In the Matter of:

MICHAEL COLLINS,	**ARB CASE NO. 07-079**
COMPLAINANT,	**ALJ CASE NO. 2006-SDW-003**
v.	**DATE: March 30, 2009**
VILLAGE OF LYNCHBURG, OHIO,	
RESPONDENT.	

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Paul H. Tobias, Esq., and David G. Torchia, Esq., *Tobias, Kruas & Torchia,* Cincinnati, Ohio

For the Respondent:
Fred J. Beery, Esq., Lynchburg Village Solicitor, Hillsboro, Ohio

FINAL DECISION AND ORDER

Michael Collins filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration (OSHA) alleging that the Village of Lynchburg (Village) fired him because he engaged in activity protected under the whistleblower protection provisions of the Safe Drinking Water Act,[1] as implemented by

[1] 42 U.S.C.A. § 300j-9(i) (West 2006).

the regulations at 29 C.F.R. Part 24 (2006). After a hearing, a Labor Department Administrative Law Judge (ALJ) concluded that the Village fired Collins because he engaged in protected activity. The ALJ awarded Collins $25,000 in back pay with interest, $25,000 in compensatory damages, and $20,000 in punitive damages. The Village timely appealed to the Administrative Review Board (ARB or Board). We affirm the ALJ's conclusion that the Village fired Collins for his protected activity. We also affirm his award of back pay and compensatory damages; we reverse his award of punitive damages.

BACKGROUND

Collins began work as a laborer for the Village in September 1997. His duties included performing water taps, sewer taps, road maintenance, snow removal, reading water meters, and other basic labor duties. From August 2005 until his termination, Collins's immediate supervisor was Shawn Berry, who reported directly to William Priore, mayor of the Village.[2]

Rick Ludwick, the licensed water plant operator, and Berry were responsible for testing the Village's water supply.[3] Collins was responsible for flushing out the water meters, but he also had familiarized himself with the processes involved in keeping the water supply safe, including water distribution, sampling, and testing the water for bacteria and lead.[4] In August 2005, Ludwick informed Collins that Test America, the firm that tested the Village water samples, had ordered further testing on a batch of samples because testing had revealed that the samples contained bacteria.[5] Ludwick called the Ohio Environmental Protection Agency (OEPA) and discussed the bad samples with Tim Schmidt, OEPA Field Representative for the Southwest District, the district in which the Village is located. Schmidt told Ludwick to take another sample and to chlorinate the well.[6]

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[2] Hearing Transcript (Tr.) at 46-47.

[3] Tr. at 49, 50, 116.

[4] Tr. at 48-52.

[5] Tr. at 55, 119.

[6] Tr. at 120-122.

Collins testified that Ludwick told him that "he was going to dump chlorine bleach into the wells to kill the bacteria so that the test would test negative for bacteria."[7] Collins believed that dumping chlorine in a well would kill any bacteria in the well and would not yield a true sample. When Collins spoke with Berry about the proposed chlorination of the well, Berry told Collins that he had previously put chlorine in the well.[8] Because Collins did not believe that Ludwick was following a proper procedure for the test, he called the OEPA on August 30 and spoke with Joshua Jackson, an employee of the OEPA, Southwest District, Division of Surface Water.[9] Since Collins's complaint was not a surface water complaint, Jackson passed it on to Schmidt, who was the contact for drinking water complaints.[10] Jackson then wrote a memorandum of his conversation with Collins, stating that Collins had told him that he had seen Ludwick chlorinating the samples.[11] Collins, however, testified that he did not tell Jackson that he had witnessed Ludwick chlorinating the samples.[12]

On August 31, 2005, Ludwick informed Mayor Priore that someone had filed a complaint with the OEPA "regarding sample acquisition and impropriety in sample acquisition."[13] Priore called Schmidt to find out who had filed the complaint. After Schmidt told Priore that Collins had filed the complaint, Priore asked the Chief of Police to start a criminal investigation of Collins's action. The Mayor testified that he believed that Collins had filed a false complaint because Ludwick and Schmidt had informed him that Collins had accused Ludwick of chlorinating the samples, and not the well.[14] Priore asked Berry to have Collins report to the Mayor's Office, where Priore and the Chief of Police met with Collins.[15] Priore testified concerning their meeting: "Mr. Collins walked in, had a smirk on his face like he knew what was coming off, and never volunteered

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7 Tr. at 55.

8 Tr. at 56.

9 Tr. at 56-57.

10 Tr. at 164.

11 Tr. at 57-58.

12 Tr. at 79.

13 Tr. at 181.

14 Tr. at 181-182.

15 Tr. at 182.

anything, and I knew at that point in time that there was no sense in discussing it, so I terminated him."[16]

Collins filed his complaint on October 6, 2005, alleging that the Village had fired him for protected activity, i.e., complaining to the OEPA. OSHA found that Collins's complaint had merit, and the Village requested a hearing before an ALJ. After a one-day hearing, the ALJ found that the Village had terminated Collins's employment because of his protected activity. The ALJ therefore awarded Collins back wages of $25,000, compensatory damages of $25,000 and punitive damages of $20,000.[17] The Village appealed the ALJ's determination.

JURISDICTION AND STANDARD OF REVIEW

The Administrative Review Board (ARB) has jurisdiction to review the ALJ's recommended decision pursuant to 29 C.F.R. § 24.8 and Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the Board the Secretary's authority to review cases under the statutes listed in 29 C.F.R. § 24.1(a), including, inter alia, the SDWA whistleblower protection provisions).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. At the time the parties appealed and filed their briefs with the Board, we reviewed questions of fact under the SDWA de novo.[18] A new regulation calls for substantial evidence review.[19] Substantial evidence is that which is "more than a mere scintilla." It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20]

Neither party addressed the standard of review in its briefs to the Board. Nor has either party requested leave to supplement or amend its brief in light of the change in the standard of review for questions of fact. We therefore assume that neither party

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16 Tr. at 182.

17 Recommended Decision and Order (R. D. & O.) at 18.

18 *See Sayre v. VECO Alaska, Inc.*, ARB No. 03-069, ALJ No. 2000-CAA-007, slip op. at 2 (ARB May 31, 2005).

19 72 Fed. Reg. 44,956 (Aug. 10, 2007), codified at 29 C.F.R. § 24.110(b).

20 *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998).

considers the change in the standard of review material to this case.[21] In any event, applying either standard of review, we conclude that the Village violated the Act and that Collins's complaint must be granted.

DISCUSSION

The Legal Standards

The SDWA's employee protection (whistleblower) provisions prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment, i.e., taking adverse action, because the employee has notified the employer of an alleged violation of the act, has commenced any proceeding under the act, has testified in any such proceeding or has assisted or participated in any such proceeding.[22]

To prevail on a complaint of unlawful discrimination under the SDWA, a complainant must establish that he or she engaged in protected activity of which the

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[21] *Cf.* Fed. R. App. P. 28(j) (the parties have the burden of calling the court's attention to any pertinent and significant authorities that came to the parties' attention after its brief has been filed).

[22] The SDWA provides in pertinent part:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has –
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> (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,
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> (B) testified or is about to testify in any such proceeding, or
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> (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C.A. § 300j-9(i)(1).

respondent was aware; he or she suffered adverse employment action; and the protected activity was the reason for the adverse action, *i.e.*, that a nexus existed between the protected activity and the adverse action.[23]

Protected Activity, Knowledge, and Adverse Action

We first review whether Collins established protected activity, employer knowledge, and adverse action.

The SDWA's whistleblower provision protects employees who "commence," "testify," "assist," or "participate" in a "proceeding" or administer or enforce requirements of the act or carry out its purposes.[24] The purpose of the SDWA is to promote the safety of the nation's public water systems through the regulation of contaminants so as to provide water fit for human consumption.[25] We have interpreted the term "proceeding" to include internal and external employee complaints that may precipitate a proceeding.[26]

An employee engages in protected activity if he provides information "grounded in conditions constituting reasonably perceived violations" of the SDWA. The employee need not prove that the hazards he perceived actually violated the act, or that his assessment of the hazard was correct.[27] On the other hand, a complaint that expresses only a vague notion that the employer's conduct might negatively affect the environment or that is based on "numerous assumptions and speculation" is not protected.[28]

We agree with the ALJ's conclusion that Collins engaged in protected activity when he expressed his concerns to the OEPA about Ludwick's intention to chlorinate a

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[23] *See Jenkins v. United States Envtl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-002, slip op. at 16-17 (ARB Feb. 28, 2003).

[24] 42 U.S.C.A. § 300j-9(i)(1).

[25] *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-20, 2001-CAA-009, -011, slip op. at 9 (ARB June 30, 2004).

[26] *Dixon v. U.S. Dep't of Interior*, ARB Nos. 06-147, 06-160, ALJ No. 2005-SDW-008, slip op. at 9 (ARB Aug. 28, 2008).

[27] *Id.* at 8.

[28] *Id.*

well before taking samples of the well water for testing. Although the information Collins provided to the OEPA was based on Collins's misunderstanding regarding the proper procedure for chlorinating the wells, we find that the information was nevertheless "grounded in conditions constituting reasonably perceived violations" of the SDWA. As the ALJ stated, "[e]ven the Ohio EPA attributed [Collins's] concern to only a misunderstanding and stated that Complainant was concerned with the safety of the water supply."[29] The legitimacy of Collins's misunderstanding is further illustrated by Ludwick's testimony that he had never before used the chlorination procedure in the village and that he and Schmidt had a misunderstanding as to how he was to proceed.[30] Ludwick also believed that Collins had misunderstood the situation.[31]

The Village contends that Collins did not reasonably believe that it was using an improper procedure to test the water because, the Village contends, Collins invented the allegations regarding the water supply to retaliate against Berry and Ludwick for their refusal to take Collins with them to look at a truck.[32] The ALJ, however, credited Collins's testimony that he "only had the best interests of the Village and the water supply at heart" when he called the OEPA.[33] Moreover, there is no evidence to support the contention that Collins was angry because of the truck incident beyond the testimony of Ludwick, who stated that Collins's facial expressions showed that he was upset at the time of the truck incident. As the ALJ found, this evidence was insufficient without further corroborating evidence in the record.[34] Moreover, even if Collins were motivated by a retaliatory intent in making the phone call to OEPA, a complainant's motivation in making a safety complaint has no bearing on whether the complaint is protected.[35] All that is required under the SDWA is that a complainant reasonably believe that a violation of the act occurred.

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29 R. D. & O. at 12.

30 Tr. at 149-154.

31 *Id.*

32 Village Brief at 8-9, 11-12**.**

33 R. D. & O. at 11.

34 *Id.*

35 *Caldwell v. EG&G Defense Materials, Inc.,* ARB No. 05-101, ALJ No. 2003-SDW-00l, slip op. at 12 (ARB Oct. 31, 2008).

Based on this evidence, we conclude that Collins established that he engaged in protected activity under the SDWA. We also conclude that Priore and Ludwick knew of Collins's protected activity. Schmidt informed Ludwick that someone had called the OEPA to report chlorine in the samples.[36] Ludwick testified that he suspected that Collins made the call.[37] After Ludwick informed Priore that someone had filed a complaint with the OEPA "regarding sample acquisition and impropriety in sample acquisition," Priore called Schmidt to find out who had complained, and Schmidt identified Collins.[38]

Finally, the Village does not dispute that Collins's discharge was an adverse action. Therefore, the remaining issue to be resolved is the causal relationship between Collins's protected activity and his discharge.

Causation

Priore terminated Collins's employment on August 31, 2005, within two hours of discovering that Collins called the OEPA on August 30, 2005, to report his concerns about improper water sampling procedures. We may infer retaliatory motive when adverse action closely follows protected activity. And while temporal proximity does not establish retaliatory intent, it is "evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." [39]

The irregularity of the procedure that Priore used to terminate Collins is further evidence of retaliation. As the ALJ noted, Priore made his decision without any investigation and without following the protocol that the Village designed for terminating employees.[40] In addition, he never asked Collins why he had contacted the OEPA. In fact, he admitted that he had already decided to terminate Collins before Collins even

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[36] Tr. at 126.

[37] Tr. at 128.

[38] Tr. at 181-182.

[39] *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, -036, slip op. at 6 (ARB Mar. 30, 2001).

[40] Priore admitted that when he fired Collins, he was unaware that the Village had an employee handbook, which contained provisions for termination of employees. Tr. at 207; R. D. & O. at 10.

walked into his office.[41] Finally, Collins did not have a troubled employment history with the Village. He had one reprimand in his employment record: he allowed the Mayor's clerk to bring her car into the Village garage, and the Village Administrator disciplined him for that infraction by writing a memorandum, which Collins refused to sign.[42] In addition, the Mayor had problems with Collins's inappropriate attire and failure to wear his uniform regularly, and Berry had spoken to Collins about his attire from time to time.[43] Priore testified that he did not rely on the incident with the clerk in the garage or problems with Collins's attire when he decided to fire Collins.[44]

Finally, the Village did not demonstrate a legitimate, non-discriminatory reason for firing Collins. The Village contends that it fired Collins because he went outside the chain of command when he called the OEPA without first discussing his concerns with his supervisor or the Mayor. But a long-standing principle of whistleblower case law, established by the Secretary and further developed by this Board and the United States Courts of Appeals, holds that it is a prohibited practice for an employer to retaliate against an employee for not following the chain of command in raising protected safety issues.[45] This chain of command principle is as applicable to communications with a state regulating agency like the OEPA as it is to the raising of safety concerns within the employer's organization.[46]

Since the only reason the Village offered for firing Collins is not a legitimate reason, we find that the Village terminated Collins because of his protected activity. Therefore, we affirm the ALJ on the issue of the Village's liability.[47]

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41 Tr. at 196.

42 Tr. at 65.

43 Tr. at 76, 189.

44 Tr. at 218-219.

45 *See Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565-66 (8th Cir. 1980); *Saporito v. Florida Power & Light Co.*, Nos. 1989-ERA-007, -017, slip op. at 5-7 (Sec'y Feb. 16, 1995); *Pillow v. Bechtel Const. Co.*, No. 1987-ERA-035, slip op. at 22-23 (Sec'y July 19, 1993), *aff'd sub nom. Bechtel Const. Co. v. Sec'y of Labor*, 98 F.3d 1351 (11th Cir. 1996) (table).

46 *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1511-13 (10th Cir. 1985); *Mackowiak v. Univ. Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

47 R. D. & O. at 14.

Remedies

If the whistleblower establishes retaliation, the SDWA provides for remedies.[48] The ALJ ordered the Village to pay Collins $25,000 in back pay with interest, $25,000 in compensatory damages, and $20,000 in punitive damages.

The Village challenges only punitive damages award, contending that Collins failed to demonstrate bad faith on the part of the Village sufficient to justify an award of punitive damages.[49] We reverse the ALJ's award of punitive damages, but for another reason. The SDWA permits an award of exemplary (i.e., punitive) damages.[50] But punitive damages are not awardable against a municipality.[51] Since the Village of Lynchburg is a municipality, Collins is not entitled to an award of punitive damages.

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[48] The SDWA provides in pertinent part:

> (ii) If in response to a complaint filed under subparagraph (A) the Secretary determines that a violation of paragraph (1) has occurred, the Secretary shall order (I) the person who committed such violation to take affirmative action to abate the violation, (II) such person to reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, (III) compensatory damages, and (IV) where appropriate, exemplary damages. If such an order is issued, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

[49] Village Brief at 18-19.

[50] 42 U.S.C.A. § 300j-9(i)(2)(B)(ii).

[51] *See Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-271 (1981) (holding that in action brought under 42 U.S.C.A. § 1983, municipality immune from punitive damages).

Additionally, under the applicable law and the record before us, reinstatement would have been an appropriate remedy, but the ALJ failed to order reinstatement. Reinstatement is an automatic remedy under the SDWA. It is possible that the ALJ assumed that it was unnecessary for him to order reinstatement because the Village had re-employed Collins prior to the hearing.[52] Nevertheless, the ALJ erred in not awarding reinstatement.[53] Reinstatement must be ordered unless it is impossible or impractical. But since neither party has raised the issue on appeal, we deem the issue of reinstatement waived.[54]

CONCLUSION

We agree with the ALJ that the Village fired Collins because of his protected activity. We therefore **AFFIRM** the ALJ's determination of liability as supported by the evidence of record, but **REVERSE** his award of punitive damages. We accept the remainder of his recommended decision. Collins will have thirty (30) days to file a fully supported attorney's fee petition, and the Village will have thirty (30) days thereafter to file an opposition thereto, if any.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Chief Administrative Appeals Judge

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[52] Tr. at 85.

[53] *See Rooks v. Planet Airways, Inc.*, ARB No. 04-092, ALJ No. 2003-AIR-035, slip op. at 10 (ARB June 29, 2006).

[54] *Tipton v. Indiana Michigan Power Co.*, ARB No. 04-147, ALJ No. 2002-ERA-030, slip op. at 10 (ARB Sept. 29, 2006).