23, 2008), the Board held, citing *Allen v. Stewart Enterprises, Inc*., ARB No. 06-081 (ARB July 27, 2006), slip op. at 16, that "ordinary tribulations of the workplace do not rise to the level of adverse actions because they do not result in tangible job consequences or deter employees from engaging in protected activity." It also went a step further when it adopted the Supreme Court's definition derived from *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 69 (2006), that other "materially adverse" actions were those considered "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.'" (*Williams, supra*, slip op. at 11, citing *Hirst v. Southeast Airlines, Inc*., ARB Nos. 04-116, 04-160 (ARB Jan. 31, 2007). In *Burlington Northern*, the Court stated, "[w]e phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." (*Burlington Northern, supra, at* p. 69)). Again citing *Burlington Northern*, (*Id.)*, with a quote from *Washington v. Illinois Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005), the Board, then cautioned that, "a legal standard that speaks in general terms rather than specific prohibited acts is preferable, for an 'act that would be immaterial in some situations is material in others.'" *Williams v. American Airlines*, ALJ No. 2007-AIR-00004 (Oct. 23, 2008).

Addressing other sources cited in *Burlington Northern,* the Seventh Circuit, in *Crady v. Liberty Nat'l Bank & Trust Co. of Indiana*, 993 F.2d 132, 136 (7th Cir. 1993), stated that, "a termination from employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities' may signal 'a materially adverse change.'"

In *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146 (2003), also citing *Burlington Industries*, the Board stated:

> To be actionable, [as "adverse personnel actions"] an action must constitute a "tangible employment action," for example "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

Quoting from *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 192-194 (5th Cir. 2001), the *Jenkins* Board observed that, "obvious material adverse actions such as discharge, demotion or loss of benefits and compensation are actionable,' 'while [l]ess obvious actions likewise are actionable, for example, stripping an employee of job duties or altering the quality of an employee's duties, if they have tangible effects.'" See also *Scamardo v. Scott County*, 189 F.3d 707, 709-711 (8th Cir. 1999).

Importantly, in *Martin v. Dep't of the Army*, 93-SDW-1 (Sec'y July 13, 1995), the Secretary ruled that whistleblower provisions prohibit discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, "including transfer to a less desirable position, even though no loss of salary may be involved." Furthermore, in *Studer v. Flowers Baking Company of Tennessee, Inc*., 93-CAA-11 (Sec'y June 19, 1995), The Secretary ruled that training and educational programs that advance an employee in his or her career or enable him or her to perform work more efficiently constitute a "privilege" of employment, and found to be such an "adverse personnel action."

More recently, the Board has stated that, "[n]ot every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. To succeed, [he or she] … must prove by a preponderance of the evidence that … [the Employer] … took a 'tangible employment action' that resulted in a significant change his employment status…. [that the] … action was 'materially adverse,' that is, … harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity." *Overall v. Tennessee Valley Authority*, ARB No. 04-073, ALJ No. 1999-ERA-25 (ARB July 16, 2007). Another example of "a transfer to a less desirable position even when it involves no loss in salary may be an adverse action," was cited in *Burnett v. PPL Montana*, LLC, 2007-CAA-00003 (July 15, 2008) (citing *Nathaniel v. Westinghouse Hanford Co*., 91-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 13-14 and n.13).

It is my determination that the increase in the chance of loss of Van Winkle's future employment options generated by the loss of his CPRP certification (*i.e.*, by limiting his "layoff" options), was as "materially adverse" and as discouraging to a person in that position, regardless of loss in pay, as any other action that would result in his direct termination. Therefore, such action must constitute an "adverse personnel action" that is "material" under the applicable DOL whistleblower provisions (here, the CAA and SWDA Acts and regulations), regardless of its characterization or that of the incident caused it. [21]

[21] In the absence or loss of other non-CPRP certification work, Van Winkle's CPRP decertification does affect his dependence on continued or future employment at BGCA for the following reason: If non-CPRP work

It also seems clear that under *Egan, Romero* and *Hall* judicial precedential development, that the United States Supreme Court intended that whistleblower standards such as "adverse personnel action" concepts may not simply be totally "regulated" out of existence under applicable military regulations, such as the Army's CPRP regulations. These conclusions protecting an evaluation of military procedures were facially designed for a different purpose; particularly, when the Army regulations do not specifically address the effects of such "adverse personnel action."

Viewed as such an "adverse action" or "adverse personnel action" that is "material" under AR 50-6, as it relates to preserved procedural rights under the environmental whistleblower acts, I find that if a significant procedure has been omitted, mishandled or not been followed by military and/or civilian officials authorized to act on Van Winkle's CPRP certification then the provisions of CAA and/or the SWDA, and related statutes do apply. Further, those omitted, mishandled steps would result in or contribute to a materially adverse personnel action such as the disqualification of Complainant from his CPRP status, and/or, in Van Winkle's case, would, therefore, interfere with, alter, or contribute to employment conditions that would result in a layoff and adversely affect the retention of Complainant's CPRP status. Then such an action would constitute a "material adverse action" or "material adverse personnel action" that would have also contributed to that lay-off or adverse status, and therefore "harmful" under *Romero*. Thus, it would have constituted a violation of the respective the CAA and/or the SWDA acts, and would require a remedy based solely on the material adverse action.

Respondent's "Material" Adverse Personnel Actions Regarding Van Winkle

As the Administrative Law Judge under the applicable whistleblower provisions heard by the Office of Hearings and Appeals of the U.S. Department of Labor, I must determine under the Clean Air Act (CAA) and the Solid Waste Disposal Act (SWDA), whether there has been an applicable, "material," "adverse personnel action." Under these statutes and regulations, I find that while both the temporary and permanent decertification of Van Winkle from the CPRP may not have constituted individual "material adverse personnel actions" or "disciplinary actions" by its specific rejection of those concepts, under the provisions of Paragraph 2-26, of AR 50-6, they did constitute, what I have found to be "material adverse personnel actions" under the provisions of the CAA and/or the SWDA, and 29 CFR Part 24 implementing regulations, in that they were last steps in the employment process that potentially affected Van Winkle's right to continued employment, and that all that must be established by a preponderance of the evidence, is that the "material adverse personnel action" was motivated by "protected activity" prohibited by the CAA and/or SWDA acts.

Bilyeu's investigation required answers to the following questions: whether Van Winkle (1) initiated a legal action on the mini-cam configuration; (2) solicited co-workers to discuss

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becomes unavailable, for budgetary or other reasons, his employment dependency on work at that location is adversely affected by the CPRP loss, in that it subjects him to a lay-off when his continued employment in a required CPRP position would otherwise not have resulted in such an outcome. Therefore, I find that it is a "material adverse personnel action" in and of itself, without examining reasons presented for such an action that might have occurred within the AR 50-6.

workplace activity; (3) attempted to get employees to sign an affidavit about this activity, and/or (4) "threatened" employees with a subpoena if they refused cooperation. Van Winkle confirmed being called by the committee; being asked the first question and then leaving the meeting.[22]

The investigation committee's report verified Van Winkle's employee contacts (17) and their responses (3), and found it created an uncomfortable environment of mistrust and fear within the workplace. The committee also found that some employees had refused to talk to him and to answer his questions, and that he had threatened them with a subpoena. He also refused to answer questions posed by the investigation committee. As such, they concluded that Van Winkle's CPRP should be temporarily suspended. Shuplinkov accepted their recommendation and eventually approved a temporary CPRP certification suspension.

In Bilyeu's August 3, 2005 "Temporary Disqualification" letter to Van Winkle, Bilyeu recited the temporary CPRP disqualification from his performance of chemical surety duties, and stated that it was "based upon allegations of suspect quieries (sic) to crew members," and his "contemptuous and arrogant behavior and attitude" toward his Certifying Official. It found that his, "attitude" had been "disruptive to the work environment, causing unease and uncertainty to crews members with threats of future subpoena action." (JX 8) Consequently, Shuplinkov issued an interim decision to suspend Van Winkle's CPRP certification.

Begley's presence at Bilyeu's investigation meeting (and other meetings), fulfilled one of the two procedural obligations of AR 15-6, that a union representative be present upon request of the individual under investigation. Shuplinkov made sure that a union representative was present at virtually every meeting involving Van Winkle, whether he requested it or not, and there is no evidence that he ever objected to it. With regard to the second procedural requirement, that there be no questioning in violation of the Fifth Amendment if raised by the witness, I find that Van Winkle's action in leaving the meeting and refusing to answer further questions, did not comply with his right to refuse to answer questions based upon the Fifth Amendment, or AR 31. He neither requested it, nor did he claim or establish that he was questioned in violation of that right.

Van Winkle's refusal to answer further questions constituted an unwarranted action regardless of Begley's statement that he did not have to answer the investigation committee's questions if Van Winkle felt "uncomfortable" in so doing. The only protected "refusal" to answer the committee's questions would have been his raising of the Fifth Amendment issue,

[22] Again, Begley credibly confirmed his advice to Van Winkle that he did not have to answer Bilyeu's questions if he was uncomfortable with a question, and Van Winkle credibly confirmed that a legal action over BGCA's mistaken configuration of the mini-cam was initiated by him; that he did request support from co-workers regarding the action; that he did "inform" some of the co-workers that they could be subpoenaed to testify in it; and that most refused to cooperate. He denied "threatening" them with such action. He asserted a legal right to make inquiries necessary to form his defense regarding the temporary and permanent revocation of his CPRP certification. As stated above, however**,** I find from a CAA/SWD legal perspective, that there is insufficient evidence to conclude that Van Winkle did anything other than to try to enlist support requested by PEER, or that he "threatened" to subpoena anyone with adverse action for refusing to sign a statement. However, I must also find that his leaving the investigation committee meeting was not protected activity, despite Mr. Begley's erroneous advice that he did not have to respond to questions that he was uncomfortable with, as stated above, and was subject to the Army's rulings on that matter.

which he did not do. Otherwise, his action in leaving the investigation committee's inquiry was completely within discretion of the AR 15-6 investigating committee to determine.

It is my opinion that when Van Winkle left that meeting, he forfeited his ability to raise any procedural issues that he might have had to the rest of the procedures being utilized, which remained within the jurisdiction of Respondent to administer.

Richard Burnett v. PPL Montana

In Administrative Law Judge Jennifer's Recommended Decision and Order Dismissing Complaint, *Richard Burnett v. PPL Montana*, LLC, Case No., 2007-CAA-3, July 15, 2008, Slip Opinion pp. 12- 13, she stated:

> The Respondent [PPL Montana] presented evidence that it genuinely believed Complainant [Richard Burnett] to be a security threat, and the Complainant did not show otherwise. The Respondent need not show that its articulated reasons were supported by the facts, but only that it believed them at the time. *See Morgan v. Massachusetts General Hospital*, 901 F.2d 186, 191 (1st Cir. 1990); *Pignato v. Am. Trans Air, Inc.*, 14 F.3d 342, 349 (7th Cir. 1994) ("[I]t is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a "phony reason.").
>
> The Respondent genuinely believed that the Complainant stole company tools and was involved in a sabotage of the plant. The Respondent hired a private investigator to investigate the allegations which came from someone who knew the Complainant and claimed first hand knowledge of the Complainant's actions.
>
> * * * * *
>
> I find it plausible that the employees at the [PPL Montana] Colstrip plant still suspected that the Complainant was fired for stealing tools. The Complainant denied at the hearing that he stole tools, but this does not show that the Respondent's belief that he did steal the tools was not in good faith.
>
> Nor did the Complainant show that the Respondent acted on its suspicions about him in a way that supports a finding of pretext. The Complainant testified that … [an] acquaintance … talked … about the Complainant's alleged theft and sabotage, acted out of revenge and was therefore not a reliable source of the Respondent's beliefs…. [T]he factual basis of the Respondent's good faith beliefs are irrelevant. They are relevant if the Respondent had known (or should have known) that the informant "clearly had his [or her] own ax to grind with the Complainant" while taking the informant's statements at face value and acting on them with haste. *White v. Osage Tribal Council*, 95-SDW-1 (ARB Aug. 8, 1997). In other words, it must be shown that the Respondent was willing to "blindly accept" a recommendation to take adverse action against the Complainant. *See Redweik v. Shell Exploration and Production Co.*, ARB No. 05-052, 2004-SWD-2 (ARB Dec. 21, 2007). I find that the Complainant has not shown this to be the case. The Respondent was justified in believing …" [its witness.]

In *Burnett v. PPL Montana*, Burnett lost his security clearance when PPL Montana presented evidence supported by the facts, that it genuinely believed Burnett to have stolen tools and he did not show otherwise. Therefore, he was considered a security threat. PPL Montana only had to show that it believed this at the time. Likewise, I credit Bilyeu, and Rooney who at the time of their recommendations regarding their lack of trust in Van Winkle on behalf of Respondent, needed only to show their belief that their articulated reasons for temporarily and permanently disqualifying his CPRP status, backed by his October 19, 2005 explosive declaration in a meeting with other officials, regarding his lack of trust in his supervisor, and Certifying Official, Bilyeu, and warranted a concern about his possibly placing "the stockpile" of sarin and mustard gas in jeopardy.

Complainant's "Temporary" CPRP Decertification Conclusions

However, as stated above, while I find this "Temporary" CPRP Decertification was not motivated by what I otherwise might have determined to have been an unjustified "adverse personnel action" under the provisions of the CAA and SWDA Acts, Van Winkle's refusal to participate in the Army's investigation inquiry, and leaving the proceeding after answering only one question, was not justified. At the very least he should have raised his issues concerning the proceeding, and he should have asked for the necessary assistance and time to prepare for it. If Begley was purporting to represent Van Winkle in the proceeding, he should have stated that condition, or Van Winkle should have made it clear what their respective roles should have been during the proceeding. While Begley's apparently unsolicited advice not to answer the questions might have been ill advised, I find that Van Winkle's leaving the investigatory meeting constituted a "death knell" to any possible determination of adverse personnel action against the Respondent and the chance of surviving his temporary CPRP decertification inquiry.

Complainant's "Permanent" CPRP Decertification Conclusions

Regarding the specific issue concerning the permanent decertification of Van Winkle's CPRP under AR 50-6, the AR 15-6 procedure invoked by Shuplinkov was a "tool" to implement the certification/decertification provisions of AR 50-6. Together, this constituted the total procedure used by Respondent for permanently decertifying Van Winkle CPRP. I find that Complainant has presented insufficient evidence to establish by a preponderance of the evidence that any of the procedural issues that he raised constituted any violations of those regulations.

As stated above, the permanent CPRP disqualification of Van Winkle by Mr. Bilyeu on January 30, 2006, acknowledged their mutual "lack of trust" and was repeated in its review and approval by Mr. Rooney on March 9, 2006, bolstered by Van Winkle. This was acknowledged in Van Winkle's strongly stated distrust of Bilyeu upon being questioned by Shuplinkov on October 19, 2005, after his temporary CPRP disqualification by Bilyeu on August 3, 2005, and the continuing factors considered by both of them in 2006, such as Van Winkle's being "disgruntled," displaying a "lack of a positive attitude" and "unacceptable" as observed actions toward management. I have found this to have been fully believed by Bilyeu, Rooney, Stanfield, Sydor and others. Even Shuplinkov, whom I credit as having gone to the absolute end to save Van Winkle's CPRP status, finally conceded that those management officials believed

Complainant had "crossed the line," by Shuplinkov's acceptance of the fact that Van Winkle's actions toward Bilyeu went beyond what was acceptable conduct in a CPRP controlled, work situation, but was willing to start a rehabilitation program to regain his CPRP status, which did not mean that there was not a basis for its forfeiture in the first place.

This final action did consider Van Winkle's February 3, 2006 rebuttal to Bilyeu's permanent CPRP determination, which was attached to a letter from PEER to Laura M. Roenker, Esq., an attorney at BGCA, which set forth a number of specific "protected" actions that Van Winkle had taken, after Bilyeu's recommendation, and of objections to Mr. Bilyeu's January 30th recommendation, sometime before the March 9th meeting. (JX 17) In that meeting, Rooney, Van Winkle and Begley went over the PEER response to Bilyeu's action. They also reviewed Rooney's reasons for his own recommendation as set forth above, that Van Winkle's CPRP be permanently disqualified.

For these reasons, I find that under the *Egan, Romero* and *Hall* progeny, no procedural defect has been either raised or established by a preponderance of the evidence, by the Complainant, that would warrant a finding that any act or omission involved in the procedures governing the CPRP investigation was related to his adverse personnel actions involving his temporary and/or his permanent CPRP disqualification, or that any of the acts or omissions involved in any procedural defects were motivated by that protected activity, under the provisions of either the CAA or the SWDA.

CONCLUSION

As previously stated, *Egan*, *Romero* and *Hall*, stand for the proposition that while a judge may review whether an agency has complied with its *procedures* for revoking a security clearance, it may not review the *substance* of the revocation decision. Therefore, what is left for this court to consider is *process*. I note that the post-hearing reply briefs have been carefully reviewed, specifically with regard to the AR 15-6 investigation process that was instigated by Shuplinkov, to carry out the objectives of AR 50-6, and issues relating to procedural violations involving both AR 15-6 and AR 50-6.

First, I note that in general, the briefs do not contain many references to issues of process. Complainant's sole, specific allegation regarding a procedural violation involving either AR 15-6 or AR 50-6, alleges a violation of AR 50-6 § 2-29 which requires the "certifying official to 'cite specific circumstances that support the certifying official's decision to disqualify.'" (Complainant's Post-hearing Reply Brief, 24). He cites the language of § 2-29 that states that "statements such as 'Alcohol abuse,' 'drug abuse,' 'contemptuous attitude,'…are inadequate by themselves." (Complainant's Opening Post-hearing Brief, 62). Specifically, he alleges that the "non-specific nature of the allegations is also a violation of…AR 50-6," and that the reasons he was given for his permanent disqualification were not adequate "to enable him…to make a meaningful response." *Id.* (Citing *Cheney v. Dep't of Justice*, 479 F.3d 1343 (Fed. Cir. 2007)). However, this argument is without merit because § 2-29 spells out that "any display of poor attitude or lack of motivation as evidenced by aberrant attitude (arrogance, inflexibility, or suspiciousness)…" is a disqualifying factor. As such, I find that the reasons Complainant was given – "lack of trust," "signs of behavior of a disgruntled employee," and "lack of positive attitude" were sufficient and within AR 50-6.

Complainant does raise an issue regarding the omission in the temporary and permanent disqualification letters and AR 15-6 report of reference to the "release of non-public information about chemical operations." (Complainant's Post-hearing Reply Brief, 26). However, he does not state how such omission is a procedural violation. Furthermore, he claims inadequate procedural protection because he "was not allowed to be present during the witness interviews in the CPRP disqualification investigation, did not have the opportunity to confront or cross-examine those witnesses, was not given the opportunity to present witnesses on his behalf, and was not allowed to see the report upon which his disqualification was based…" *Id*. at 24. However, there are no regulations that require such procedural protection. "AR 50-6 … provides for minimum due process which does not include providing copies of evidence to the individual pending disqualification." (Respondent's Closing Argument Brief, 20). Moreover, the investigations of the Department of the Army Inspector General Surety, the Army Material Command Surety Inspector, and OSHA "revealed no deficiencies in the Agency's process…" *Id*. Finally, both LTC Shuplinkov and Jim Rooney testified that they went over the AR 15-6 investigation "point by point" with Complainant and the union representative. *Id*. Complainant offered two documents in rebuttal and was provided additional time to submit further information, which he declined to do. Thus, I find the claim of inadequate procedural protection to be without merit.

I note that the established schedule allowed each party to file post-hearing briefs by March 3, 2008 and reply briefs by March 17, 2008. Subsequent to these dates, the Complainant has filed the following: a motion to strike or for leave to file a supplement to post-hearing reply brief, a supplement to his post-hearing reply brief, and a submission of supplemental authority. In addition, the Respondent Agency has filed a response to Complainant's submission of supplemental authority. All matters in reference to the submission of supplemental authority have been reviewed and have been found not to change the basic thrust of *Egan* and *Hall*. In all other respects, the filings are improperly before this judge and, as such, are out of order or denied.

It is therefore my conclusion that, insofar as the exercise of the remaining jurisdiction that I have as the United States Administrative Law Judge hearing this case under the restrictions imposed by the courts and Administrative Review Board in *Romero* and *Hall* as addressed by the U.S. Supreme Court in *Egan*, are concerned, application of the AR 50-6 regulations, as supplemented by those of AR 15-6 in the individual investigations ordered by Shuplinkov are concerned, were performed in accordance with the provisions of the procedures set forth in those Army Regulations, as set forth above.

Those additional due process procedures claimed by Complainant to be applicable in this case, are procedures that are set forth in non-military decisions otherwise applicable to either environmental whistleblower cases or principles developed in equal employment discrimination and retaliation cases.

The Army Regulation process provisions set forth in those documents have been complied with in this case. Complainant has not been able to establish otherwise by a preponderance of the evidence in it[23], and the complaint is, therefore dismissed. Therefore,

IT IS RECOMMENDED that the complaint of DONALD VAN WINKLE against Respondent, BLUE GRASS CHEMICAL ACTIVITY/BLUE GRASS ARMY DEPOT be dismissed by the Administrative Review Board.

A

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).

[23] I note that the documents under seal have been reviewed and did not provide support to the considerations herein.