APPENDIX

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
November 13, 2020
Lyle W. Cayce
Clerk

No. 19-60561
Summary Calendar

FREDERICK B. WRIGHT,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for Review of a Final Decision and Order
of the United States Department of Labor's Administrative Review Board

Before OWEN, Chief Judge, and SOUTHWICK and WILLETT, Circuit Judges.

PER CURIAM:*

Frederick Wright sued his former employer, the Railroad Commission of Texas (RRC), alleging that his employment was terminated in retaliation for engaging in protected activity under the Federal Water Pollution Control Act[1] (FWPCA) and the Safe Drinking Water Act[2] (SDWA). After a hearing and an

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 33 U.S.C. § 1367.
[2] 42 U.S.C. § 300j-9(i).

initial rejection of those claims that was vacated on appeal, an administrative law judge (ALJ) at the Department of Labor again rejected Wright's claims, and the Administrative Review Board (ARB) upheld that rejection. We affirm.

I

The RRC is responsible for regulating the oil and gas industry in Texas.[3] Part of the RRC's responsibility includes overseeing underground injection programs under the SDWA.[4] The RRC is also the state agency that certifies federal permits under the FWPCA.[5]

In October 2007, the RRC hired Wright as an engineer specialist who handled field operations in the oil and gas sector.[6] Wright's job included "conducting surveys, making inspections, investigating complaints, and collecting and analyzing engineering data."[7] Wright's primary duty was to work with oil and gas operators to ensure compliance with state and federal rules, statutes, and regulations.[8]

During Wright's tenure with the RRC, there were numerous complaints about Wright's behavior from colleagues and from oil and gas operators.[9] Wright received several employee evaluations and participated in counselling sessions urging him to improve his behavior,[10] but he did not do so.[11] In one instance, a witness said that an operator asked Wright how he could bring several wells into compliance with state and federal rules.[12] Wright laughed

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[3] EN.250.
[4] EN.250.
[5] EN.250.
[6] EN.250; CX-52.
[7] EN.250.
[8] EN.743.
[9] EN.250-55.
[10] EN.250-55.
[11] EN.250-55.
[12] EN.250-55.

at the operator and threatened to cite the operator for further violations.[13] In another instance, a witness testified that operators complained that Wright had engaged in name-calling, including calling an operator "stupid."[14] Colleagues complained that Wright was arrogant, rude, and insulting.[15]

Wright frequently ignored his manager's instructions.[16] For instance, near the end of his employment with the RRC, Wright's manager had approved a new form for operators to complete in conducting compliance reviews.[17] An operator submitted this new form to the RRC, but Wright requested that the operator complete the old form.[18] Wright made this request despite the fact that his manager had told him that a phone call about the missing information from the already-completed form would suffice.[19] When this operator complained to Wright's manager, the manager reiterated his request for Wright simply to ask for the new information by phone.[20] Wright continued to disagree with his manager over the use of the new form. This disagreement led to disciplinary recommendations, which resulted in the termination of Wright's employment with the RRC.[21]

According to Wright, the RRC retaliated against him for trying to enforce federal laws protecting safe drinking water.[22] During his employment, Wright had submitted a complaint for a hostile work environment, alleging that his managers and colleagues did not understand the state and federal rules they

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[13] EN.260, 270, 785.
[14] EN.157, 258.
[15] RX-14, 17; Tr. 338-40, 465-66, 469-70, 476-77.
[16] EN.250-55.
[17] EN.254-55.
[18] EN.255.
[19] EN.255.
[20] Dep't of Labor's Br. at 14.
[21] EN.254-56.
[22] *See* Wright's Br. at 18-19.

were charged with enforcing and often disregarded them.[23] Wright also argued for the use of the old compliance review form, contending that it would improve enforcement of federal and state laws and would better inform the public about wells.[24]

After Wright's employment with the RRC was terminated, Wright asked the Occupational Safety and Health Administration (OSHA) to investigate whether his termination was because he had engaged in protected activity under the SDWA and FWPCA.[25] OSHA concluded that "it had no cause to believe" that the RRC had violated either the SDWA or FWPCA by retaliating against Wright for protected activity.[26] Wright appealed OSHA's decision to an ALJ at the Department of Labor.[27] The ALJ concluded that Wright had not engaged in protected activity.[28] Wright appealed to the ARB, which vacated the ALJ's decision, ordered that one of Wright's exhibits be admitted into evidence, clarified the law regarding protected activity, and remanded the decision to the ALJ for further proceedings.[29] The ALJ again rejected Wright's claims, concluding in part that any protected activity he engaged in was not a motivating factor for his termination from the RRC's employment.[30] The ARB affirmed the ALJ's decision.[31] This appeal followed.

II

Wright's first argument on appeal is that the ALJ abused his discretion by not admitting several of Wright's exhibits which, he argues, would have "presented evidence that the negative comments in [the RRC's employee

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[23] EN.576-80; CX 56-60; Dep't of Labor's Br. at 19-20.
[24] *See* Wright's Br. at 18-19.
[25] EN.121.
[26] EN.121.
[27] EN.121.
[28] EN.142.
[29] EN.183, 376.
[30] EN.376.
[31] EN.379.

performance evaluation] were retaliation for protected activity."[32] We generally review evidentiary rulings for abuse of discretion.[33] In an evidentiary ruling, an abuse of discretion occurs "only where the challenged ruling affects a substantial right of a party."[34]

Wright's contention that the ALJ abused his discretion in not admitting several exhibits is unavailing. Wright fails to show how any of the rejected exhibits, if admitted, might have "had a substantial influence on the outcome of the" proceedings and thus affected a substantial right of his.[35] Several of the rejected exhibits would have been cumulative as they were identical to other admitted exhibits.[36] Other exhibits, although not identical, would have also been cumulative because of their similarity to testimony from the hearing. For instance, several of the rejected exhibits are requests for admission from state court,[37] which are remarkably similar to testimony at the ALJ's hearing.[38] Still other exhibits, such as email correspondence about the Texas Legislature's renumbering of all engineering specialist jobs at the RRC, are not relevant to whether Wright's supervisors retaliated against him for engaging in protected activity under the SDWA, FWPCA, and related regulations.[39] Therefore, Wright has failed to show that the ALJ abused his discretion in denying these exhibits.

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[32] Wright's Br. at 38.

[33] *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997).

[34] *Jones v. Benefit Trust Life Ins. Co.*, 800 F.2d 1397, 1400 (5th Cir. 1983) (first citing *Muzyka v. Remington Arms Co.*, 774 F.2d 1309, 1313 (5th Cir. 1985); and then citing *Jon-T Chems., Inc. v. Freeport Chem. Co.*, 704 F.2d 1412, 1417 (5th Cir. 1983)); *see also* FED. R. EVID. 103(a).

[35] *See United States v. Limones*, 8 F.3d 1004, 1008 (5th Cir. 1993).

[36] *See, e.g.*, Wright's Br. at 36 ("Judge Kennington rejected this exhibit as irrelevant despite the fact that he admitted this exact same exhibit as one of Respondent's exhibits.").

[37] *See* Wright's Br. at 38-39.

[38] *Compare* EN.457 (discussing a 10-day delay) *with* EN.395 (discussing the same 10-day delay).

[39] *See* CX-224-25.

Wright similarly contends that the ALJ abused his discretion by not allowing him to "elicit testimony about the [e]xhibit that the ALJ was required to admit . . . on remand" from the ARB.[40] But Wright has likewise failed to show how this "had a substantial influence on the outcome of the" proceedings and thus affected a substantial right of his.[41] He simply makes conclusory statements that not allowing him to elicit testimony on this exhibit was prejudicial.[42] Wright has failed to show the ALJ abused his discretion in not allowing him to elicit testimony on this exhibit.

III

Wright's second argument on appeal is that the ALJ's decision relied on inadmissible hearsay evidence.[43] Specifically, Wright contends that witnesses' testimony recounting complaints from former colleagues and oil and gas well operators is inadmissible hearsay.[44] Wright's argument is unpersuasive. Hearsay is defined as "an out-of-court statement offered to prove the truth of the matter asserted."[45] Generally, "a statement is not hearsay if it is offered to prove the statement's effect on the listener."[46]

Here, the witnesses did not offer their statements to prove the truth of the complaints from former colleagues and oil and gas well operators. Rather, the witnesses' provided these to statements show why they believed Wright was acting unprofessionally and why they recommended that the RRC terminate Wright's employment.[47] For instance, one witness testified that he

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[40] Wright's Br. at 15, 32 (internal citations omitted).
[41] *See Limones*, 8 F.3d at 1008.
[42] Wright's Br. at 15, 32.
[43] Wright's Br. at 30-31, 37.
[44] Wright's Reply Br. at 17-18; EN.286-87.
[45] *United States v. Piper*, 912 F.3d 847, 855 (5th Cir. 2019), *cert. denied*, 139 S. Ct. 1639 (2019) (citing *United States v. Reed*, 908 F.3d 102, 119 (5th Cir. 2018)); *see also* FED. R. EVID. 801(c).
[46] *Reed*, 908 F.3d at 120 (citations omitted).
[47] *See, e.g.*, EN.851-53; *see also* EN.250-60.

"recommend[ed] that Mr. Wright be terminated for unprofessional behavior" and, when asked for the basis of that recommendation, testified about specific complaints he received about Wright that led him to make that recommendation.[48] The statements that Wright claims were inadmissible hearsay were not offered to prove the truth of their content but were offered for their effect on the listener, and are not hearsay.[49]

IV

Wright's third argument on appeal is that the ALJ's conclusions lack substantial evidence.[50] Wright contends that substantial evidence does not support the ALJ's conclusions that (1) Wright did not engage in protected activity meant to safeguard drinking water in accordance with SDWA, FWPCA, and relevant regulations, and (2) even if he did, the RRC terminated Wright's employment for reasons rather than in retaliation for engaging in protected activity.[51]

We first examine whether substantial evidence supports the ALJ's conclusion that the RRC terminated Wright's employment for reasons other than retaliation.[52] The substantial evidence standard requires that a "decision must be upheld if, considering all the evidence, a reasonable person could have reached the same conclusion."[53] Substantial evidence requires "more than a mere scintilla but less than a preponderance."[54]

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[48] EN.851-54.

[49] *Reed*, 908 F.3d at 120 (citations omitted) ("Ordinarily, a statement is not hearsay if it is offered to prove the statement's effect on the listener."); *see also White v. Fox*, 470 F. App'x 214, 222 (5th Cir. 2012).

[50] Wright's Br. at 31, 37.

[51] Wright's Br. at 31, 37.

[52] *See Ameristar Airways, Inc. v. ARB, Dep't of Labor*, 771 F.3d 268, 272 (5th Cir. 2014) ("An agency's conclusions of law are reviewed de novo and its findings of fact are reviewed for substantial evidence." (citing *Willy v. Admin. Rev. Bd.*, 423 F.3d 483, 490 (5th Cir.2005))).

[53] *Id.* (quoting *Williams v. Admin. Rev. Bd.*, 376 F.3d 471, 476 (5th Cir. 2004).

[54] *Id.* (internal quotations omitted) (quoting *Williams*, 376 F.3d at 476).

We conclude that the ALJ's decision is supported by substantial evidence. In his opinion, the ALJ points to the numerous instances of Wright's "interpersonal conflicts with other employees [and] operators" as well as his disregard for directions from his managers.[55] The ALJ cited several employment evaluations occurring over a span of years that document Wright's need to "strive for better relations" with colleagues and operators,[56] how difficult Wright was to work with,[57] and a continued failure on Wright's part to improve his behavior.[58] Witnesses testified about the numerous complaints against Wright by his colleagues and by operators, including "multiple incidents where [he] clashed with operators and behaved in a rude and threatening manner."[59] One witness recalled seeing Wright laugh at an operator and threaten additional violations when asking for his help,[60] and another witness said that Wright had engaged in name-calling, such as calling people "stupid" and "liars."[61] Another witness testified that Wright ignored the instructions of his manager, requesting an operator to complete outdated forms after Wright's manager had explicitly told Wright that the old form did not need to be completed and that a phone call about the missing information from the already-completed form would suffice, as discussed above.[62] Witnesses also testified that operators found Wright so difficult to work with that they would actively avoid having to speak with him.[63]

The main evidence that would support a conclusion that Wright was terminated for engaging in protected activity is that some acts Wright alleges

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[55] EN.269-72.
[56] EN.271-72.
[57] EN.272.
[58] EN.272.
[59] EN.272.
[60] EN.260, 270, 785.
[61] EN.157, 258.
[62] EN.258.
[63] EN.260.

were protected happened in relatively close proximity to his termination.[64] The ALJ declined to make the inference that this close temporal proximity was enough given the significant evidence that the RRC terminated Wright's employment solely because of behavioral issues.[65] The evidence of behavioral issues, together with other documents and testimony from several witnesses about similar behavioral issues, sufficiently supports the ALJ's finding that Wright's employment with the RRC was terminated for behavioral issues and not because he engaged in protected activity.

Since we conclude that the ALJ's finding that Wright's employment was terminated for behavioral issues is supported by substantial evidence, we need not examine whether the ALJ's finding that Wright did not engage in protected activity is supported by substantial evidence. Either would have been sufficient to reject Wright's claims.

V

Wright's fourth argument on appeal is that the ALJ improperly rejected his motion for recusal, and Wright was therefore deprived of the right to have his case heard by an impartial arbiter.[66] "We review a denial of a motion to recuse for abuse of discretion."[67] An ALJ has abused his discretion when "a reasonable man, cognizant of the relevant circumstances surrounding [the] judge's failure to recuse, would harbor legitimate doubts about that judge's impartiality."[68] Although the Department of Labor contends that Wright failed to exhaust his administrative remedies regarding his motion for recusal by not

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[64] EN.269-70.

[65] EN.269.

[66] Wright's Br. at 33-37.

[67] *Brown v. Oil States Skagit Smatco*, 664 F.3d 71, 80 (5th Cir. 2011) (citing *Andrade v. Chojnacki*, 338 F.3d 448, 454 (5th Cir.2003)).

[68] *Id.* (alteration in original) (citing *Andrade*, 338 F.3d at 454).

raising them with the ARB,[69] the record shows that Wright did raise them before the ARB.[70]

In his brief to this court, Wright references eleven reasons why the ALJ should have recused himself and why the ALJ could not be impartial.[71] Wright's first argument is that there were technical issues with the record the ALJ forwarded to the ARB.[72] But there is no allegation that the ALJ intentionally removed the missing documents from the record forwarded to the ARB. Even Wright himself says the ALJ might have "unconsciously" created the technical errors in the record.[73] The issue was also corrected before the ARB.[74] Unintentional, technical errors do not represent prejudicial bias that would warrant recusal.[75]

Wright's second argument is that the ALJ should be recused because he requested the opposing party submit a response to Wright's motion for recusal.[76] But simply requesting a response to a motion to recuse does not represent bias in the judge.[77]

Wright's third argument is that the ALJ rejected Wright's attempt to admit an exhibit that was already admitted by the opposing party.[78] But the rejection of a duplicate exhibit is not indicative of bias because rejecting

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[69] Department of Labor's Br. at 38-42.
[70] EN.244, 303; Wright's Reply Br. at 9-10.
[71] Wright's Br. at 33-37.
[72] Wright's Br. at 34-35.
[73] Wright's Br. at 35.
[74] Dep't of Labor's Br. at 42-43.
[75] *See Liteky v. United States*, 510 U.S. 540, 556 (1994) (noting that "routine trial administration efforts" are not a basis for prejudicial bias); *see also United States v. O'Keefe*, 169 F.3d 281, 287 n.5 (5th Cir. 1999).
[76] Wright's Br. at 34.
[77] *See Liteky*, 510 U.S. at 556 (noting that "routine trial administration efforts" are not a basis for prejudicial bias).
[78] Wright's Br. at 36.

duplicative exhibits is a prerogative of a judge to prevent confusion as well as the wasting of time and resources.[79]

Wright's fourth argument is that the ALJ admitted alleged hearsay during the hearing on Wright's case.[80] But this argument is not persuasive. As we concluded, Wright has not pointed to any actual hearsay that was admitted in the proceeding before the ALJ. Furthermore, even if the ALJ did admit hearsay and Wright did timely object to it, Wright has failed to show how the ALJ's evidentiary rulings are evidence of bias since "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion."[81]

Wright's fifth argument is that the ALJ was "reluctan[t] to go into the required detail" in the case because he only held a three-day hearing rather than a two-week hearing and because the ALJ said, in an off-hand remark, that he had no intention of becoming a petroleum engineer through the proceedings.[82] Insisting upon haste in judicial proceedings is generally not indicative of prejudicial bias.[83] Additionally, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge."[84]

Wright's sixth argument is that the ALJ did not make it clear when he admitted a certain exhibit.[85] Unless a judge is intentionally trying to frustrate a party's case, not making clear when a certain exhibit has been admitted is

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[79] *See* FED. R. EVID. 403.

[80] Wright's Br. at 37-38.

[81] *Liteky*, 510 U.S. at 555 (1994) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

[82] Wright's Br. at 35-36.

[83] *See Nicodemus v. Chrysler Corp.*, 596 F.2d 152, 156 (6th Cir. 1979).

[84] *Liteky*, 510 U.S. at 555; *see also Andrade v. Chojnacki*, 338 F.3d 448, 462 (5th Cir. 2003) ("'[E]xpressions of impatience, dissatisfaction, annoyance and even anger' do not establish bias or partiality." (quoting *Liteky*, 510 U.S. at 555-56)).

[85] EN.199-201.

not indicative of prejudicial bias. If Wright was uncertain whether the ALJ had admitted a certain exhibit, he should have asked the ALJ.

Wright's seventh argument for why the ALJ should have recused himself is that the ALJ did not compel the RRC to allow Wright access to a personnel file of a former colleague.[86] Wright does not explain how this reflects the ALJ was biased.[87] The mere act of denying a specific discovery request, without more, can almost never show that an ALJ was prejudicially biased.[88]

Wright's eighth argument is that the ALJ allegedly made factual conclusions unsupported by the evidence.[89] As we concluded, the ALJ's factual conclusions that were necessary to dispose of the case were supported by substantial evidence. But even if other conclusions made by the ALJ were not, that does not automatically render the ALJ unfairly biased against Wright, otherwise every mistaken conclusion would be evidence of bias.[90]

Wright's ninth argument is that the ALJ unfairly denied Wright a hearing on his FWPCA claims by limiting the only hearing solely to consideration of Wright's SWDA claims.[91] Wright contends this is evidenced by the Notice of Hearing and Pre-Hearing Order issued by the ALJ.[92] However, the notice and order does not contain such a limitation.[93] Moreover, Wright concedes that the ALJ referenced the FWPCA in his opinion, reflecting that the ALJ was considering Wright's FWPCA claims in the context of the hearing,

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[86] EN.212-13.

[87] EN.212-13.

[88] *See Liteky*, 510 U.S. at 555 ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966))).

[89] EN.209-10.

[90] *See Liteky v. United States*, 510 U.S. at 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." (citing *Grinnell Corp.*, 384 U.S. at 583)).

[91] EN.200-01.

[92] EN.200.

[93] EN.003-005.

and that the ARB discussed Wright's FWPCA claims in some detail in its opinion.[94] Wright has failed to show that the ALJ did not allow him to present his FWPCA claim.

Wright's tenth argument is that the ALJ allegedly allowed Wright to admit evidence only for actions after 2010 while allowing the RRC to admit evidence from before 2010.[95] But Wright has failed to demonstrate that this actually occurred. In the portion of the transcript Wright cites, the ALJ inquired about situations that caused a hostile work environment within the 30 days prior to Wright's complaint.[96] The transcript does not show that the ALJ barred Wright from introducing evidence from prior to 2010.[97]

Wright's eleventh argument is that the ALJ refused to admit several of Wright's exhibits.[98] Rulings on the admission of exhibits generally does not constitute prejudicial bias without some showing that the judge was acting antagonistically towards the party whose exhibit was rejected.[99]

Even considering all of Wright's arguments together, Wright has failed to show that the ALJ exhibited prejudicial bias against Wright. The ALJ did not abuse his discretion in rejecting Wright's motion for recusal.

VI

Lastly, Wright contends that this court must determine which of several differing transcripts is the correct version in order to resolve this appeal.[100] We

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[94] EN.201.
[95] EN.208-09; *see also* EN.438-43.
[96] EN.438-43.
[97] EN.438-43.
[98] Wright's Br. at 32.
[99] *See Liteky v. United States*, 510 U.S. 540, 555 (1994) ("[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion." (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966))).
[100] Wright's Br. at 16, 40 ("[I]t appears that a ruling on which Transcript, is the correct Transcript, is warranted.").

disagree. Wright does not allege which part of the transcript is not in the record before us.[101] Wright was not unfairly prejudiced by the existence of several different transcripts of his hearing before the ALJ, and thus we do not need to resolve which iteration of the transcript was the official version to resolve this appeal.

* * *

For the foregoing reasons, the judgment of the Administrative Review Board is AFFIRMED.

[101] *See generally* Wright's Br.

U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

FREDERICK B. WRIGHT,

COMPLAINANT,

v.

RAILROAD COMMISSION OF TEXAS,

RESPONDENT.

ARB CASE NO. 2019-0011

ALJ CASE NO. 2015-SDW-00001

DATE: MAY 22 2019

Appearances:

For the Complainant:

Frederick B. Wright; *pro se*; Houston, Texas

For the Respondent:

Michael J. DePonte, Esq., and Julie C. Tower, Esq.; *Jackson Lewis, P.C.*; Austin, Texas

Before: William T. Barto, *Chief Administrative Appeals Judge*, James A. Haynes and Daniel T. Gresh, *Administrative Appeals Judges*

FINAL DECISION AND ORDER

PER CURIAM. The Complainant, Frederick Wright, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA), the Federal Water Pollution Control Act (FWPCA), and their implementing regulations.[1] He alleged that the Railroad Commission of Texas, his employer and the Respondent, violated the SDWA and FWPCA whistleblower protection provisions when it retaliated and discriminated against him because he

[1] 42 U.S.C. § 300j-9(i) (1994); 33 U.S.C. § 1367 (1972); 29 C.F.R. Part 24 (2018).

EN.375

raised concerns about requiring oil and gas operators to comply with rules regulating drilling wells to protect sources of underground drinking water.

Following a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Wright's complaint because he found that Wright did not meet his burden of showing that any protected activity motivated the termination of his employment. After Complainant appealed the ALJ's decision to the Administrative Review Board (ARB or Board), the Board vacated the ALJ's conclusion that Complainant had not engaged in protected activity and remanded for further consideration for the ALJ to assess whether Complainant had a reasonable belief that he was furthering the purpose of the Acts when he engaged in activities he alleges were protected.[2]

On remand, the ALJ reconsidered whether Complainant engaged in protected activity and found that "Complainant did not have a reasonable belief that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA" when he engaged in his alleged protected activities. Decision and Order on Remand (D. & O.) at 26-27.[3] Further, the ALJ found that even if Complainant did engage in protected activity, he "failed to establish by a preponderance of the evidence that such activity was a motivating factor in his termination." *Id.* at 27. Finally, the ALJ found that Respondent proved by a preponderance of the evidence that it would have taken the same action against Complainant absent his alleged protected activity. *Id.* We affirm the ALJ's

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[2] *Wright v. R.R. Comm'n of Tex.*, ARB No. 16-068, ALJ No. 2015-SDW-001 (Jan. 12, 2018).

[3] While it is evident that the ALJ undertook the analysis the Board directed on remand, the ALJ did not specifically indicate in his D. & O. on remand whether Complainant lacked a subjective belief that he was raising environmental concerns in his complaints, his complaints were not objectively reasonable, or both. *See Newell v. Airgas, Inc.*, ARB No. 16-007, ALJ No. 2015-STA-006, slip op. at 10 (ARB Jan. 10, 2018) (noting a complainant must demonstrate that s/he had a reasonable belief that the conduct complained of violated the pertinent act or regulations, which requires both a subjective belief and an objective belief); *Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027, ALJ No. 2009-CAA-008, slip op. at 13 (ARB Jan. 31, 2013). And notwithstanding the ALJ's assertion that the Board originally remanded this case for reconsideration under an "expansive definition of protected activity," *see* D. & O. at 3, the Board had merely set forth the definition of protected activity as it exists in law and regulation and directed the ALJ to reconsider that element on remand pursuant to that definition. Nevertheless, in light of our affirmance of the ALJ's finding that Complainant failed to establish causation, any shortcomings in the findings and conclusions made by the ALJ in this regard are harmless.

EN.376

dismissal of Complainant's complaint because substantial evidence supports the ALJ's finding that Complainant failed to prove by a preponderance of the evidence that any protected activity was a motivating factor in Respondent's decision to take adverse action against him.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board authority to review ALJ decisions in cases arising under the SDWA and FWPCA and issue final agency decisions in these matters.[4] The Board will affirm the ALJ's factual findings if supported by substantial evidence.[5] The Board reviews an ALJ's conclusions of law de novo.[6]

DISCUSSION

To prevail on a whistleblower complaint under the Acts, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."[7] If a complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity."[8]

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4 Secretary's Order No. 1-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13072 (Apr. 3, 2019).

5 29 C.F.R. § 24.110(b). And, as the United States Supreme Court has recently observed, "the threshold for such evidentiary sufficiency is not high," amounting to "more than a mere scintilla," and requiring only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Biestek v. Berryhill*, U.S. , 139 S. Ct. 1148, 1155 (2019).

6 *Wolslagel v. City of Kingman, Ariz.*, ARB No. 11-079, ALJ No. 2009-SDW-007, slip op. at 2 (ARB Apr. 10, 2013) (citations omitted).

7 29 C.F.R. § 24.109(b)(2).

8 *Id.*

EN.377

The findings of fact are set forth in the ALJ's D. & O. at pages 4 to 10. The ALJ's further findings and conclusions regarding motivating factor causation are set forth at D. & O. at 23-25.

The ALJ reviewed the evidence of record and noted that Complainant had a documented history of interpersonal conflicts with both staff and operators. D. & O. at 24. Specifically, he found that Complainant had demonstrated an "unwillingness to work with operators . . .", "behavioral problems," "inappropriate conduct," an "inability to work with [a] Respondent employee," "unprofessional conduct," "uncooperative conduct in dealing with operators and colleagues," and that he was "arrogant, insulting, and insolent" in working with other people. *Id.* Similarly, the ALJ found that Respondent fired Complainant because "he refused to follow instructions and created a state of confusion which was indicative of his refusal to work with operators and to make the application process more difficult than necessary." *Id.* at 25. Substantial evidence in the record supports these findings of fact and the ultimate finding as to Respondent's motivation; therefore, we affirm the ALJ's findings.

Wright objects to the ALJ's finding that Complainant was disciplined because he failed to make reasonable efforts "to call" a consultant to inform her about the correct number of centralizers needed for a project, asserting that he was never specifically told to telephone the consultant. We reject this assertion because substantial evidence supports the ALJ's finding that Respondent expected Complainant to let the operator/consultant know in some manner what was needed for approval and Respondent believed that he had failed to do so.[9] Specifically, Charles Teague emailed other members of Respondent's management team that Complainant "placed on the operator the unnecessary task of filling out another form and failed to detail what specific information is needed for approval." RX 25 at 1. Respondent expected Complainant to let the operator know what was required by sending either a fax or email, making a call, etc., in some manner so that she could get approval for her project.[10]

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[9] We note that it is the role of neither the ALJ nor the Board to act as a super-personnel "department that reexamines an entity's business decisions." *Jones v. U.S. Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 2001-ERA-021, slip op. at 17 (ARB Apr. 30, 2004) (citations omitted).

[10] Complainant also asserts the ALJ erred in rejecting certain exhibits Complainant proffered and in admitting certain others that Respondent proffered. In regard to the various exhibits at issue, we reject Complainant's allegations of error and conclude that the ALJ did not abuse his discretion with respect to any of his evidentiary determinations. *See*
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CONCLUSION

Accordingly, we **AFFIRM** the ALJ's finding that Complainant failed to prove that protected activity caused or was a motivating factor in the adverse action alleged in the complaint, an essential element of his case. Therefore, this complaint is **DENIED**.

SO ORDERED.

Wright, ARB No. 16-068, slip op. at 10 n.49 (stating that an "ALJ's evidentiary rulings are reviewed under an abuse of discretion standard") (citing *Shactman v. Helicopters, Inc.*, ARB No. 11-049, ALJ No. 2010-AIR-004, slip op. at 3 (ARB Jan. 25, 2013)).
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U.S. Department of Labor

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Issue Date: 15 November 2018

CASE NO.: 2015-SDW-1

In the Matter of:

FREDERICK B. WRIGHT
Complainant

v.

RAILROAD COMMMISSION OF TEXAS
Respondent

APPEARANCES:

FREDERICK B. WRIGHT, *pro se*
Complainant

MICHAEL J. DEPONTE, ESQ.
JULIE C. TOWER, ESQ.
On Behalf of the Respondent

BEFORE: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding arises under the employee protective provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1367, and the regulations thereunder at 29 C.F.R. Part 24 brought by Frederick Wright (Complainant) against the Railroad Commission of Texas (Respondent).

I. PROCEDURAL BACKGROUND

On July 19, 2013, Complainant filed this complaint based upon his assertion that Respondent terminated him on June 20, 2013 due to his protected activities under these statutes when he raised concerns about requiring oil and gas operators to comply with rules regulating

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drilling wells to protect sources of underground drinking water. (RX-35).[1] In addition to his termination, Complainant also alleged Respondent created a hostile work environment by allowing his immediate supervisors Director Teague and Assistant Director Fisher to (1) remove him on December 1, 2012 from approval of well plugging procedures based upon an complaint filed by operator Monty L. McCarver; (2) assign Teague and Fisher to manage the Houston district with only a rudimentary understanding of the rules, regulations, and engineering drilling principles resulting in a failure to require operators to comply with the rules (plugging procedures, preparation of completion reports); (3) limit his access to information necessary to perform his duties; (4) approve two completion reports subject to deficiencies so that the reports could be evaluated by compliance and engineering; and (5) require him (a specialist VI) to report to Terry Papek (a specialist IV). (CX-31-48).

On April 9, 2015, OSHA issued its findings stating it found no cause to believe that Respondent violated either the SDWA or FWPCA. On May 6, 2015, Complainant timely appealed OSHA's finding. Pursuant to Complainant's appeal, a hearing was held before the undersigned in Houston, Texas on December 9-10, 2015. Thereafter, both parties timely submitted post-hearing briefs.

On May 19, 2016, the undersigned dismissed Complainant's complaint and found that he did not meet his burden of showing that any protected activity motivated the termination of his employment. Complainant timely appealed this decision.

On January 12, 2018, the Administrative Review Board (hereinafter "ARB" or "Board") issued a Decision and Order remanding this matter for further proceeding consistent with its opinion. Specifically, the Board vacated my May 2016 Decision and Order finding Complainant did not engage in protected activity because he did not explicitly reference the SDWA or FWPCA. Since I did not assess whether Complainant had a reasonable belief when he engaged in the activities he alleges were protected, the ARB remanded this matter for further fact finding and consideration. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 6.

On remand, the Board directed that the undersigned conduct the proper legal analysis to determine whether Complainant engaged, or reasonably believed he engaged, in protected activity. In particular, the Board instructed the undersigned consider whether Complainant's email to Teague and his allegations within his hostile work environment complaint are protected activities and if Complainant reasonably believed he was raising environmental or public health and safety concerns when he acted in each instance. As such, the Board directed the undersigned make findings of fact and determinations about whether Complainant had a reasonable belief in each instance. The ARB also left the determination regarding the issues of causation and affirmative defense to the undersigned on remand. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 8-11.

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[1] References to the record are as follows: Transcript: Tr. __; Complainant's Exhibits (listed by bates numbers): CX-__; Respondent's exhibits: RX-__; Stipulated facts: STF.

Further, the Board affirmed my finding that there was an adverse action and reversed my decision regarding the issues of causation and the affirmative defense since they must be reanalyzed in light of the expansive definition of protected activity. Finally, the Board instructed the undersigned to clarify with specificity which exhibits were admitted and which exhibits were rejected at the admitted. Exhibits CX 56-60 were also to be admitted into the record. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 12.

II. ADMITTED EXHIBITS

Pursuant to the Board's instructions, I hereby **ADMIT** CX-56-60. Further, in determining whether Complainant reasonably believed his actions constituted environmental hazards, it is helpful to consider his work performance prior to termination to determine objectively what he actually believed or should have believed as an oil and gas engineer. To do this, the Board instructed the undersigned to first clarify with specificity which exhibits were admitted or rejected. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 12.

Regarding the admitted exhibits, I hereby **ADMIT**, to the extent they are not already admitted, Complainant's bates-marked exhibits labeled CX-24-25, 31-48, 52-66, 68-98, 103-161, 179-211, and 221-223.[2] Also **ADMITTED** are Respondent's exhibits RX-1-12, 14, 16-21, 24-32, 35.

III. ISSUES PRESENTED ON REMAND

Based the Board's remand and the parties' arguments, I find the following issues need to be addressed:

1. Whether Complainant engaged, or reasonably believed he engaged, in protected activity under the Acts;

2. Whether any alleged protected activity caused, or was a motivating factor in, Complainant's termination; and

3. Whether Respondent demonstrated by a preponderance of the evidence that it would have terminated Complainant in the absence of any protected activity.

[2] I **REJECT** the remainder of Complainant's exhibits not listed above as irrelevant to the determination of the issues presented to the undersigned for resolution in this matter.

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IV. STATEMENT OF THE CASE

A. Factual Background[3]

Respondent is a Texas state agency responsible for the regulation of the oil and gas industry in the state of Texas, including administration and enforcement of the underground injection control program under the federal Safe Drinking Water Act for class 2 injection wells associated with oil and gas exploration and production activities as well as brine mining activities. Respondent also serves as the certifying agency for federal permits under the Federal Water Pollution Control Act (FWPC), for projects associated with oil and gas exploration and production activities. (Tr. 211-213; 40 CFR §147.2201).

Respondent's former District 3 Director, Guy Grossman, hired Complainant on October 1, 2007, as an engineer specialist II for its Houston District 3 Office, Field Operations Section, Oil and Gas Division. (CX-52; STF-1, 3). Prior to his employment with Respondent, Complainant worked as a petroleum engineer for the U.S. Bureau of Land Management, as a car sales manager, and as a project engineer for Gulf Oil, Union Texas Petroleum, and Exxon. (CX-196-201). As an engineer for Respondent, Wright's duties included conducting surveys, making inspections, investigating complaints, and collecting and analyzing engineering data. (RX-1). Complainant was assigned as a technical staff person to work with the regulated industry to secure compliance by oil and gas operators with the rules and statutes assigned to Respondent for enforcement. (RX-31; Tr. 93-95).

Regarding the alternate surface casing program which was the primary activity involved in this proceeding, Wright had two responsibilities: (1) to insure that the operator was going to circulate cement to the surface and (2) to determine the number of centralizers to be used in this process. (Tr. 219-220, 230, 231-233).

As of June 20, 2013, Wright had received two promotions to engineer VI with his last bonus effective December 1, 2012. (RX-2; 27, STF-2). Respondent terminated Wright on June 20, 2013, at which time he was under the supervision of District Director Charles Teague and assistant director Peter Fisher, who both reported to Deputy Director Raymond Fernandez.[4]

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[3] The factual background consists of not only the parties' stipulations but also the undersigned's factual determination of the record consisting of admitted exhibits and credibility determinations. In general, I was not impressed with Complainant's denial of his mistreatment of operators and refusal to work with staff personnel. Management was very lenient with Complainant and tried to encourage him to work with, as opposed to working against, independent contractors and fellow employees.

[4] Raymond Fernandez retired from Respondent on August 31, 2014. Prior to his retirement, Fernandez served as Respondent's Deputy Director of Field Operations for its Oil and Gas Division for three years. In that position, he managed nine district offices, including Houston's District 3 Office. As Deputy Director, he had overall supervision for 250 employees. Before his promotion to Deputy Director, he held a numerous other positions with Respondent. As a professional petroleum engineer, he worked with oil and gas operators in dealing with and resolving regulatory issues. (Tr. 812-92).

At his first employee evaluation (EPE) on April 29, 2008, supervisor Gil Bujano, Director of Respondent's Oil and Gas Division, and Guy Grossman rated Wright as meeting the requirements of his position. (RX-3). On his next two evaluations on October 21, 2008, and October 28, 2009, Wright received similar evaluations. (RX-4-5).

At the next evaluation (EPE) on October 28, 2010, Wright maintained an overall rating of meeting the requirements of his position on average but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived Complainant was unwilling to work out amenable solutions at times. (RX-6). In reply, Wright stated:

> I am taking this comments option to file a complaint that the District Director and the Assistant District Director are using their official capacities to harass me, with the intent to create a hostile work environment and adversely impact my employment opportunities. The baseless comments in this EPE about my lack of professionalism, me engaging in debates with operators, as well as the implication that unbiased individuals are hesitant to approach me, is part of the manifestation of this harassment.

(RX-6, p. 7).

In response, Guy Grossman and Raymond Fernandez stated there was no attempt to harass or create a hostile work environment for Wright. Rather, they were suggesting ways Wright could improve his performance for the betterment of Respondent. On appeal, HR Director Mark Bogan reviewed Wright's harassment allegations and denied any evidence of harassment. He also indicated that Houston's District Office management comments were suggestions for work improvement. (RX-7-8).

In support of its evaluation of Wright, Respondent produced an e-mail from Douglas Storey of Fidelity Exploration & Production sent to Grossman dated June 15, 2010, in which Storey complained of Wright's arrogant opinion of himself. According to Storey, Wright acted as though he was the only individual who knew anything about engineering or regulatory issues and accused Storey of not properly calculating the correct number of centralizers. Complainant also demanded Storey write a letter of apology indicative of a lack of professionalism. (RX-17). Storey also sent another e-mail dated April 16, 2013 indicating other instances of Wright arbitrarily holding up completion reports. (RX-19).

On his next employee evaluation (EPE) on October 28, 2011, Wright received an overall average evaluation with suggestions of taking more field trips and working for better relations with all operators to make "every effort to assist operators in keeping wells on production but also complying with the rules and regulations" and viewing violations from practical standpoint "in addition to the straight rules and regulations." (RX-9).

On the next employee evaluation (EPE) of November 14, 2012, Respondent evaluated Wright as average but still needing to improvement relations with operators with the goal of

providing excellent customer service and making the path to compliance quick and uncomplicated while working on better relations with staff as well. (RX-16). In support of its suggested improvements, Respondent cited instances of Wright requiring analyst Marsha Vogel to report string depths on a completion package when she had never been required to do so in 20 years of regulatory reporting. (RX-13). Wright denied causing any delays in processing completion reports and informed Fernandez his processing of completion reports "...significantly exceeds the rest of the District." (CX-31).

On September 6, 2012, Wright filed a complaint with Gil Bujano, Director of Respondent's Oil and Gas Division, concerning the temporary assignment of Terry Papak to run the District 3 office in the absence of Teague and Fisher. Wright claimed former District Director Ron Smelley initiated this practice of appointing Papak, who was only specialist IV, as opposed to Complainant, who was a specialist VI, in order to demean him. According to Wright, he contacted Mark Bogan about this appointment and was advised it was only a temporary appointment and that he should not be concerned about it. Wright disregarded Bogan's advice and when Fisher later made a similar appointment, Wright again filed an informal complaint with Bujano. (CX-32).

Rather than working with operators to resolve compliance problems, Wright continued to play "hard ball" with operators by refusing to help them resolve problems. For example, operator Paul Hendershott met with Wright in an attempt to resolve potential drilling problems. Rather than helping Hendershott, Wright laughed and told him that he could come up with more violations. Fellow employee Mark Motal overheard the exchange and apologized for Complainant's conduct, after which Hendershott stated he had never been so humiliated, talked down to, and made fun of in his entire life. The following day, Hendershott spoke with District Director Charlie Teague, who resolved Hendershott's problems and answered his questions. (RX-12).

Besides the Hendershott incident, Respondent produced an e-mail from fellow employee Michael Sims to Charlie Teague dated March 21, 2013, wherein Wright, rather than helping Sims resolve an issue of the burial of oil based mud, continued to argue with Sims, which resulted in Sims having to seek assistance from Wright's supervisor, Charlie Teague, and Peter Fisher, Deputy District Director, because Wright refused to listen to anything Sims had to say. (RX-14).

As a further example of Wright's unwillingness to work with operators and a lack of professionalism, Respondent provided an e-mail from Carla Martin of Enervest to Fernandez dated April 12, 2013, wherein she reported submitting a new form approved by Teague for use in a SWR 13(b)(2) request (alternative surface casing exemption request) for Strake #1H well in Grimes County only to be told by Wright that she had to use an old form to get her request approved. In addition, she complained that Wright had a problem working with women and cited her experience of being interrupted by Wright when she called to explain the purpose of her call. (RX-18).

Wright's refusal to work with operators was exemplified by his dealing with Douglas Storey of Fidelity Exploration & Production Co. which was also set forth in an e-mail dated

April 16, 2013. The email states that Wright rejected Storey's revisions of a completion package tracking no. 71248 without letting Respondent's proration and engineering personnel determine whether they were going to give Storey the necessary allowance. Upon receiving Wright's response, Storey e-mailed Fernandez indicating that everything he submitted to Wright was rejected even for things Storey was admittedly correct on. Further, Storey told Fernandez that if necessary he could provide three years of issues with Wright. (RX-19).

B. Events Leading to Complainant's Discharge

In support of his hostile work complaint mentioned above, Wright stated District Director Teague and Assistant Director Fisher possessed only a rudimentary understanding of the rules, regulations, and engineering principles associated with a Director's office. Complainant alleged both had ignored operator compliance with rules such that new hires to the technical staff had no opportunity to develop understanding of the issues. He also alleged that Teague brought in several clerical staff members to train other clerical staff in Region 3 which resulted in the improper processing of completion reports as seen in the plugging back of a well without setting an effective isolating plug in May 2012.

On July 24, 2012, Wright stated Teague approved several reports of down hole production comingling without a SWR I0 exception. In addition, on September 3, 2012, Teague received a call from an operator who reported that cement was not circulating to the surface during the primary cementing of the surface casing. Teague approved running a one inch string down the annulus to 500 feet and from there cementing the annulus to the surface allowing two fresh water reservoirs that were supposed to be isolated from each other to communicate with each other on the annulus.

Teague denied Wright's allegations that he was willing to allow completion reports without bringing them in compliance with the rules. Rather, it was Teague's position that Commission employees should help operators by providing them with information needed to comply. Teague was upset with Wright's failure to come forth with needed information and admitted temporarily appointing Papak because he head practical knowledge and a fair amount of humility. (RX-22, pp 1-4). Regarding the appointment of Aton Motal and Fisher to deal with Monty Mc Carver of Nabors Completion, Teague did so to provide McCarver with a fair and productive conversation with the Commission as opposed to dealing with Wright, who devised very different and costly suggestions when a variance arose.

Wright then cited various instances involving a lack of understanding and disregard of the rules. These allegations included a review of completion reports by Nancy Cook, Pete Fisher, and Aton Motel and their improper approval of remedial squeezing of surface casings and improper writing up the entire plugging procedure without requiring the operator to properly isolate the base of usable quality water. He also cited their refusal to discuss staff issues with Teague and their limitations on his access to information from Austin. (RX-22, pp. 9-12).

Operators continued to file complaints against Complainant regarding his inability or unwillingness to provide practical solutions to drilling problems. In December 2012, Monty L. McCarver, operations manager for Nabors Completion & Production Services Company, complained to Teague that every time they called to get a variance in plugging operations, Complainant came up with costly and impractical methods. In turn, Teague assigned other personnel, including himself and Fisher, to address these problems while removing Complainant. In response, Complainant filed a formal complaint with Gil Bujano, contending his removal was in retaliation for a previous complaint he filed against Teague and Fisher in September 2012 and as a means to demean him and to impair his ability to have operators comply with the rules. (CX-32-34).

On April 17, 2013, Fernandez informed Teague that Complainant had filed a complaint alleging that District 3 management had created a hostile work environment due to their lack of understanding of the rules, regulations, and engineering principles associated with the responsibilities of a district office. In support of his complaint, Complainant cited instances wherein Teague approved a completion packet involving the use of partial plugs in inappropriate situations and wherein Fisher, in consultation with Anton Motal, improperly approved the remedial squeezing of a surface casing of a new well followed by an improper remedial cementing of another surface casing. Wright also asserted Teague had improperly limited his access to information and made other assertions which Teague denied. (CX-37-47). Regarding Fisher, Wright alleged he came to District 3 without a proper understanding or regard for the rules and improperly turned over responsibilities for reviewing completion reports to clericals, which Fisher also denied. (CX-56-59).

On May 17, 2013, Fernandez and Bill Miertschin from Respondent's Austin office travelled to the Houston District Office to conduct a Form P-112 "Performance Counseling" session of Wright. Teague and Fisher attended this counselling session. A summary of the counseling in RX-20 stated the following:

> This counseling session is to remind you of past conversations we have had with you regarding your performance, along with suggested improvement that has been addressed in your earlier EPE's. All issues that you may have regarding your work assignments should first be brought to the attention of your District Director before you contact the Deputy Director of Field Operations or the Director of the Oil and Gas Division. Exceptions may be limited to those issues outlined in the Equal Employment Opportunity section of the Employee Handbook. The use of the "chain of command" has been brought to your attention in the past and you are reminded that you are expected to follow these instructions.
>
> Unsolicited complaints continue to be received regarding your relationship with operators. This continues to occur despite our efforts to help you with your work relationships. Operators report that you are difficult to work with, you exhibit rude behavior, and you are condescending in your dealings with them, and that you

> have resorted to "name calling." Operators complain that you are unreasonable and do not attempt to offer solutions to bring them into compliance with Commission rules. The Commission expects you to behave in a professional manner with Commission staff and industry representatives.
>
> Your work assignment does not include any management duties. Yet, you continue to insert yourself into managing co-workers when that is clearly not your assignment. This behavior disrupts the workplace. You are not to intervene in the management of the district office and its staff. If you believe there is a need for your involvement, you must contact the District Director or Assistant District Director.
>
> A great deal of time has been consumed by management at the district office and in Austin in dealing with your issues. Improvement in your behavior is required. Failure to do so may result in further disciplinary action up to and including termination of your employment with this agency.

(RX-20).

In response, Wright appealed by asking for specific incidents supporting the above evaluation, claiming he had not been provided with such information in the past. (RX-20, p. 2). On May 23, 2013, Gil Bujano replied, indicating Wright's response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination. (RX-24).

On May 31, 2013, Kathryn Jaroszewicz (Jaro), a consultant with Miller Consulting Inc., submitted an application with Complainant for an alternate surface casing program and utilized a new form approved by Teague in January 2013 (which did not require the number of centralizers to be listed for the BUQW on the second string when a short casing is run and did not address the issue of whether the bottom 20% of the surface casing was going to be cemented with critical cement). Complainant told the consultant that she needed to use an older form and list the correct number of centralizers.[5] Jaro stated she would supply the requested information but was confused as to the correct form, new or old, to be used. (STF-6-8). When Teague learned of Wright's treatment of Jaro, he informed her she did not have to fill out another form. Rather, she could e-mail or phone Wright and give him the number of centralizers needed to fulfill the requirements of Rule 13 whereupon Complainant could alter the form she submitted, initial the alteration, and approve it. (RX-25).

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[5] In January of 2013, Teague approved use of an Alternate Surface Casing Program form (January ASCF) in District 3. In a February 5, 2013 e-mail, Teague requested comments from District 3 technical staff on changing the January ASCF form to a form he had used in other districts (February ASCF). On February 6, 2013, Complainant advised Teague he would have to get additional information from operators to review their alternate surface requests if Teague adopted the February ASCF form, which he did. (STF3-5).

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On June 4, 2013, Teague e-mailed Wright and told him the new form contained enough information to approve Jaro's request regarding the issue of the sufficiency of cement. He informed Wright that the new form addressed by the question of whether the operator planned on circulating cement to the surface on all casing strings protecting usable-quality water. Teague then asked Wright if he had approved her request as Teague had informed her. (RX-23).

The following day, Wright e-mailed Teague, telling him that the new form did not address all issues raised by SWR 13(b)(2)(F), unless Teague was re-interpreting SWR 13(b)(2)(F) to eliminate the requirement that centralizers be run from BUQW to the surface. He also stated the new form did not ask for the centralizers that had been required from the BUQW on the second string when a short surface casing was run. Further, SWR 13 requires the bottom 20% of the surface casing be cemented with critical cement which the new form did not address or require the operator to provide the data to verify. Wright then stated that the RCC's failure to review the data that operators had been submitting for the past five years amounted to "gross negligence" since operators made errors in the past that did not comply with the regulations intended to protect fresh water.

Wright then stated:

> If you are informing me that it isn't my job to conduct the RCC's due diligence review of these applications and/or that you're revising these criteria, I will proceed accordingly. Your e-mail below appears to indicate your position on cement; however I will hold the application for your interpretation of the centralizers issue or the operator's response.

(RX-23, p.1).

On June 6, 2013, Teague, in an e-mail to Bogan and Fernandez, recommended further disciplinary action of Wright's due to his refusal to comply with the directives of his counseling session. (RX-25). On June 10, 2013, Jaro submitted the correct number of centralizers for the alternate surface casing request for the well named "Ol Army Unit #1," which was the well Jaro had originally requested an alternate surface casing form. On June 10, 2013, Wright approved Jaro's request. (STF-8-14).

On June 20, 2013, Respondent terminated Wright due to his refusal to comply with Respondent's directives to work with management and staff and to assist operators in resolving compliance problems. This included the most recent issue of assisting an operator on how to resolve a casing exception request. Instead of resolving this issue as instructed, Wright engaged Teague in an e-mail debate and turned a simple resolution into a complex process by accusing Teague of incorrectly reinterpreting rules, interfering with his ability to perform his duties, and characterizing Teague's actions as "gross negligence." In so acting, Wright ignored prior warnings that such action could lead to his termination.

C. Complainant's Testimony

Wright testified that he used the Alternate Surface Casing Program Form (ASCF) approved in January 2013 rather than the ASCF approved by Teague in February 2013, because the January form provided more information. Further, he interpreted Fernandez's comments that his use of the January 2013 form was not required by his job to be the primary reason for his termination even though he allegedly insisted on using the January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act. (Tr. 518-519).

Regarding his communication on May 31, 2013 with Jaro, Wright advised her that the use of seven centralizers was insufficient and that she should fill out the January ASCF form with the correct number of centralizers. (CX-70). Previously, she had used the February ASCF form. Wright testified that the January ASCF form allowed the reviewer to evaluate more detailed information regarding cement volume, the placement of centralizers on the surface, the second string of casing, and the strength of the casing. (Tr. 522).

Twenty minutes later, Jaro responded to Wright's e-mail saying she would update the information concerning the centralizers when she received it from the operator. Further, she requested information as to which ASCF form to use. About 5 minutes later, Marie Blanco informed Peter Fisher of the correspondence and within seven minutes, Teague sent an e-mail to Jaro telling her it is not necessary to submit another form but simply to advise Wright of the number of centralizers to fulfill the requirement of Rule 13. On June 3, 2013, Wright e-mailed Teague, with copies to Fernandez and Fisher, stating it appeared that Teague was telling him that he could no longer request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules. (CX-168-170; Tr. 524-526). On June 3 and June 7, 2013, Jaro e-mailed the operator indicating "They (Complainant) would not indicate the number of centralizers needed to proceed with the application" to which the operator indicated on June 7, 2013 that he would run at least 20. On June 10, 2013, Jaro relayed with this information to Wright, and he approved the application. (CX-186-192, Tr. 531-532).

Wright testified that his use of the January form, which requested additional information, constituted protected activity. Further, Wright was told by Teague that the February form contained sufficient information to approve operators' request. However, Complainant disagreed with Teague, because the February form did not ask for the number of centralizers from the base of usable quality water in the second string. Teague accused Wright of doing a detailed analysis of alternate surface request, which was not his job, and told Complainant he could calculate the number of required centralizers from the February form. (Tr. 544-549). Wright complained of being subject to a hostile work atmosphere in February 2013 when he was assigned to bring wells into compliance. According to Wright, Teague stated operators accused Wright of being unreasonable and not offering solutions. As a result, Teague ordered him to approve completion reports and refer them to Austin for resolution. (Tr. 591-596).

On cross examination, Wright denied being told by his supervisors that he needed to improve his relationships with co-workers and industry operators by not only pointing out violations but suggesting alternative ways to achieve compliances. (RX- 9-11, 16; Tr. 634-641). Yet, in the counselling session, he admitted being reminded of his duty to improve relations or be terminated for failing to do so. (Tr. 648-652).

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Regarding the alternate surface casing request of Jaro for "Ol Army Unit #1" (CX-146, RX-25) which she submitted on May 31, 2013 using the February form, Wright knew the number of centralizers (7) was more than enough for the surface casing set at 825 feet but not enough for the base of usable quality water set at 2,025 feet which had to be protected. Rather than get on the phone and ask additional questions to determine the proper number and placement of the centralizers, Wright sent Jaro the January form to complete, although in doing so he was going beyond what his duties required. (Tr. 679-681).

D. Testimony of Raymond Fernandez, Charles Teague, Peter Fisher, & Mark Bogan

Fernandez testified that he and Gil Bujano, Division Director, recommended to Milton Rister, Executive Director, that Wright be terminated for unprofessional and unacceptable behavior with industry operators and staff, including incidents reported directly to them by operators and outside experts who claimed that Wright had been rude to them, called them "stupid" and "liars," and refused to work with them in resolving problems. (Tr. 106-108, 126-131). As a result of Wright's misconduct, Respondent fell far behind in its work due to an undersized staff and a booming industry as well as due to the delays caused by dealing with the complaints generated by Wright. (Tr. 134-135).

Regarding the May 31, 2013 alternate surface casing request of Jaro, Fernandez found fault with the manner in which Wright handled the request and how Wright dealt with the deficiencies in this request. Instead of calling the operator and resolving the deficiencies over the phone, Wright chose not to do as Teague had instructed him to do in similar situations and complete the process in a few simple steps. Rather, Wright told Jaro to fill out the older and more detailed form as opposed to the less detail form approved in February. Teague told Jaro it was not necessary to fill out the older and more detailed January form but simply to inform Wright of the number of centralizers to be used. Then, Wright could initial the changes on the February form and submit it for approval (assuming it correctly identified the number of centralizers). It was not necessary to provide the additional information relating to cement volume as long as the operator indicated that it was going to circulate cement to the surface. (Tr. 164-166). In essence, Fernandez stated it was not Wright's duty to redesign the operator's casing program but rather to determine if the operator was going to circulate cement back to the surface and the number of centralizers to be used. (Tr. 181-187).

In addition, Fernandez also testified that Wright was terminated not for insisting on completion of the older January alternative casing form but for the unprofessional manner in which he handled the May 31, 2013 alternate surface casing request of Jaro which could have been determined by use of the February alternative surface form, initializing the correct number on the February form she had already used, and approving it as corrected. Instead, he instructed Jaro to fill out the January form, which caused unnecessary confusion and delay. (Tr. 216-221, 225-227, 231-238, 287, 288).[6] In so doing, Complainant admittedly went outside his instructions and demands of his office. (Tr. 271-281).[7]

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[6]A copy of the new and more streamlined application for alternate surface casing program form as authorized by District Director Teague and used by Ms. Jaroszewicz appears at RX-21. A copy of the older form that Complainant insisted that Ms. Jaroszewicz fill out in addition to the newer form appears as RX-23, pp. 4-5. Respondent admitted the older form required more detailed information.

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In deciding to terminate Complainant, Fernandez took into consideration Teague's June 6, 2013 e-mail in which Teague stated that Complainant refused to correct the errors on the February alternative casing form, initial the changes, and sign it. Complainant failed to inform Jaro of what was needed for approval. Wright's behavior was not the correct way to handle the problem. Instead, Complainant characterized Teague's efforts as incompetent and a disregard for rules by creating a hostile work environment. In his e-mail, Teague stated that Complainant's conduct was not professional and a manifestation of being difficult to work with, about which he had been warned during his counselling session on May 17, 2012. (CX-67; RX-20, 26; Tr. 289).[8]

Teague, who retired from Respondent on December 31, 2014, and was District Director for District 3 from May 1, 2012 to December 31, 2014, testified that he recommended additional disciplinary action (not necessarily termination) due to Complainant's refusal to follow the directives of his counselling session of May 21, 2013. Specifically, Complainant was directed to behave in a professional manner with Commission staff and industry representatives and to cease being arrogant, insolent, and insulting to Commission managers and operators. He was also directed with avoiding unnecessary obstacles to getting paper work done or approval, holding up approval of requests form minor issues, issuing a vague request for information, telling individuals to refile applications when the simple solution would have been to get on phone, and advising operators of deficiencies. (Tr. 338-339).[9] Teague cited instances of Wright's

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[7] Fernandez testified about other instances of unprofessional conduct by Wright in April 2012 when Fernandez received unsolicited complainants from regulatory analysts alleging Wright was rude, called one stupid, and was impossible to work with. (Tr. 106, 131, 248). Fernandez also received other complaints about Wright being unable to work with by a former employee who had retired and was working for an outside contractor and from another contractor accusing Wright of calling him a liar. (Tr. 107-108, 247, 313-314). Fernandez cited another instance of Complainant not getting along with fellow employee, Terry Papak, when he complained about an instance when Papak was appointed to supervise the Houston office for several days. (Tr. 311-313). Former employee Doug Storey complained to Fernandez about Complainant unduly delaying the processing of his applications after leaving Respondent and going to work for an outside contractor. (Tr. 315-316).

[8] RX-26 sets forth Fernandez's reasons for terminating Complainant, which amounted to Complainant's unacceptable behavior with Commission staff and industry personnel who had previously complained about Complainant's refusal to work with them in resolving regulatory issues as exemplified by his treatment of Ms. Jaroszewicz's May 31, 2013 surface application request. Instead of following Fernandez's admonition to improve his working relationship with staff and outside contractors as directed in the May 21, 2013, counselling session, Wright ignored this advice knowing such conduct could lead to his termination. Fernandez summarized his position in a subsequent affidavit to DOL. (RX-33). Complainant also ignored the May 31, 2013 instruction of Gil Bujano, Director of Respondent's, Oil and Gas Division to improve his conduct or be terminated. (RX-24).

[9] After the counselling session of May 23, 2013, Complainant appealed what he had been told to Gil Bujano, Director of the Oil and Gas Division, who concluded Complainant was continuing to reject the guidance of his supervisors. In turn, he advised Complainant that continued rejection could result in his termination. (RX-24). Complainant's subsequent treatment of Ms. Jaroszewicz on May 31, 2013 led to his termination on June 21, 2013. (RX-26-27).

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misconduct wherein Wright made compliance unnecessarily difficult and unpleasant, especially the May 31, 2013 request by Jaro. (RX-34; Tr. 347-367, 369-378). The only thing missing from Jaro's application was the correct number of centralizers, which if not performed as answered on the new form, her application would not be approved and no drilling commenced.(Tr. 180-189, 218, 219).

It was not Wright's job to redesign casing problems but to work with operators using the newer application forms. If operators did not properly case and cement the well, then Respondent would not approve the completion report and no production would be allowed. (Tr. 225-226, 230-233). Teague testified that Wright, rather than accepting his directive, accused him and Respondent of gross negligence and suggested it was not his job to diligently review alternative surface casing requests. (RX-25, p. 2; Tr. 445- 450). Teague then cited Complainant's inappropriate treatment of former employee Doug Storey by demanding an apology for not allegedly calculating the correct number of centralizers, his refusal to work with Michael Simms on a mud pit issue in March 2013, and his humiliation of operator Hendershott, who asked for his help in resolving compliance issues only to be met with threats of finding additional violations in April 2013. (RX-12, 14; Tr. 469-477).[10]

Fisher, currently District Director for District 3 since August 17, 2015 and formerly Assistant Director for District 3, confirmed the occurrence of the Terry Papek and Hendershott incidents. (RX-11; Tr. 698-700). Fisher also testified that Complainant mishandled Jaro's May 31, 2013 alternate surface request and could have calculated the number of centralizers to be run, informed her of that number, and then approve that request as modified without having her complete the older form. Instead, Complainant turned a simple request into a more complex proceeding in disregard of Respondent's policy of streamlining the approval process while protecting ground water. (Tr. 704-709).

Bogan, the Human Resources Director for Respondent, testified that in response to internal complaints Wright filed against Teague and Fisher for creating a hostile work environment, he learned that Wright had problems with other co-workers and operators such that operators went out of their way to avoid contact with Wright because they found him difficult to work with. (RX-7-8; Tr. 760-762). Bogan testified Complainant was terminated for not following Respondent's procedures. (Tr. 752-753). Further, when terminated, Wright did not claim he was being retaliated against for engaging in protected activity in violation of the Federal Water Pollution Act or the Safe Drinking Water Act. More importantly, Respondent did not terminate Complainant for engaging in such activities. (Tr. 754-755).

V. THE PARTIES' POSITIONS

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[10] Storey cited other examples of Complainant's lack of professionalism. On June 15, 2010, Complainant arrogantly accused Storey of not correctly calculating the correct number of centralizers and demanded a letter apologizing and stated it would never happen again. (RX-17). On April 16, 2013, Storey informed Fernandez of Complainant again unreasonably demanding a letter of apology from Storey for allegedly miscalculating the number of centralizers and holding up completion reports for punitive reasons. (RX-19).

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A. Complainant

On remand, Complainant questions which exhibits and transcripts can be referenced as evidence. In regards to whether he engaged in protected activity under the Acts, Complainant offered several instances where he sought to protect usable quality water, such as ensuring compliance with pollution prevention, reviewing request for exceptions to SWR 13, and providing Jaro with a January ASCF form requiring the submission of all requested information. In particular, Complainant asserts the information requested on the January ASCF form would enable him to make a more accurate evaluation of the cement design for wells applying for alternate surface casing exceptions and to identify design oversights that could not be identified with the information requested on the February ASCF form. Further, Complainant argues the January ASCF form allows for a more accurate evaluation of the proposed cementing program and that the Acts prohibit knowingly rendering inaccurate monitoring devices or methods. (Comp. Br., pp. 1, 7-11).

Complainant also contends Teague's switch to the February ASCF form was meant to eliminate his collection of the more detailed information requested in the January form and to avoid Complainant creating any problems in approval. Moreover, Complainant's termination letter specifically addressed his use of the January ASCF form to justify his termination of employment with Respondent, despite the testimony of both Teague and Fernandez wherein they confirm the January form provides a more accurate evaluation of an operator's proposed casing design modification. (Comp. Br., pp. 12-14).

In addition, Complainant sent an email to Teague on June 5, 2013 wherein he pointed out technical inaccuracies that the February ASCF form introduced into the SWR 13 approval process. Complainant's alleges Teague's testimony in regards to this email makes it clear that he was aware of his complaints about the environmental issues of protecting fresh water. Instead of responding to Complainant's concerns, Teague submitted this email to Fernandez and recommended further disciplinary action against Complainant. (Comp. Br., pp. 14-20).

B. Respondent

On the other hand, Respondent argues Complainant failed to present evidence that he reasonably believed that the practices complained of could result in violations of the SDWA or FWPCA. Specifically, Respondent contends Complainant's hostile work environments complaint does not amount to protected activity since it merely amounts to a list of criticisms of his supervisors' performance and perceived professional slights that fail to demonstrate a reasonable belief of possible water contamination. In addition, Complainant failed to show that his decision to use the January ASCF form amounts to protected activity. Further, Respondent argues Complainant's June 2013 email to Teague does not constitute protected activity as it fails to demonstrate a reasonable belief that Respondent was in violation of the Acts. (Resp. Br., pp. 11-20).

Even if Complainant engaged in protected activity, Respondent asserts Complainant cannot establish a causal connection between his alleged protected activity and any adverse employment action. Rather, Complainant was terminated due to his uncooperative conduct in

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dealing with operators and colleagues. Further, Respondent argues Complainant's termination would have occurred in the absence of any protected activity. (Resp. Br., pp. 20-25).

VI. DISCUSSION

A. *Prima Facie* Elements of Safe Drink Water Act (SDWA) and Federal Water Pollution Control Act (FWPCA) Violations

The purpose of the SDWA "is to assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. REP. 93-1185, 1974 U.S.C.C.A.N. 6454, 1974 WL 11641, 6454 P.L. 93-523; *see also Nat. Res. Def. Council, Inc. v. E.P.A.*, 812 F.2d 721, 723 (D.C. Cir. 1987). In addition to "establishing overall minimum drinking water protection standards for the nation," the statute provides "for delegation of specific regulation and enforcement to states," including state primary enforcement of underground injection processes to protect sources of drinking water. *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Mar. 30, 2000) (citing 42 U.S.C. § 300h). The Congressional declaration of goals and policy for the FWPCA provides that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.

Both the SDWA and the FWPCA contain anti-retaliation provisions prohibiting employers from discriminating against employees who have participated in activities protected by the statutes. Specifically, the SDWA prohibits employers from discriminating against an employee who "assisted or participated . . . in any other action to carry out the purposes of this subchapter," and the FWPCA prohibits employers from discriminating against an employee who "filed, instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 42 U.S.C. 300j-9(i); 33 U.S.C. § 1367. Under the environmental whistleblower statutes, for a complainant's acts to be protected, the complainant must show that he reasonably believed that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant act(s). *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001 (ARB Dec. 28, 2012).

To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). If a complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id.*

B. Whether Complainant Engaged in Protected Activity Under the Acts

Under the SDWA and FWPCA, an employee engages in protected activity if he or she:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in §24.100(a) or a proceeding for the administrative or enforcement of any requirement of any requirement impose under such statute;

2. testified or is about to testify in any such proceeding; or

3. assisted, 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.

29 C.F.R. § 24.102(b).

Protected activities include external and internal complaints, written or oral, and extends to the filing of complaints under OSHA when such complaints touch on the concerns for the environment and public health and safety that are addressed by the statute. *Melendez v. Exxon Chemical Americas,* ARB No. 96-051, ALJ 1993-ERA-6, slip op. at 17 (ARB July 14, 2000). Whistleblower protection requires an employee's complaints be grounded in conditions constituting violations of the environmental acts. *Powell v. City of Ardmore, Oklahoma,* ARB No. 09-071, ALJ No. 2007-SDW-1 at 5 (ARB Jan 5, 2001). The reasonableness of a whistleblower's belief regarding statutory violations by an employer is determined on the basis of the knowledge available to a reasonable person in the circumstances within the employees training and experience. *Melendez,* ARB No. 96-051, ALJ No. 1993-ERA-006, at 27.

While raising internal complaints to an employer can be considered to be protected activity, "[p]rotected activity cannot be based on assumptions and speculation." *Kuehu Donna Sweetie v. United Airlines*, ALJ No. 2010-CAA-00007, at 13 (May 25, 2012) (finding that Complainant did not engage in protected activity under the FWPCA where Complainant made complaints regarding alleged environmental violations pertaining to water stream, but was unable to explain the basis of her belief that grease from a grease trap on employer's premises would enter the water stream in question, rendering her complaint speculative."). "An employee's protected activity must be grounded in conditions constituting reasonably perceived violations of the environmental acts." *Id.* at 13. "In other words, the complainant must demonstrate that [his] complaints were based on a reasonable belief that the respondent violated the applicable environmental laws." *Id.* "Reasonable belief must be scrutinized under both a subjective and objective standard; namely [the complainant] must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in the [complainant's] circumstances having his training and experience." *Id.*

Employee complaints are not protected simply because the employee "subjectively thinks the complained of employer conduct might affect the environment." *Kesterson v. Y-12 Nuclear Weapons Plant,* ARB Case No. 96-173, ALJ Case No. 95-CAA-0012 at 3 (April 8, 1997). "Internal complaints which could only threaten the environment if many speculative events all occurred" are not protected. *Kesteron,* ARB Case No. 96-173, at 4. Indeed, "a complaint that expresses only a vague notion that the employer's action might negatively affect the environment

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is not protected." *Saporito v. Central Locating Serv., Ltd.*, ARB No. 05-004, ALJ No. 2001-CAA-00013 at 6 (Feb. 28, 2006).

In remanding this matter to the undersigned, the Board found the appropriate standard in which to determine whether Complainant engaged in protected activity is whether he reasonably believed the actions he reported or complained about constituted environment hazards irrespective of whether Respondent's actions violated a particular environmental statute. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 6-12.

In discussing the reasonable or objective belief standard, the Board found the following are to be considered protected activity under the Acts if Complainant reasonably believed that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA:

1. Requesting consultant Kathryn Jaroszewicz (Jaro) complete and submit additional information requested on an older January 2013 Alternative Surface Casing Form as opposed to the newer form which Teague had used without any problem and had implemented in February 2013.

2. E-mailing Teague on June 5, 2013 protesting that Respondent was restricting him from doing his job to protect drinking water by denying his request to use the old form; and

3. Alleging on April 4, 2013 the creation of a hostile work environment by Respondent and ignoring their responsibility to require operator compliance within the rules.

Wright v. Railroad Comm'n., ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 7-8. The Board made no ruling as to whether Complainant held a reasonable belief for each of these allegations. As such, each allegation will be discussed individually.

1. Complainant's Use of the January 2013 ASCF Form

Complainant's first specific allegation of protected activity acknowledged by the Board is his request that Jaro send him additional information using the January 2013 ASCF form as opposed to the February 2013 ASCF form. Complainant argues he preferred the use of the older January 2013 form as it would apparently unearth any errors and ensure that operators were complying with the rules. I disagree. Not only do I find Complainant's insistence in using the older form did not carry out the purpose of either Act, I also find Complainant did not have a reasonable belief that he was raising environment or public health and safety concerns when he used the January 2013 ASCF form.

At the 2015 hearing, Respondent admitted that the older January 2013 form used by Wright required more information than the newer February 2013 form. However, the February 2013 form was more streamlined in processing the number of centralizers necessary to guarantee

adequate cement circulation. Moreover, the newer form allowed for Complainant to more quickly approve and correct mistakes by noting the errors, if any, and approve it subject to modification. (Tr. 325, 350-351, 597-98; RX-25).

I find no basis to believe Complainant was motivated by a desire to carry out the purposes of either Act. Rather, I find he relies on both Acts in an effort to escape the consequences of his misconduct in not following Teague's directions to reach out and work with operators, inform them what was missing from an application, and note it on the application. In fact, Teague informed Complainant that the newer form contained sufficient information to approve Jaro's request for circulating cement to the surface.

While Complainant contends Respondent took issue with the technical merits of the January 2013 ASCF form as well as the fact that he asked Jaro for more information it deemed unnecessary, I find Complainant did not send the older form to Jaro to assure the water systems met the minimum national standards or maintain the chemical, physical, or biological integrity of the Nation's water. Rather, his use of this form reflects his refusal to work cooperatively with operators and commission employees. Instead of having Jaro submit additional information, Complainant could have simply told Jaro the correct number of centralizers that could be determined from the application itself. By requesting Jaro to complete another application, Wright essentially created conflicting instructions and confusion that could have easily been avoided by telling Jaro the correct number of centralizers to use and then noting it on the newer application. (Tr. 238-239, 348-349). By not telling Jaro the correct number of centralizers, Wright unnecessarily delayed the approval of Jaro's application.

Additionally, I find he failed to offer any support that he reasonably believed his use of the January 2013 form raised environmental or public health and safety concerns and that the February 2013 ASCF form was inadequate or failed to carry out the purposes of the Acts. Rather, the record evidence reflects that the newer form had been widely used in Teague's former district without any apparent error. More important, the February 2013 form contains language indicating an operator's plan to circulate cement to the surface on all casings strings protecting usable quality water. (CX-146). Complainant also acknowledged that the use of the February form was not improper and admitted he ultimately used this form to approve Jaro's May 2013 application. (Tr. 214, 283-284). In addition, Fernandez testified that an operator's application would never be approved if the operator did not use the proper number of centralizers or the proper amount and quality of cement. (Tr. 166-167).

In reviewing Complainant's allegations, Complainant argued he wanted additional information from Jaro in order determine whether the operators planned to use sufficient centralizers. However, Complainant failed to address how he reasonably believed this information would protect drinking water and reveal any environmental or public health and safety concerns. Contrary to his assertions, Complainant held a speculative and unreasonable belief that his use of the older form was proper. In addition, Complainant overstated the necessity of additional information on the old form. Instead, Complainant caused unnecessary delay and misstated his role in the compliance. Fernandez testified Complainant's role in approving alternate surface casing requests was to ensure that operators intended to comply with the applicable rules at the outset. (Tr. 219). Fernandez further described the process and testified

that operators must file a completion report after the well is completed such that Respondent can determine if the well is properly cased and cemented. (Tr. 226). It is upon receipt of this completion report that Respondent determines if the well was properly built. (Tr. 226). This form must be approved in order for an operator to be allowed to produce from a well. (Tr. 226, 271-272).

Based on the above, it is evident Complainant's use of the January ASCF form is based on an unreasonable objective belief that he was carrying out the purposes of either Act. Instead, his use of the older form stems from his misunderstanding of his role in the process for ensuring compliance with Respondent's rules and regulations. Had Complainant possessed a sufficient understanding of the compliance process and his role at the outset of the process, he would have known the additional information requested on the January 2013 ASCF form was unnecessary and a cause for delay. Therefore, I find and conclude Complainant did not engage in protected activity under either Act when he requested that Jaro send him information using the January form on May 31, 2013.

2. Complainant's June 2013 Email to Teague

Next, the Board held Complainant's June 2013 email to Teague would constitute protected activity under the Acts if he reasonably believed he was acting in furtherance of the SDWA and FWPCA and if he reasonably believed he was raising environmental or public health and safety concerns. *Wright*, ARB No. 16-068, slip op. at 10-11 (emphasis added).

After Complainant sent Jaro the older form requesting she list the correct number of centralizers, Teague informed Jaro that this was unnecessary. (Tr. 348-349; RX-25, p. 3). In an email to Jaro in which Complainant was copied, Teague asked Jaro to email or phone Complainant with the correct number of centralizers needed to fulfill the requirements of SWR 13. (RX-25, p.3). Teague also emailed Complainant and informed him that the new February 2013 ASCF form contained enough information to approve Jaro's request about circulating cement to the surface. (RX-23).

In response, Complainant told Teague that the new form did not provide enough information, because operators make oversights in alternate surface casing designs that do not comply with the regulations intended to protect fresh water. Complainant further elaborated that it was his opinion "that [Respondent] not taking the five minutes to review the data that the operators have been submitting to this District for years and should have readily available, rises to the level of gross negligence." Complainant concluded that if he was being informed that it was not his job to conduct Respondent's due diligence review of applications or that Teague was revising this criteria, then he would proceed accordingly. (RX-23, p. 1; RX-25, p. 2).

While Complainant argues his email to Teague protesting that Respondent was restricting form doing his job to protect drinking water is protected under the Acts, I disagree. While the Board acknowledged Complainant's protests were protected by the Acts if he reasonably believed he was acting in furtherance of the Acts and raising environmental and public health and safety concerns, I find Complainant did not hold such a reasonable belief when he emailed Teague on June 5, 2013. Rather, I find his protests were the result of his dissatisfaction with

Teague's instructions to follow management directives and his inability to work with his colleagues that he now attempts to disguise as concerns for the protection of drinking water. Indeed, this email is a reflection of Complainant's habit of disrupting the compliance process and causing unnecessary delay due to his inability to work professionally with colleagues, contractors, and operators.

Similar to Complainant's use of the older form, his email to Teague does not carry out the purpose of either Act. In reviewing Complainant's email sent to Teague on June 5, 2013, it appears Complainant alleges, without any support, that the older form would unearth any errors operator had previously made. Complainant also alleges he is being restricted from doing his job. However, Teague was attempting to help Complainant from making compliance unnecessarily difficult and from avoiding unnecessary obstacles in approving requests. (Tr. 180-189, 218-219, 338-399, 347-378). However, Complainant remained adamant in his preference to process an alternate surface casing request which caused confusion and delay.

Therefore, I find Complainant did not have a reasonable belief that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns in his June 2013 email to Teague. Rather, it appears Complainant sent this email to Teague out of anger and frustration. While Complainant deceptively alleges Teague was restricting him from doing his job, Teague testified he was attempting to help Complainant from making the compliance process difficult and redundant. Complainant now attempts to disguise his email as protected activity, and I find his argument to be without merit. Accordingly, I find and conclude Complainant did not engage in protected activity under either Act when he emailed Teague on June 5, 2013.

3. Complainant's Allegations of a Hostile Work Environment

Finally, Complainant alleged numerous instance of protected activity within a hostile work environment complaint he had submitted internally on April 4, 2013 about protecting drinking water. (CX-56-60; RX-23, pp. 1-3). As stated by the Board, these allegations include, but are not limited to, the following: reports that Respondent's District Director and Assistant Director were willing to ignore their responsibility to require operators to comply with the rules; they did not require operators to bring their wells into compliance on several occasions; and they demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012. For example, he noted that Fisher "approved the remedial squeezing of the surface casing of a new well in a fashion that would not properly isolate the fresh water reservoirs"; that Teague's approvals to an operator "demonstrated a misunderstanding of well configurations and a lack of concern for protecting fresh water"; and that Teague "was willing to approve completion reports without them being in compliance the rules." (CX-56-60).

In reviewing his allegations of a hostile work environment, I find Complainant did not have a reasonable belief he was raising environmental or public health and safety concerns when he submitted this complaint. Rather, I agree with Respondent that his complaint merely amounts to a rejection of supervisory directives and perceived, but unreasonable, professional slights. Indeed, none of these allegations demonstrate Complainant reasonably believed he was raising

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concerns of possible water contamination. On the contrary, Complainant accuses his supervisors of having a "rudimentary understanding of the rules" and criticizes Fisher for two events which occurred over a year before he submitted his hostile work environment complaint in April 2013. CX-56.

Several of Complainant's allegations do not concern protecting drinking water, but involve critiques of decisions made by Fisher. In particular, Complainant questions approvals made by Fisher and second-guesses Fisher's decisions without offering any detail that he reasonably believed he was reporting violations of the SDWA or FWPCA. These critiques are wholly subjective, lack any objective belief that Respondent's conduct was in violation of either Act, and fail to explain how these management deficiencies pose a threat to the contamination of drinking water. Further, Complainant's critiques of Teague occurred more than seven months before his submission of his hostile work environment complaint. CX-57. Similar to his criticism of Fisher, Complainant's criticism of Teague's actions amount to subjective criticisms that fail to show Complainant reasonably believed he was reporting violations of either Act or was concerned about protecting drinking water. The remainder of Complainant's hostile work environment allegations involve events occurring from March 2012 through December 2012, with only one event addressing water. Specifically, Complainant alleges a plugging procedure drafted by a co-worker did not "properly isolate the base of usable quality water." CX-58. However, Complainant offers no further explanation as to his reasonable belief how this amounted to a violation of either Act.

In reaching this determination, I also note Complainant's hostile work environment allegations are based on assumptions and speculations. *See Kuehu Donna Sweetie*, ALJ No. 2010-CAA-00007, at 13. More important, these complaints cannot be considered protected activity as they are based on Complainant's subjective belief that the complained of conduct might affect the environment. *See Kesterson*, ARB Case No. 96-173, ALJ Case No. 95-CAA-0012 at 3. Accordingly, I find and conclude the allegations set forth in Complainant's hostile work environment complaint fail to show Complainant had a reasonable belief he was reporting perceived violations of the SDWA or FWPCA. Therefore, it is insufficient to show Complainant engaged in protected activity under both Acts.

4. Conclusion on Protected Activity

While I note the broad language of the SDWA and FWPCA, I nevertheless find Complainant's actions fall outside these Acts based on his lack of reasonable belief that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns when he requested Jaro submit information using an older January 2013 ASCF form. In like manner, I also find Complainant failed to demonstrate that he had a reasonable belief that that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns in his June 2013 email to Teague or in his hostile work environment complaint. While Complainant appears to retroactively argue he held a reasonable belief, I find otherwise. Accordingly, I conclude Complainant has failed to demonstrate, by a preponderance of the evidence, that he engaged, or reasonably believed he engaged, in protected activity under the SDWA or the FWPCA.

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C. Remaining Elements

Assuming *arguendo* that Complainant engaged in protected activity, I will analyze and discuss the remaining ~~*prima facie* e~~lements stated above. It is undisputed that Respondent was aware of Complainant's conduct. In addition, Respondent admits, and the Board affirmed, that Complainant suffered adverse action when he was terminated. Thus, the only remaining questions to be resolved are whether Complainant proved by a preponderance of evidence that his alleged protected activity was a motivating factor in his discharge and whether Respondent is able to establish that it would have taken the same adverse action in the absence of any alleged protected activity by a preponderance of the evidence.

1. Motivating Factor

To establish discrimination under the FWPCA and SDWA, the complainant must prove by a preponderance of the evidence that the protected activity was a "motivating factor" in the employer's decision to take adverse action. *Dixon v. U.S. Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, -160; ALJ No. 2005-SDW-008, slip op. at 8 (ARB Aug. 28, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024; ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007); *Morriss v. LG&E Power Servs., LLC,* ARB No. 05-047; ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007); *accord* 29 C.F.R. § 24.100(a), 24.109(a). 29 C.F.R. § 24.109(b)(2). "A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action." *Onysko v. State of Utah, Dep't Envt'l Quality*, ARB No. 11-023; ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); *see also Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). In making this showing, the "Complainants need only establish that th[e] protected activity was a motivating factor, not the motivating factor, in the decision to discharge them." *Abdur-Rahman*, ARB Nos. 08-003, 10-074, slip op. at 10, n.48. While temporal proximity does not necessarily 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." *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101; ALJ No. 1996-ERA-034, -036; slip op. at 6 (ARB Mar. 30, 2001).

Assuming Complainant established he engaged in protected activity, then I find that such activity was not a motivating factor in Respondent's decision to terminate his employment. In its decision, the Board stated that if Complainant engaged in protected activity on April 4, May 31, and June 5, 2013, then temporal proximity to the June 20 termination and to the June 6 recommendation of further disciplinary action supports an inference of causation. *Forrest v. Smart Transp. Servs. Inc.*, ARB No. 08-111, ALJ No. 2007-STA-009, slip op. at 5, n.6 (ARB Sept. 21, 2010) (While not necessarily dispositive, "temporal proximity may support an inference of retaliation."). While I agree with the Board that an inference of causation is supported, I find that this inference alone is insufficient to support a finding that Complainant's alleged protected activity was a motivating factor in his termination.

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I have reviewed Complainant's entire employment record, including his most recent evaluations. From these evaluations that clearly precede his discharge, I note a documented history of interpersonal conflicts with operators and Respondent's own staff. In particular, Complainant demonstrated an unwillingness to work with operators in identifying alternative ways to become compliant such that operators went out of their way to avoid dealing with him by calling outside Complainant's schedule hours of work. (RX-6, 9, 16; Tr. 105-109, 631, 633-634, 640-641, 691-693, 746-747).

When he became District 3 Director, Teague observed Wright's behavioral problems and found Wright to be arrogant, insulting, and insolent when working with co-workers, supervisors, and operators. (RX-17; Tr. 335, 338-340, 465, 466, 477). Instead of helping operators obtain specific information to process applications, Wright would instead locate a piece of missing or inaccurate information, issue a vague request for more information, and ask operators to refile their applications without providing any guidance. (Tr. 340).

Teague cited a specific example of Complainant's inappropriate conduct wherein Complainant demanded an apology from former employee Doug Storey for his submission of incorrect centralizers. Teague also recalled observing Complainant laughing at operator Paul Hendershott when Hendershott asked for help in resolving well violations. (RX-12, Tr. 476-477). Teague also testified about Complainant's inability to work with Respondent employee Michael Simms on a technical issue. (RX-14, Tr. 469-470).

Along similar lines, Fernandez testified that he continued to receive complaints about Wright in 2013 from Storey and two regulatory analysts who found Wright to be rude and impossible to work with. (Tr. 106, 130-131, 318). One of these analysts, Carla Marn, emailed Fernandez on April 12, 2013, and complained about Wright demanding an old alternate surface casing request to fill out when Teague had already sent her a new form. (RX-18, Tr. 314).

On May 21, 2013, Complainant received a P-112 employee counseling from Fernandez wherein he warned Complainant that further misconduct could result in disciplinary action and even his termination. (RX-20, Tr. 320). Despite this admonition, Wright continued to display unprofessional conduct. On May 31, 2013, Wright received an alternate surface request from Jaro, a consultant to an operator. Wright directed Jaro to fill out the old form and indicate the appropriate number of centralizers although the correct number could be determined from the new application. (RX-25, Tr. 155-156, 347-348, 350-353, 369-372, 383-384, 441-442, 520, 597-598).

The record supports a finding that Complainant was terminated due to his uncooperative conduct in dealing with operators and colleagues. Contrary to Complainant's allegation, Teague did not take action against him because of his use of an old environmental application. Rather, Complainant was disciplined due to his failure to make reasonable efforts to call and inform the consultant of the correct number of centralizers which could be determined from the new application form Complainant ultimately used. Indeed, Fernandez testified Complainant was terminated as a result of his behavioral problem in dealing with other people. In addition, Fernandez testified that Complainant was insubordinate and argumentative. (Tr. 232-233). Further, Fernandez stated he had no issue with the technical aspects of Complainant's work and that his attitude and unprofessional behavior was the problem. (Tr. 104, 327, 338).

The record evidence clearly indicates Complainant made the compliance process more complex than necessary. More important, Teague did not recommend discipline of Complainant because he sought to require more detailed information through the use of the older form. Instead, Teague recommended discipline of Complainant, because he refused to follow instructions and created a state of confusion which was indicative of his refusal to work with operators and to make the application process more difficult than necessary. Unfortunately, Complainant was unable to accept the fact that his job did not involve a review of well designs but was a much simpler process of reviewing alternative surface drilling requests. (Tr. 219).

Consequently, in light of the above, the undersigned concludes that, even if he was able to establish that he engaged in protected activity under the SDWA and FWPCA, Complainant has failed to establish by a preponderance of the evidence that such activity was a motivating factor in his termination.

2. Respondent's Affirmative Defense

A respondent can avoid liability by "demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id; see also Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013). "[T]he preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true." *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 28 (ARB Dec. 30, 2004)(citing *Masek v. The Cadle Co.*, ARB No. 97-069; ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

As previously discussed, the undersigned concluded that Complainant's alleged protected conduct was not a motivating factor in Respondent's decision to terminate Complainant's employment. However, in the alternative, even if Complainant's alleged protected activity was a motivating factor in Respondent's decision to terminate Complainant, the undersigned concludes Respondent is able to establish by a preponderance of the evidence it would have taken the same adverse action in the absence of any alleged protected activity.

Undisputed evidence of record establishes that Respondent had documented a history of Complainant's interpersonal conflicts with other employees as well as operators in the industry. In particular, Complainant's October 29, 2010 performance evaluation indicated Complainant lacked a better understanding that there can be exceptions to many of the rules if the circumstances seem to meet the required objective. In addition, the evaluation also stated that personnel in the office and industry were hesitant to approach Complainant due to his perceived unwillingness to work out an amenable solution at times. (Tr. 633; RX-6). Further, Complainant's October 2011 evaluation also noted Complainant should strive for better relations with all operators and point out alternative ways to come into compliance and to assist operators in keeping wells on production while complying with the rules and regulations. (Tr. 634; RX-9). Moreover, Complainant's November 2012 evaluation also showed Complainant was still being

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directed to improve relations with operators and staff. (Tr. 640-641; RX-16). Similarly, a May 2013 performance evaluation indicated Complainant was difficult to work with, had exhibited rude behavior, and had resorted to name-calling. (RX-20). Complainant was warned that a failure to improve his behavior could result in further disciplinary action, including the termination of his employment. (RX-20).

This undisputed testimony is further corroborated by the testimonial evidence in the record. For example, Fernandez described Complainant's relationships with industry representative and operators as unacceptable and recalled multiple incidents where Complainant clashed with operators and behaved in a rude and threatening manner. (Tr. 105-109). In addition, Bogan testified he discovered that operators would call Respondent outside of Complainant's scheduled working hours to avoid having to work with him. (Tr. 746-747). Further, Teague described Complainant as arrogant, insolent, and insulting. (Tr. 338). He also testified that Complainant presented unnecessary obstacles to processing approvals, requests, and paperwork. (Tr. 338-339).

Respondent also successfully demonstrated that Complainant was not reprimanded for sending Jaro a second form or for his email to Teague. Rather, in response to receiving Jaro's form, Complainant sent Jaro a second form rather than simply calling her to determine whether the proper number of centralizers would be used. In so doing, Complainant again demonstrated his inability to work with operators and his unwillingness to work with operators. As a result of Complainant's continued behavioral issues, Teague recommended Complainant be subjected to further disciplinary action and noted Complainant was insubordinate and disruptive. (Tr. 347; RX-25). Upon receipt of Teague's recommendation and after consulting with Bojano and Bogan, Fernandez recommended Complainant be terminated due to his continued behavioral problems. (Tr. 327-328). Complainant was then terminated on June 20, 2013. (RX-27).

Based on the above, Respondent has demonstrated by a preponderance of the evidence that it would have taken the same adverse action in the absence of any protected activity. Indeed, Respondent treated Complainant in the same manner it would have treated any other employee who refused to follow directions. (Tr. 763-764). Contrary to Complainant's assertions, Respondent terminated Complainant due to his uncooperative behavior and combative attitude. Despite several warnings and repeated coachings, Complainant failed to follow directions and act in a professional manner. I am convinced that Complainant's misconduct hampered and impeded his supervisors' ability in dealing with an overload of problems associated with the proper enforcement of a booming regulatory business. As such, Respondent has proven by a preponderance of the evidence it would have terminated him even if he was able to prove that alleged protected activity was a motivating factor in his discharge.

VII. CONCLUSION

Pursuant to the Board's instructions, the undersigned has reanalyzed the issue of whether Complainant engaged in protected activity in light of the expansive definition of what constitutes protected activity under the Acts. In considering all of the evidence and testimony submitted by the parties, the undersigned remains of the opinion that Complainant failed to demonstrate he engaged in protected activity. Specifically, I find Complainant did not have a reasonable belief

that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA when he requested Jaro complete and submit additional information on an older January 2013 ASCF form, when he emailed Teague alleging he was being restricted form doing his job, or when he alleged the creation of a hostile work environment in a complaint dated April 4, 2013.

Assuming *arguendo* that Complainant engaged in protected activity, I also find that Complainant has failed to establish by a preponderance of the evidence that such activity was a motivating factor in his termination and that Respondent has shown by a preponderance of the evidence that it would have terminated him even if he was able to prove that alleged protected activity was a motivating factor in his discharge. Accordingly, the undersigned finds that Complainant has failed to produce sufficient evidence to demonstrate by a preponderance of the evidence that he engaged in protected activity or that Respondent's decision to terminate him was motivated, at least in part, by a discriminatory purpose. Therefore, I find he has not met his burden under the SDWA and FWPCA and dismiss the instant charges as lacking merit.

VIII. ORDER

In view of the foregoing, **IT IS HEREBY ORDERED** that the claim in the above-captioned matter file by Complainant Frederick B. Wright against Respondent Railroad Commission of Texas is **DISMISSED** with prejudice.

ORDERED this 15th day of November, 2018, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check

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the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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 filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

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.

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SERVICE SHEET

Case Name: **WRIGHT_FREDERICK_B_v_RAILROAD_COMMISSION__**

Case Number: **2015SDW00001**

Document Title: **Decision and Order on Remand**

I hereby certify that a copy of the above-referenced document was sent to the following this 15th day of November, 2018:

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U.S. Department of Labor
Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

FREDERICK B. WRIGHT,

COMPLAINANT,

v.

RAILROAD COMMISSION OF TEXAS,

RESPONDENT.

ARB CASE NO. 16-068

ALJ CASE NO. 2015-SDW-001

DATE: JAN 12 2018

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Frederick B. Wright; *pro se*; Houston, Texas

For the Respondent:
Julie C. Tower, Esq.; *Jackson Lewis, P.C.*; Austin, Texas

BEFORE: Paul M. Igasaki, *Chief Administrative Appeals Judge*, Joanne Royce, *Administrative Appeals Judge*, and Tanya L. Goldman, *Administrative Appeals Judge*

DECISION AND ORDER OF REMAND

The Complainant, Frederick Wright, filed a retaliation complaint under the employee protection provisions of the Safe Drinking Water Act (SDWA) and the Federal Water Pollution Control Act (FWPCA), and their implementing regulations.[1] He alleged that the Railroad Commission of Texas violated the SDWA and FWPCA whistleblower protection provisions when it retaliated and discriminated against him because he raised concerns about requiring oil and gas operators to comply with rules regulating drilling wells to protect sources of underground drinking water. Following a hearing, a Department of Labor (DOL) Administrative Law Judge (ALJ) dismissed Wright's complaint because he found that Wright did not meet his

[1] 42 U.S.C.A. § 300j-9(i) (Thomson Reuters 2011); 33 U.S.C.A. § 1367 (Thomson Reuters 2016); 29 C.F.R. Part 24 (2017).

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burden of showing that any protected activity motivated the termination of his employment. We **VACATE** and **REMAND** for further proceedings.

BACKGROUND

The findings of fact are set forth in the ALJ's Decision and Order (D. & O.) at pages 6 to 12. They are summarized below in pertinent part.

On October 1, 2007, the Railroad Commission of Texas hired Wright to work as an engineer specialist in Houston, Texas.[2] The Railroad Commission is the certifying agency for federal permits under sections 401 and 404 of the FWPCA for oil and gas exploration and production projects and is the state agency responsible for administration and enforcement of a program under the SDWA for wells associated with oil and gas exploration and production. As an engineer specialist, Wright's job included working with the regulated industry to secure compliance by oil and gas operators with the rules and statutes for which the Railroad Commission is responsible. Two of Wright's responsibilities with regard to a particular program involving variance approvals for building oil and gas wells were to 1) insure that operators were going to circulate cement to the surface, and 2) determine the number of centralizers that were going to be used.[3]

On his first three performance evaluations, Wright received ratings of "meeting the requirements of the position."[4] At his next evaluation, Wright received the same rating "but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived [that he] was unwilling to work out amenable solutions at times."[5] At his October 28, 2011 evaluation, the Railroad Commission rated Wright as average but suggested that he work for better relations with operators to assist them in keeping wells on production as well as comply with the rules and regulations and view violations from a "practical standpoint 'in addition to the straight rules and regulations.'" At the next year's evaluation, the Railroad Commission indicated that Wright still needed improvement regarding relations with operators with the goal of "providing excellent customer service and making the path to compliance quick and uncomplicated . . . ." Throughout Wright's employment, operators complained that Wright was unable or unwilling to provide practical solutions to drilling problems.

On December 7, 2012, Wright filed an internal complaint by e-mail to Gil Bujano, the Railroad Commission's Oil and Gas Division Director, stating that Charles Teague, District

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[2] The citations in this paragraph are to the D. & O. at 6.

[3] The parties' definitions for technical and industrial terms applicable to this case are in the D. & O. at 3-6.

[4] The citations in this paragraph are to the D. & O. at 7-9.

[5] This evaluation occurred on October 28, 2010.

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Director and Wright's supervisor, removed him from assignments to demean him and to impair his ability to make operators comply with the rules.[6] On April 4, 2013, Wright filed a hostile work environment complaint with Railroad Commission management reporting that Railroad Commission's leadership 1) were willing to ignore their responsibility to require operators to comply with the rules, 2) were not requiring operators to bring their wells into compliance on several occasions, and 3) demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012, among other things.[7]

On May 17, 2013, the Railroad Commission conducted a "Performance Counseling" session regarding Wright.[8] During the session, the Railroad Commission told Wright that operators complained about his relationship with them and reported that he was "difficult to work with," exhibited rude behavior, was condescending, and that he called people names.[9] In response to this counseling, Wright appealed and asked for specific incidents supporting the events discussed in his performance counseling session, to which Bujano replied, indicating that Wright's "response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination."[10]

In early 2013, Kathryn Jaroszewicz, a consultant with one of the operators the Railroad Commission regulated, submitted a casing exception request to Wright using a form that Teague had approved in January 2013.[11] On May 31, 2013, Wright informed Jaroszewicz that she needed to use an older form that was attached to his e-mail and asked her to list the correct number of centralizers. Teague learned that Wright had asked that Jaroszewicz use the old form and told her that she did not have to. Teague told Jaroszewicz that she could e-mail or call Wright to inform him how many centralizers were required. Teague e-mailed Wright and told him that the new form contained enough information to approve Jaroszewicz's request about circulating cement to the surface.[12] Wright e-mailed Teague and told him that the new form did not provide enough information because "operators made errors in the past that did not comply with the regulations intended to protect fresh water."[13] Wright "allegedly insisted on using the

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6 D. & O. at 9 (citing CX 33).

7 *Id.* (citing CX 56-59); Hearing Transcript (Tr.) at 566. Wright has pointed out on appeal that while this exhibit was not admitted at the hearing, it was cited by the ALJ in his decision. We address this issue in the Discussion section of this decision.

8 The citations in this paragraph are to the D. & O. at 10.

9 *Id.* (citing RX-20).

10 *Id.* (citing RX-20 at 2; RX-24).

11 The citations in this paragraph are to the D. & O. at 11-12; see RX 23.

12 See RX-23.

13 *Id.* at 1.

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January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act."[14] In the e-mail to Teague, Wright stated that it appeared that Teague was telling him that he could not "request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules," and was therefore restricting him from doing his job.[15]

On June 6, 2013, Teague recommended further disciplinary action against Wright based on this incident concerning Jaroszewicz's request. Four days later, Jaroszewicz submitted the correct number of centralizers to Wright, and on that same day, Wright approved her request.

The Railroad Commission fired Wright on June 20, 2013, because he refused "to comply with Commission directives to work with management and staff and to assist operators in resolving compliance problems, including the most recent issue of assisting an operator on how to resolve a casing exception request."[16] Thus, Wright's request to Jaroszewicz, which according to the Commission exemplified Wright's misconduct, ultimately led (or contributed) to his termination.[17]

Wright filed this action with the DOL, alleging that the Railroad Commission violated the SDWA and the FWPCA when it terminated his employment. After an investigation, OSHA issued findings stating that it found no reason to believe that the Railroad Commission violated either statute and dismissed Wright's claim. Wright timely objected to OSHA's findings and requested a hearing before an ALJ.[18] The ALJ held a hearing in Houston, Texas on December 9 and 10, 2015.

At the hearing, Ramon Fernandez, who had been the Railroad Commission's Deputy Director of Field Operations for its Oil and Gas Division, testified that he and Bujano recommended to Milton Rister, Executive Director, that Wright be fired for unprofessional and unacceptable behavior with operators and staff. This decision was based, in part, on direct reports by operators and outside experts who claimed that Wright had been rude, called them "stupid" and "liars," and refused to work with them in resolving problems.[19] Teague testified that Wright presented unnecessary obstacles to approval, held up the approval of requests for minor issues, issued vague requests for information, told individuals to refile applications instead of advising them of deficiencies over the telephone, and otherwise "made compliance

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14 D. & O. at 12 (citing Tr. at 518-19).

15 *Id.* at 12-13.

16 *Id.* at 7, 12.

17 *Id.* at 15, n.10.

18 *See* 29 C.F.R. § 24.106(a).

19 D. & O. at 13. Fernandez was retired at the time of the hearing. Peter Fisher and Teague both directly reported to Fernandez as their supervisor. *Id.* at 7, n.5.

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unnecessarily difficult and unpleasant."[20] Mark Bogan, the Railroad Commission's Human Resources Director, testified that Wright was fired for "not following [the Commission's] procedures."[21]

On May 19, 2016, the ALJ found that Wright failed to meet his burden of showing that he engaged in protected activity that was a motivating factor in the termination of his employment and dismissed the complaint.[22] Wright appealed the D. & O. to the Board.[23] On appeal, he argues that the Railroad Commission retaliated against and fired him because he participated in actions to carry out the purposes of the SDWA and FWPCA. He also objects to many of the ALJ's evidentiary rulings. Additionally, Wright has moved to strike several of the Railroad Commission's exhibits from the record for various reasons. The Railroad Commission asserts that the ALJ's findings of fact are supported by substantial evidence.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to decide this matter on appeal from the ALJ's decision to the ARB.[24] The ARB reviews the ALJ's factual findings under the substantial evidence standard.[25] The Board reviews the ALJ's conclusions of law de novo.[26] We liberally construe pro se pleadings.[27]

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20 *Id.* at 15.

21 *Id.* at 7, 16 (citing Tr. at 752-53).

22 *Id.* at 1.

23 *See* 29 C.F.R. § 24.110(a).

24 Secretary's Order 2-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 69,378 (Nov. 16, 2012); 29 C.F.R. § 1979.110.

25 29 C.F.R. § 24.110(b).

26 5 U.S.C.A. § 557(b).

27 *Droog v. Ingersoll-Rand Hussman*, ARB No. 11-075, ALJ No. 2011-CER-001, slip op. at 3 (ARB Sept. 13, 2012).

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DISCUSSION[28]

The ALJ committed legal error in concluding that Wright did not engage in protected activity because he did not explicitly reference the SDWA or FWPCA. Based on the record evidence, we hold that if Wright had a reasonable belief that he was furthering the purposes of the acts when he e-mailed his supervisor to protest that he was being restricted from performing his job to protect drinking water and in complaints he made in a hostile work environment complaint about lack of sufficient oversight of operators to protect fresh water, then he engaged in protected activity. As the ALJ did not assess whether Wright had a reasonable belief when he engaged in the activities he alleges were protected, we remand for further fact finding and consideration.

The purpose of the SDWA "is to assure that water supply systems serving the public meet minimum national standards for protection of public health."[29] In addition to "establishing overall minimum drinking water protection standards for the nation," the statute provides "for delegation of specific regulation and enforcement to states," including state primary enforcement of underground injection processes to protect sources of drinking water.[30] Respondent is a state agency with administration and enforcement obligations under the SDWA.[31]

The Congressional declaration of goals and policy for the FWPCA provides that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[32] "Respondent . . . serves as the certifying agency for federal permits under sections 401 and 404 of the . . . FWPCA, for projects associated with oil and gas exploration and production activities."[33]

The SDWA and the FWPCA contain anti-retaliation provisions prohibiting employers from discriminating against employees who have participated in activities protected by the statutes. Specifically, the SDWA prohibits employers from discriminating against an employee who "assisted or participated . . . in any other action to carry out the purposes of this subchapter," and the FWPCA prohibits employers from discriminating against an employee who "filed,

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28 Neither party has appealed the ALJ's decision regarding Respondent's sovereign immunity challenge.

29 H.R. REP. 93-1185, 1974 U.S.C.C.A.N. 6454, 1974 WL 11641, 6454 P.L. 93-523; *see also Nat. Res. Def. Council, Inc. v. E.P.A.*, 812 F.2d 721, 723 (D.C. Cir. 1987).

30 *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Mar. 30, 2000) (citing 42 U.S.C. § 300h).

31 D. & O. at 6.

32 33 U.S.C.A. § 1251.

33 D. & O. at 6 (citing Tr. at 211-213; 40 C.F.R. § 147.2201).

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instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter."[34] Under the environmental whistleblower statutes, for a complainant's acts to be protected, the complainant must show that he reasonably believed that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant act(s).[35]

To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint."[36] If a complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity."[37]

In his complaint, Wright alleged that he complained to management about being asked to approve completion reports and certify that operators had complied with rules protecting fresh water when the operators had not complied.[38] His specific allegations of protected activity are the following: 1) he requested that a consultant for an operator, Kathryn Jaroszewicz, send him information using the January form on May 31, 2013, to obtain sufficient information needed to protect underground sources of drinking water to further the SDWA; 2) he e-mailed Teague on June 5, 2013, protesting that the Railroad Commission was restricting him from doing his job to protect drinking water in denying his request to ask for the old form; and 3) he alleged numerous instances of protected activity within a hostile work environment complaint he had submitted internally on April 4, 2013, about protecting drinking water.[39]

Regarding the first two numbered allegations above, the ALJ found that Wright had not engaged in protected activity because there was no evidence that Wright ever referred specifically to the two statutes in this case, ever notified or accused the Railroad Commission of any violations of these specific statutes, ever refused to engage in any practice made unlawful by the statutes, or filed or testified before Congress or in any other proceedings regarding any provision of the statutes.[40] The ALJ noted that "Complainant . . . appears to be a person who

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34 42 U.S.C.A. 300j-9(i) and 33 U.S.C.A. § 1367.

35 *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001 (ARB Dec. 28, 2012).

36 29 C.F.R. § 24.109(b)(2).

37 *Id.*

38 D. & O. at 2.

39 *Id.* at 11, 12, 20; RX 23 at 3, 1; CX 56-60 (this exhibit appears to be included also within RX 22, but with comments by Teague; Peter Fisher, the Railroad Commission's Deputy District Director; and Fernandez).

40 EN.178 *Id.* at 20.

prides himself on attention to detail." He thus concluded that "[i]f Complainant was concerned about Respondent's alleged disregard of the SDWA or FWPCA, then it is only logical that he would have referred to such in his correspondence with Respondent, which he failed to do. Accordingly, I find no credible evidence of protected activity."[41]

The ALJ's restrictive view of protected activity is not legally sustainable. A complainant is not required to explicitly mention the statutes by name or to otherwise allege a violation of the statute to engage in activity the SDWA protects. The language of the SDWA simply prohibits employers from discriminating against employees who have "participated in activities to carry out the purposes" of the act.[42] This is broad language, some of the broadest of any of the statutes the ARB has the responsibility to adjudicate. While the FWPCA's language is not as broad, neither the SDWA nor the FWPCA's language requires a complainant to cite the statute specifically[43] or to report a "violation."[44] And under both statutes, a "proceeding" does not have to be a formal proceeding.[45] Thus, we vacate the ALJ's legal conclusion regarding protected activity because the ALJ did not conduct the proper legal analysis and we conduct our own

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41 *Id.* at 21.

42 42 U.S.C.A. 300j-9(i).

43 *See, e.g., DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015, 1021 (11th Cir. 2016). In *DeKalb Cty.*, the Eleventh Circuit affirmed the ARB's conclusion that complainants—compliance experts—engaged in protected activity under the FWPCA where they sought records of restaurant sewer spills, suspected the County was hiding information about sewer spills, and informed "coworkers and supervisors that 'the County could get in trouble' with the State as a result," in addition to confronting a supervisor about ongoing compliance problems. The supervisor "viewed their questions as 'insubordination' and informed them they were being 'too thorough or scientific.'" *Id.* at 1018. The court's opinion does not reflect that complainants ever referenced the specific statute at issue in holding that they engaged in protected activity.

44 While there is some ARB caselaw in environmental whistleblower cases that suggests that a complainant must report a violation of the underlying statute, or a threat to the environment, it is the language of the statute that prevails. As neither of these statutes requires a violation to be reported for there to be protected activity, it is not a requirement. *Cf. Williams*, ARB No. 12-024; *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005 (ARB Dec. 30, 2004) ("An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer's actions violate a particular environmental statute.") (citation omitted)); *Abu-Hjeli v. Potomac Elec. Power Co.*, No. 1989-WPC-001, slip op. at 6-7 (Sec'y Sept. 24, 1993).

45 *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 478 (3d Cir. 1993) (affirming ARB's interpretation of FWPCA and holding that the "statute's purpose and legislative history allow, and even necessitate, extension of the term 'proceeding' to intracorporate complaints."); *DeKalb Cty.*, 812 F.3d at 1020 ("The Secretary has interpreted 'proceeding' to shield from retaliation employees who make 'informal' or 'internal' complaints to supervisors and coworkers, even if those complaints ultimately lack merit.") (citations omitted)).

EN.180

analysis based on the facts the ALJ found and under the definitions of protected activity the statutes express.

The ALJ found that not only was it the Railroad Commission's responsibility to regulate certain programs under the FWPCA and the SDWA, it was Wright's responsibility to work with the regulated industry, the oil industry, to secure compliance by oil and gas operators with those same statutes and any other rules for which the Railroad Commission was responsible. Regardless of whether asking for the older version of the form itself was protected activity,[46] Wright's protest in his e-mails to Teague that he should have been able to ask for the additional information the older form required, was protected by the statutes. Wright e-mailed Teague and told him that he asked for the old form because the new form did not provide enough information and operators had "made errors in the past that did not comply with the regulations intending to protect fresh water."[47] He wanted the information from the old form that apparently would unearth any errors and thereby ensure that operators were complying with the rules, rather than simply trusting that there were none. Wright also told Teague that it appeared to him that Teague was telling him that he could not request information from the operators about whether they were planning on using sufficient amounts of cement to comply with the rules. This is clearly a protest that he is being restricted from doing his job, of which one of his primary duties was to secure compliance by operators with the statutes at issue in this case. Wright's e-mail to Teague was in furtherance of the SDWA and therefore constitutes protected activity, if Wright reasonably believed that he was doing so. Wright's complaint to his supervisor would also constitute protected activity under the FWPCA, as it was a "proceeding resulting from the administration or enforcement of the" FWPCA, again, if Wright had the reasonable belief that he was raising environmental or public health and safety concerns.[48]

Wright's hostile work environment complaint (CX 56-60) also contained potential protected activity, subject to the same caveat regarding a reasonable belief.[49] Wright's

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[46] We cannot determine whether use of the old form versus the new form is protected activity without additional fact finding. Therefore, on remand, the ALJ should reanalyze whether use of the old form was protected activity, taking into account the broad purview of protected activity.

[47] RX 23 at 1.

[48] 33 U.S.C.A. § 1367.

[49] The ALJ apparently did not consider the hostile work environment claim as protected activity. The record on this is confusing, but there was some discussion during the hearing about the claim, as an adverse action, being excluded as time barred. While CX 56-60 was not admitted as an exhibit at the hearing, the ALJ cited it as a part of his fact finding in his decision and order. D. & O. at 9. The ALJ either believed that he admitted the exhibit or otherwise mistakenly excluded it, as it contains allegations of protected activity, which cannot be time barred. In any event, on remand, the ALJ should either admit or make clear that he already admitted this exhibit into the record. Excluding it would be an abuse of discretion. *Shactman v. Helicopters, Inc.*, ARB No. 11-049, ALJ No. 2010-AIR-004, slip op. at 3 (ARB Jan. 25, 2013) (noting that ALJ's evidentiary rulings are reviewed under an abuse of discretion standard).

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statements within this exhibit fall squarely into the category of protected activity under both the SDWA and the FWPCA. These statements include, but are not limited to, the following: reports that the Railroad Commission's District Director and Assistant Director were willing to ignore their responsibility to require operators to comply with the rules; they did not require operators to bring their wells into compliance on several occasions; and they demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012.[50] For example, he noted that Fisher "approved the remedial squeezing of the surface casing of a new well in a fashion that would not properly isolate the fresh water reservoirs"; that Teague's approvals to an operator "demonstrated a misunderstanding of well configurations and a lack of concern for protecting fresh water"; and that Teague "was willing to approve completion reports without them being in compliance the rules."[51]

We conclude that Wright's June 5, 2013 e-mail to Teague (protesting that the Railroad Commission was restricting him from doing his job to protect drinking water in denying his request to require the use of the old form) and allegations within Wright's hostile work environment complaint are protected activities if Wright reasonably believed he was raising environmental or public health and safety concerns when he acted in each instance. Wright's insistence on using the old form to request information may also constitute protected activity, which the ALJ will decide on remand. Because determinations about whether Wright had a reasonable belief in each instance requires fact findings that are not within the Board's purview to make, we remand the case to the ALJ to make those findings.[52]

Further, we make clear that the Board is not making any directives or suggestions to the ALJ with respect to any other aspect of this case, and leaves it to the ALJ to determine issues of

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50 While the FWPCA's language is less broad than the SDWA's regarding protected activity, Wright's complaint about management's failure to require operators to comply with rules intended to protect underground water sources falls within the FWPCA's prohibition against discrimination by employees who file proceedings resulting from the administration or enforcement of the provisions of the FWPCA. A "proceeding" includes an initial internal or external statement or complaint of an employee relating to the administration or enforcement of the provisions of the FWPCA. *Abdur-Rahman v. DeKalb Cty.*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, 2006-WPC-003; slip op. at 7-8 (ARB May 18, 2010) (citation omitted), *aff'd sub nom, DeKalb Cty. v. U.S. Dep't of Labor*, 812 F.3d 1015 (11th Cir. 2016).

51 CX 56-60.

52 *See Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 12 (ARB Feb. 29, 2012) ("[B]ecause a determination of the reasonableness of his belief requires findings of fact that are not within the ARB's purview to make, we remand this case to the ALJ to make those findings and for such further proceedings as are warranted."); *Williams*, ARB No. 12-024, slip op. at 14 ("The fact question nevertheless remains as to whether Williams subjectively believed he was raising environmental concerns. The ALJ did not resolve this issue, and we cannot resolve it on the record before us.").

EN.189

causation and the affirmative defense on remand.[53] Finally, if the ALJ finds that Wright engaged in protected activity on April 4, May 31, and June 5, 2013, temporal proximity to the June 20 termination and to the June 6 recommendation of further disciplinary action, supports an inference of causation.[54]

CONCLUSION

The ALJ found that Wright failed to prove that any protected activity played any role in the termination of his employment. We **VACATE** the ALJ's decision regarding protected activity. We **AFFIRM** the ALJ's finding that there was adverse action. We **VACATE** the ALJ's decision regarding the issues of causation and the affirmative defense because he must reanalyze these issues in light of the expansive definition of protected activity. Finally, we **REMAND** the ALJ's D. & O. for further consideration. On remand, with regard to exhibits, the ALJ shall clarify with specificity which exhibits were admitted and which rejected at the hearing and admit CX 56-60, if not already admitted. All of Wright's motions to strike exhibits are

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[53] We recognize that the ALJ also analyzed in his opinion whether the alleged protected activity was a motivating factor in Complainant's discharge and whether Respondent would have terminated Complainant's employment in the absence of any protected activity. A remand is still necessary, however, because this analysis is incomplete without recognition of the scope and nature of the protected activity. The ARB has previously noted that "strained relations between regulators and producers are to be expected." *White v. Osage Tribal Council*, ARB No. 96-137, ALJ No. 1995-SDW-001, slip op. at 5 (ARB Aug. 8, 1997). We have also cautioned that the line between insubordination and whistleblowing may be thin or even nonexistent. *See, e.g., Kenneway v. Matlack, Inc.*, No. 1988-STA-020, at 3 (Sec'y June 15, 1989) (noting that intemperate language, impulsive behavior, and even alleged insubordination are often associated with protected activity). We do not prejudge the outcome of this case, but remand to ensure that the analysis separates protected activity from insubordination.

[54] *Forrest v. Smart Transp. Servs. Inc.*, ARB No. 08-111, ALJ No. 2007-STA-009, slip op. at 5, n.6 (ARB Sept. 21, 2010) (While not necessarily dispositive, "temporal proximity may support an inference of retaliation.").
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denied—the ALJ did not abuse his discretion in admitting the exhibits that Wright now objects to; further, Wright did not object to their admission at the hearing.

SO ORDERED.

TANYA L. GOLDMAN
Administrative Appeals Judge

PAUL M. IGASAKI
Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

U.S. Department of Labor

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Issue Date: 19 May 2016

CASE NO.: 2015-SDW-1

In the Matter of:

FREDERICK B. WRIGHT,
Complainant

v.

RAILROAD COMMMISSION OF TEXAS
Respondent

Appearances:

Frederick B. Wright, *pro se*
For Complainant

Michael J. Deponte, Esq.
Julie C. Tower, Esq.
Jackson Lewis, P.C.
For Respondent

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

Complainant brought this case under the employee protection (whistleblower) provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Federal Water Pollution Control Act, (FWPC) 33 U.S.C. 1367, and the implementing regulations at 29 C.F. R. Part 24 based upon Complainant's assertion that Respondent terminated him on June 20, 2013 due to his protected activities under these statutes. For the reasons set forth below, I find that this case must be dismissed, because Complainant did not establish by a preponderance of evidence that he engaged in protected activity which was a motivating factor in Respondent's decision to terminate him. Therefore, Complainant has failed to establish an action cognizable under either act. Further, even if could establish such a connection, Respondent established that it would have terminated him for a legitimate, non-discriminatory reason absent any alleged protected activity.

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PROCEDURAL BACKGROUND[1]

On July 19, 2013, Complainant filed a complaint against Respondent with OSHA. In his complaint, Complainant alleged that Respondent terminated him on June 20, 2013 because he complained to management about being asked to approve completion reports and certifying that oil and gas operators had complied with rules pertaining to the protection of fresh water when in fact these operators had not complied. On April 9, 2015, OSHA issued its findings stating it found no cause to believe that Respondent violated either the SDWA or FWPCA. On May 6, 2015, Complainant timely appealed OSHA's finding. Pursuant to Complainant's appeal, a hearing was held before the undersigned in Houston, Texas on December 9 and 10, 2015.

Sovereign Immunity

Prior to the hearing, Respondent filed a motion for summary judgment on November 16, 2015. Respondent contends I lack subject matter jurisdiction in this matter since it is an arm of the State of Texas and administrative proceedings brought against states by private citizens are barred by the eleventh amendment. Specifically, Respondent maintains Congress has not waived state sovereign immunity with respect to claims brought under the whistleblower provisions of the Safe Drinking Water Act and Federal Water Pollution Control Act.

On the other hand, Complainant contends Respondent has waived its sovereign immunity to whistleblower complaints for violations of federal and state laws. Specifically, Complainant argues Respondent acknowledged the Court's subject matter jurisdiction by litigating the merits of the case before and after filing its answer to his complaint.

Correction of Record

At the hearing, Complainant testified, called two supervisory witnesses (Ramon Fernandez and Charles Teague), and identified 28 exhibits, of which I admitted 22. In addition to questioning Fernandez and Teague, Respondent called two management witnesses, Peter Fisher and Mark Bogan, and introduced 35 exhibits. Both parties filed briefs. Before receipt of briefs, Complainant filed a motion to correct the record in 71 places. Respondent agreed with corrections 1-6, 20-21, 23-25, 33, 36-37, 42, 44-45, 48, 50, 58, 59-63, 65-69, and 71. Respondent objected to Complainant's other proposed changes as substantive and not involving grammatical, typographical, or spelling changes appropriate for such a motion. After reviewing the record, I agree with Respondent's objections, except for objections to numbers 12, 16, 18, and 30-31 referring to centralizers "bow" out not "bore" out (Tr. 29:1); "non-critical" not "nautical" cement (Tr.51:2); "re-cement" rather than "resubmit" (Tr.60:10); Complainant asking questions and not the undersigned speaking (Tr. 121:19-20); and Complainant, rather than the undersigned, commenting on Complainant's conduct. (Tr.125:7-10).

Also before receipt of briefs, Complainant filed a 16 page document entitled "Complainant's Notice of Exhibits, Objections, Fatal Errors and/or Fatal Variances" (Complainant's Notice") to be included with his post-hearing brief. Complainant's Notice

[1]References to the record are as follows: Transcript: Tr. __; Complainant's Exhibits (listed by bates numbers): CX-__; Respondent's exhibits: RX-__; Stipulated definitions: STD; Stipulated facts: STF.

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erroneously contends the undersigned accepted Complainant's exhibits 1-78 to Complainant's First Amended Complaint and exhibits 89-223 to Complainant's Motion for Summary or Partial Summary Decision. Complainant's Notice also objects to testimony at various pages of the record as being presented in surprise and in violation of "28 FRCP 37(a)(4)" as hearsay.[2] Finally, Complainant's Notice cites variances with Respondent's pleadings and answers to interrogatories.

Complainant also seeks to have the undersigned categorize the testimony of Fernandez relating to complaints he received about Complainant as representing Fernandez's state of mind rather than factual incidents. As for Bogan's testimony, Complainant seeks to have me treat complaints about him as nothing more than disagreements about technical aspects of his work. Having reviewed the file, the undersigned finds no merit to any of these arguments.

Complainant also requests a determination by the undersigned that adverse actions are only limited to the 30 day time bar as opposed to protected activity which is not so limited. That request is discussed later in legal analysis portion of this decision. To the extent Complainant seeks to exclude the adverse testimony of Respondent's management officials regarding reports they received about Complainant's rude and unprofessional treatment of staff and operators as hearsay, the undersigned finds no basis for such a request even if such reports are hearsay (which they are not). 5 U.S.C. §§556-557.

Technical Terms

Due to the use of multiple technical terms in this proceeding, the undersigned asked the parties to submit a list of defined technical and industrial terms applicable to this case which appears below:

1. Alternate Surface Casing Request- a request for an exception to the surface casing requirements in 16 TAC § 3.13 as allowed by § 3.13(b)(2)(G).

2. Alternate Surface Casing Request Form- the form used by District 3 of the Commission's Oil and Gas Division on which an operator requests an exception to the surface casing requirements in 16 TAC § 3.13.

3. Annulus- the space between two concentric objects such as between the wellbore and casing or between casing and tubing where liquid can flow.[3]

4. Annular Disposal- the practice of pumping drilling waste down the annulus between the surface casing and the next size casing string.

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[2] Complainant apparently refers to Fed. Rule of Civ. Pro. 37, which pertains to the failure to make disclosures or to cooperate in discovery and sanctions. Rule 37 does not apply in this case.

[3] Although the parties stipulations do not include definitions for the following terms, my review of the records indicates Respondent provided these definitions in its prehearing exchange on November 16, 2015 without objection from Complainant: aquifer, reservoir, and surface casing.

EN.F22

5. Aquifer- a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

6. Casing String- an assembled length of steel pipe configured to suit a specific well bore. The sections of pipe connected and lowered into a wellbore and then cemented in place with the top of the pipe coming into the casing head.

7. BUQW (Base of Usable Quality of Water)- the depth below ground surface, above which ground water has generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination.

8. Casing head- the device at the surface terminus of wells to which all casings are connected and which facilitates pumping between any two strings of casing.

9. Circulating cement- this term pertains to the conditions in which cement is placed; it is not a type of cement. To circulate cement means to pump enough cement into a well bore and up through the annular space between the casing and the earth (or the casing and the next larger casing and string) such that some quantity of cement is returned (i.e., circulated) back to the ground surface.

10. Conductor Casing- the pipe running into wells, instead of or in addition to drive pipe, to prevent the collapse of soil or water into the well. Conductor casing typically runs deeper than drive pipe if the drive pipe is also used.

11. Completion report- a set of documents required to be filed with the Railroad Commission pursuant to 16 TAC § 3.16. including form W-2 or G-1, as applicable.

12. Centralizers- devices placed on casing to keep the casing centralized with the wellbore, facilitating efficient placement of cement sheath around the casing and between the casing and the wellbore.

~~13. D-O- the inspection report completed to describe an inspection.~~

14. Fresh water- water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose as defined TWC, Title 2. Subtitle D, Chapter 27, Subchapter A, Sec. 27.002(8).

15. Freshwater Strata- geologic formation(s) or portion(s) thereof containing fresh groundwater

16. Groundwater- water percolating below the surface of the earth.

17. Intermediate Casing- a casing string that is generally set in place after the surface casing and before the production casing. The intermediate casing string provides

protection against caving of weak or abnormally pressured formations and enables the use of drilling fluids of different density necessary for the control of lower formations.

18. Pollution- the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, water that renders the water harmful, detrimental, or injurious to humans, animals, vegetation, or property, or to the public health, safety or welfare or impairs the usefulness of the public enjoyment of the water for any reasonable purpose.

19. Production Casing- a casing string that is set across the reservoir interval and within which the primary completion components are installed.

20. Remedial Cementing- a cementing operation performed to repair primary cementing problems or to treat conditions arising after the wellbore has been constructed. The two main categories of cementing include squeeze cementing and the placement of cements plugs.

21. Reservoir- a natural or artificially created subsurface sedimentary stratum, formation, aquifer, cavity, void, or coal seam from which hydrocarbons may be produced.

22. Shoe- the bottom of the casing string including the cement around it, or the equipment run at the bottom of the casing string.

23. Surface Casing- the outer casing cemented in the upper portion of the well bore to protect fresh water formations from contamination. Surface Casing also refers to the well pipe inserted as a lining nearest to the surface of the ground to protect the well from near-surface courses of contamination.

24. USDW ("Underground Sources of Drinking Water")- an aquifer or its portion which is not an exempt aquifer as defined in 40 CFR section 146.4 and which (A) supplies any public water system; or (B) contains a sufficient quantity of ground water to supply a public water system; (i) currently supplies drinking water for human consumption; or (ii) contains fewer than 10,000 milligrams per liter (mg/l) total dissolved solids.

25. UQW (Usable Quality Water)- water containing 3,000 parts per million (ppm) total dissolved solids or less.

26. Wellbore- the hole drilled into the ground.

27. Well Completion- a generic term used to describe the assembly of downhole tubulars and equipment required to enable safe and efficient production from an oil or gas well.

28. Cement with 24-hr compressive strength of at least 250 psi-SWR 13(b)(1)(D) "Cement Quality," provides as follows: An operator may use cement with volume extenders above the zone of critical cement to cement the casing from that point to the ground surface, but in no case shall the cement have a compressive strength of less than 100 psi at the time of drill out nor less than 250 psi 24 hours after being placed.

29. Cement with 72-hr compressive strength of at least 1,200 psi-SWR 13(b)(1)(D), "Cement Quality," provides as follows: Surface casing strings must be allowed to stand under pressure until the cement has reached a compressive strength of at least 500 psi in the zone of critical cement before drilling plug or initiating a test. The cement mixture in the zone of critical cement shall have a 72-hour compressive strength of at least 1,200 psi.

FACTUAL BACKGROUND[4]

Respondent is a Texas state agency responsible for the regulation of the oil and gas industry in the state of Texas, including administration and enforcement of the underground injection control program under the federal Safe Drinking Water Act for class 2 injection wells associated with oil and gas exploration and production activities as well as brine mining activities. Respondent also serves as the certifying agency for federal permits under sections 401 and 404 of the Federal Clean Water Act, formerly referred to as the Federal Water Pollution Control Act (FWPCA), for projects associated with oil and gas exploration and production activities. (Tr. 211-213; 40 CFR §147.2201).

Respondent's District 3 Director, Guy Grossman, hired Complainant on October 1, 2007, as an engineer specialist II for its Houston District 3 Office, Field Operations Section, Oil and Gas Division. (CX-52; STF-1, 3). Prior to his employment with Respondent, Complainant worked as a petroleum engineer for the U.S. Bureau of Land Management, car sales manager, and as a project engineer for Gulf Oil, Union Texas Petroleum, and Exxon. (CX-196-201). As an engineer for Respondent, Complainant's duties included conducting surveys, making inspections, investigating complaints, and collecting and analyzing engineering data. (RX-1). As an engineer specialist, Complainant was assigned as a technical staff person to work with the regulated industry to secure compliance by oil and gas operators with the rules and statutes assigned to Respondent for enforcement. (RX-31; Tr. 93-95).

Regarding the alternate surface casing program which was the primary activity involved in this proceeding, Complainant had two responsibilities: (1) to insure that the operator was going to circulate cement to the surface and (2) to determine the number of centralizers to be used in this process. (Tr. 219-220, 230, 231-233).

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[4] The factual background consists of not only the parties' stipulations but the undersigned's factual determination of the record consisting of admitted exhibits and credibility determinations. In general, I was not impressed with Complainant's denial of his mistreatment of operators and refusal to work with staff personnel. Management was very lenient with Complainant and tried to encourage him to work with, as opposed to working against, independent contractors and fellow employees.

As of June 20, 2013, Complainant had received two promotions to engineer VI with his last bonus effective December 1, 2012. (RX-2; 27, STF-2). Respondent terminated Complainant on June 20, 2013, at which time he was under the supervision of District Director Charles Teague and assistant director Peter Fisher, who both reported to Deputy Director Raymond Fernandez[5].

At his first employee evaluation (EPE) on April 29, 2008, supervisor Gil Bujano, Director of Respondent's Oil and Gas Division, and Guy Grossman rated Complainant as meeting the requirements of his position. (RX-3). On his next two evaluations on October 21, 2008, and October 28, 2009, Complainant received similar evaluations. (RX-4, 5).

At the next evaluation (EPE) on October 28, 2010, Complainant maintained an overall rating of meeting the requirements of his position on average but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived Complainant was unwilling to work out amenable solutions at times. (RX-6). In reply, Complainant stated:

> I am taking this comments option to file a complaint that the District Director and the Assistant District Director are using their official capacities to harass me, with the intent to create a hostile work environment and adversely impact my employment opportunities. The baseless comments in this EPE about my lack of professionalism, me engaging in debates with operators, as well as the implication that unbiased individuals are hesitant to approach me, is part of the manifestation of this harassment.

In response, Guy Grossman and Raymond Fernandez stated there was no attempt to harass or create a hostile work environment for Complainant. Rather, they were suggesting ways Complainant could improve his performance for the betterment of Respondent. On appeal, HR Director Mark Bogan reviewed Complainant's harassment allegations and denied any evidence of harassment indicating that Houston's District Office management comments were suggestions for work improvement. (RX-7-8).

In support of his evaluation of Complainant, Respondent produced an e-mail from Douglas Storey of Fidelity Exploration & Production to Grossman dated June 15, 2010, in which Storey complained of Complainant's arrogant manner of treating him. Complainant acted as though he was the only individual who knew anything about engineering or regulatory issues and accused Storey of not properly calculating the correct number of centralizers. Complainant also demanded Storey write a letter of apology indicative of a lack of professionalism. (RX-17).

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[5] Raymond Fernandez retired from Respondent on August 31, 2014. Prior to his retirement, Fernandez served as Respondent's Deputy Director of Field Operations for its Oil and Gas Division for three years. In that position, he managed nine district offices, including Houston's District 3 Office. As Deputy Director, he had overall supervision for 250 employees. Before his promotion to Deputy Director, he held a numerous other positions with Respondent. As a professional petroleum engineer, he worked with oil and gas operators in dealing with and resolving regulatory issues. (Tr. 812-92).

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Storey submitted another e-mail dated April 16, 2013 indicating other instances of Complainant arbitrarily holding up completion reports. (RX-19).

On his next employee evaluation (EPE) on October 28, 2011, Complainant had an overall average evaluation with suggestions of taking more field trips and working for better relations with all operators to make "every effort to assist operators in keeping wells on production but also complying with the rules and regulations" and viewing violations from practical standpoint "in addition to the straight rules and regulations." (RX-9).

On the next employee evaluation (EPE) of November 14, 2012, Respondent evaluated Complainant as average but still needing to improvement relations with operators with the goal of providing excellent customer service and making the path to compliance quick and uncomplicated while working on better relations with staff as well, (RX-16). In support of its suggested improvements, Respondent cited instances of Complainant requiring analyst Marsha Vogel to report string depths on a completion package when she had never been required to do so in 20 years of regulatory reporting. (RX-13). Complainant denied causing any delays in processing completion reports and informed Fernandez his processing of completion reports "...significantly exceeds the rest of the District." (CX-31).

On September 6, 2012, Complainant filed a complaint with Gil Bujano, Director of Respondent's Oil and Gas Division, concerning the temporary assignment of Terry Papak to run the District 3 office in the absence of Teague and Fisher. Complainant claimed former district director Ron Smelley initiated this practice of appointing Papak, who was only specialist IV, as opposed to Complainant, who was a specialist VI, in order to demean Complainant. According to Complainant, he contacted Mark Bogan about this appointment and was advised it was only a temporary appointment and should not be concerned about it. Complainant disregarded Bogan's advice and when Fisher later made a similar appointment, Complainant again filed a formal complaint with Bujano. (CX-32).

Rather than working with operators to resolve compliance problems, Complainant continued to play "hard ball" with operators by refusing to help them resolve problems. For example, operator Paul Hendershott met with Complainant on April 10, 2013 and indicated he had taken over some "orphan" wells that had numerous violations. Hendershott sought Complainant's help in resolving these violations. Rather than helping Hendershott, Complainant laughed and told him that he could come up with more violations. Fellow employee Mark Motal overheard the exchange and apologized for Complainant's conduct, after which Hendershott stated he had never been so humiliated, talked down to, and made fun of in his entire life. The following day, Hendershott spoke with District Director Charlie Teague, who resolved Hendershott's problems and answered his questions. (RX-12).

Besides the Hendershott incident, Respondent produced an e-mail from fellow employee Michael Sims to Charlie Teague dated March 21, 2013, wherein Complainant, rather than helping Sims to resolve an issue of burial of oil based mud, continued to argue with Sims, which resulted in Sims having to seek assistance from Complainant's supervisor, Charlie Teague, and Peter Fisher, Deputy District Director, because Complainant refused to listen to anything Sims had to say. (RX-14).

As a further example of Complainant's unwillingness to work with operators and a lack of professionalism, Respondent provided an e-mail from Carla Martin of Enervest to Fernandez dated April 12, 2013, wherein she reported submitting a new form approved by Teague for use in a SWR 13(b)(2) request (alternative surface casing exemption request) for Strake #1 H well in Grimes County only to be told by Complainant that she had to use an old form to get her request approved. In addition, she complained that Complainant had a problem working with women and cited her experience of being interrupted by Complainant when she called to explain the purpose of her call. (RX-18).

Complainant's refusal to work with operators was exemplified also by his dealing with Douglas Storey of Fidelity Exploration & Production Co. which was also set forth in an e-mail dated April 16, 2013. The email states Complainant rejected Storey's revisions to completion package tracking no. 71248 without letting Respondent's proration and engineering personnel determine whether they were going to give Storey the necessary allowance. Upon receiving Complainant's response, Storey e-mailed Fernandez indicating that everything he submitted to Complainant was rejected even for things that Complainant was incorrect on. Further, Storey told Fernandez that if necessary he could provide three years of issues with Complainant. (RX-19).

EVENTS LEADING TO COMPLAINANT'S DISCHARGE

Operators continued to file complaints against Complainant regarding his inability or unwillingness to provide practical solutions to drilling problems. In December 2012, Monty L. McCarver, operations manager for Nabors Completion & Production Services Company, complained to Teague that every time they called to get a variance in plugging operations, Complainant came up with costly and impractical methods. In turn, Teague assigned other personnel, including himself and Fisher, to address these problems while removing Complainant. In response, Complainant filed a formal complaint with Gil Bujano, contending his removal was in retaliation for a previous complaint he filed against Teague and Fisher in September 2012 and to demean him and to impair his ability to have operators comply with the rules. (CX-32-34).

On April 17, 2013, Fernandez informed Teague that Complainant had filed a complaint alleging that District 3 management had created a hostile work environment due to their lack of understanding of the rules, regulations, and engineering principles associated with the responsibilities of a district office. In support of his complaint, Complainant cited instances wherein Teague approved a completion packet involving the use of partial plugs in inappropriate situations and wherein Fisher, in consultation with Anton Motal, improperly approved the remedial squeezing of a surface casing of a new well followed by an improper remedial cementing of another surface casing. Complainant also asserted Teague had improperly limited his access to information and made other assertions which Teague denied. (CX-37-47). Regarding Fisher, Complainant alleged he came to District 3 without a proper understanding or regard for the rules and improperly turned over responsibilities for reviewing completion reports to clericals, which Fisher also denied. (CX-56-59).

On May 17, 2013, Fernandez and Bill Miertschin from Respondent's Austin office travelled to the Houston District Office to conduct a Form P-112 "Performance Counseling" session of Complainant. Teague and Fisher attended this counselling session. A summary of the counseling in RX-20 stated the following:

> This counselling session is to remind you of past conversations we have had with you regarding your performance, along with suggested improvement that has been addressed in your earlier EPE's. All issues that you may have regarding your work assignments should first be brought to the attention of your District Director before you contact the Deputy Director of Field Operations or the Director of the Oil and Gas Division. Exceptions may be limited to those issues outlined in the Equal Employment Opportunity section of the Employee Handbook. The use of the "chain of command" has been brought to your attention in the past and you are reminded that you are expected to follow these instructions.
>
> Unsolicited complaints continue to be received regarding your relationship with operators. This continues to occur despite our efforts to help you with your work relationships. Operators report that you are difficult to work with, you exhibit rude behavior, and you are condescending in your dealings with them, and that you have resorted to "name calling". Operators complain that you are unreasonable and do not attempt to offer solutions to bring them into compliance with Commission rules. The Commission expects you to behave in a professional manner with Commission staff and industry representatives.
>
> Your work assignment does not include any management duties. Yet, you continue to insert yourself into managing co-workers when that is clearly not your assignment. This behavior disrupts the workplace. You are not to intervene in the management of the district office and its staff. If you believe there is a need for your involvement, you must contact the District Director or Assistant District Director.
>
> A great deal of time has been consumed by management at the district office and in Austin in dealing with your issues. Improvement in your behavior is required. Failure to do so may result in further disciplinary action up to and including termination of your employment with this agency.

In response, Complainant appealed by asking for specific incidents supporting the above evaluation, claiming he had not been provided with such information in the past. (RX-20, p. 2). On May 23, 2013, Gil Bujano replied, indicating Complainant's response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination. (RX-24).

On May 31, 2013, Complainant informed Kathryn Jaroszewicz, a consultant with Miller Consulting Inc. who had applied for an alternate surface casing program and utilized a new form approved by Teague in January 2013 (which did not require the number of centralizers to be listed for the BUQW on the second string when a short casing is run and did not address the issue of whether the bottom 20% of the surface casing was going to be cemented with critical cement), that she needed to use an older form which was attached and list the correct number of centralizers.[6] Ms. Jaroszewicz stated she would supply the requested information but was confused as to the correct form, new or old (which required more information), to be used. (STF-6-8). When Teague learned of Complainant's treatment of Ms. Jaroszewicz, he informed her she did not have to fill out another form. Rather, she could e-mail or phone Complainant and give him the number of centralizers needed to fulfill the requirements of Rule 13 whereupon Complainant could alter the form she submitted, initial the alteration, and approve it. (RX-25).

On June 4, 2013, Teague e-mailed Complainant and told him the new form contained enough information to approve Ms. Jaroszewicz's request regarding the issue of the sufficiency of cement addressed by the question of whether the operator planned on circulating cement to the surface on all casing strings protecting usable-quality water. Teague then asked Complainant if he had approved her request as Teague had informed her. (RX-23).

On the following day, Complainant e-mailed Teague, telling him that the new form did not address all issues raised by SWR 13(b)(2)(F), unless Teague was re-interpreting SWR 13(b)(2)(F) to eliminate the requirement that centralizers be run from BUQW to the surface with the new form by not asking for the centralizers that had been required from the BUQW on the second string when a short surface casing was run. Further, SWR 13 requires the bottom 20% of the surface casing be cemented with critical cement which the new form did not address or require the operator to provide the data to verify. Complainant then stated that the RCC's failure to review the data that operators had been submitting for the past five years amounted to "gross negligence" since operators made errors in the past that did not comply with the regulations intended to protect fresh water.

Complainant then stated:

> If you are informing me that it isn't my job to conduct the RCC's due diligence review of these applications and/or that you're revising these criteria, I will proceed accordingly. Your e-mail below appears to indicate your position on cement; however I will hold the application for your interpretation of the centralizers issue or the operator's response.

(RX-23, p.1).

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[6] In January of 2013, Teague approved use of an Alternate Surface Casing Program form (January ASCF) in District 3. In a February 5, 2013 e-mail, Teague requested comments from District 3 technical staff on changing the January ASCF form to a form he had used in other districts (February ASCF). On February 6, 2013, Complainant advised Teague he would have to get additional information from operators to review their alternate surface requests if Teague adopted the February ASCF form, which he did. (STF3-5).

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On June 6, 2013, Teague, in an e-mail to Bogan and Fernandez, recommended further disciplinary action of Complainant due to Complainant's refusal to comply with the directives of his counseling session. (RX-25). On June 10, 2013, Ms. Jaroszewicz submitted the correct number of centralizers for the alternate surface casing request for the well named "Ol Army Unit #1," which was the well Ms. Jaroszewicz had originally requested an alternate surface casing form. On June 10, 2013, Complainant approved Ms. Jaroszewicz's request. (STF-8-14).

On June 20, 2013, Respondent terminated Complainant due to his refusal to comply with Commission directives to work with management and staff and to assist operators in resolving compliance problems, including the most recent issue of assisting an operator on how to resolve a casing exception request. Complainant initially reviewed the operator's request, found it deficient, and directed the operator to re-file a new form with the required information. Teague intervened and instructed the operator to call or e-mail the additional information to Complainant and instructed Complainant to resolve the issue by making the necessary changes to the form and to submit it to the operator with the corrections to avoid the need to re-file. Instead of resolving this issue as instructed, Complainant engaged Teague in an e-mail debate and turned a simple resolution into a complex process by accusing Teague of incorrectly reinterpreting rules, interfering with Complainant's ability to perform his duties, and characterizing Teague's actions as "gross negligence." In so acting, Complainant ignored prior warnings that such action could lead to his termination.

TESTIMONY OF COMPLAINANT

Complainant testified that he used the Alternate Surface Casing Program Form (ASCF) approved in January 2013 rather than the ASCF approved by Teague in February 2013, because the January form provided more information. Further, he interpreted Fernandez's comments that Complainant's use of January 2013 form was not required by his job to be the primary reason for his termination even though Complainant allegedly insisted on using the January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act. (Tr. 518-519).

Regarding Complainant's communication on May 31, 2013 with Ms. Jaroszewicz, Complainant advised her that the use of seven centralizers was insufficient and that she should fill out the January ASCF form with the correct number of centralizers. (CX-70). Previously, she had used the February ASCF form. Complainant testified that the January ASCF form allowed the reviewer to evaluate more detailed information regarding cement volume, the placement of centralizers on the surface and second string of casing, and the strength of the casing. (Tr. 522).

Twenty minutes later, Ms. Jaroszewicz responded to Complainant's e mail saying she would update the information concerning the centralizers when she received it from the operator. Further, she requested information as to which ASCF form to use. About 5 minutes later, employee Marie Blanco informed Peter Fisher of the correspondence and within seven minutes Teague sent an e-mail to Ms. Jaroszewicz telling her it is not necessary to submit another form but simply to e-mail or phone Complainant and advise of the number of centralizers to fulfill the requirement of Rule 13. On June 3, 2013, Complainant e-mailed Teague, with copies to

Fernandez and Fisher, stating it appeared that Teague was telling him that he could no longer request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules. (CX-168-70; Tr 524-526). On June 3 and June 7, 2013, Ms. Jaroszewicz e-mailed the operator indicating "They (Complainant) would not indicate the number of centralizers needed to proceed with the application" to which the operator indicated on June 7, 2013 that he would run at least 20. On June 10, 2013, Ms. Jaroszewicz relayed with this information to Wright, and he approved the application. (CX-186-192, 531-532).

Complainant testified that his use of the January form, which requested additional information, constituted protected activity. Further, Complainant was told by Teague that the February form contained sufficient information to approve operators' request. However, Complainant disagreed with Teague, because the February form did not ask for the number of centralizers from the base of usable quality water in the second string. Teague accused Complainant of doing a detailed analysis of alternate surface request, which was not his job, and told Complainant he could calculate the number of required centralizers from the February form. (Tr. 544-549). Complainant complained of being subject to a hostile work atmosphere in February 2013 when he was assigned to bring wells into compliance. According to Complainant, Teague stated operators accused Complainant of being unreasonable and not offering solutions. As a result, Teague ordered him to approve completion reports and refer them to Austin for resolution. (Tr. 591-596).

On cross examination, Complainant denied being told by his supervisors that he needed to improve his relationships with co-workers and industry operators by not only pointing out violations but suggesting alternative ways to achieve compliances. (RX- 9-11, 16; Tr. 634-641). Yet, in the counselling session, he admitted being reminded of his duty to improve relations or be terminated for failing to do so. (Tr. 648-652).

Regarding the alternate surface casing request of Ms. Jaroszewicz for "Ol Army Unit #1" (CX-146, RX-25) which she submitted on May 31, 2013 using the February form, Complainant knew the number of centralizers (7) was more than enough for the surface casing set at 825 feet but not enough for the base of usable quality water set at 2025 feet which had to be protected. Rather than get on the phone and ask additional questions to determine the proper number and placement of the centralizers, Complainant sent Ms. Jaroszewicz the January form to complete, although in doing so he was going beyond what his duties required. (Tr. 679-681).

TESTIMONY OF RAYMOND FERNANDEZ, CHARLES TEAGUE, PETER FISHER, AND MARK BOGAN

Fernandez testified that he and Gil Bujano, Division Director, recommended to Milton Rister, Executive Director, that Complainant be terminated for unprofessional and unacceptable behavior with industry operators and staff, including incidents reported directly to them by operators and outside experts who claimed that Complainant had been rude to them, called them "stupid" and "liars," and refused to work with them in resolving problems. (Tr. 106-108, 126-131). As a result of Complainant's misconduct, Respondent fell far behind in its work due to an

undersized staff and a booming industry as well as due to the delays caused by dealing with the complaints generated by Complainant. (Tr. 134-135).

Regarding the May 31, 2013 alternate surface casing request of Ms. Jaroszewicz, Fernandez found fault with the manner in which Complainant handled the request and how Complainant dealt with the deficiencies in this request. Instead of calling the operator and resolving the deficiencies over the phone, Complainant chose not to do as Teague had instructed him to do in similar situations and complete the process in a few simple steps. Rather, Complainant told Ms. Jaroszewicz to fill out the older and more detailed form as opposed to the less detail form approved in February. Teague told Ms. Jaroszewicz it was not necessary to fill out the older and more detailed January form but simply to inform Complainant of the number of centralizers to be used. Then, Complainant could initial the changes on the February form and submit it for approval (assuming it correctly identified the number to Austin for approval). It was not necessary to provide the additional information relating to cement volume as long as the operator indicated that it was going to circulate cement to the surface. (Tr. 164-166). In essence, Fernandez stated it was not the duty of the commission employee to redesign the operator's casing program but rather to determine if the operator was going to circulate cement back to the surface and the number of centralizers to be used. (Tr. 181-187).

Fernandez testified that Complainant was terminated not for insisting on completion of the older January alternative casing form but for the unprofessional manner in which he handled the May 31, 2013 alternate surface casing request of Ms. Jaroszewicz which could have been determined by use of the February alternative surface form, initializing the correct number on the February form she had already used, and approving it as corrected. Instead, he instructed Ms. Jaroszewicz to fill out the January form, which caused unnecessary confusion and delay on Ms. Jaroszewicz's part (Tr. 216-221, 225-227, 231-238, 287, 288).[7] In so doing, Complainant admittedly went outside of his instructions and demands of his office. (Tr. 271-281).[8]

In deciding to terminate Complainant, Fernandez took into consideration Teague's June 6, 2013 e-mail in which Teague stated that Complainant refused to correct the errors on the February alternative casing form, initial the changes, and sign it. Complainant failed to inform Ms. Jaroszewicz of what was needed for approval, and Complainant's behavior was not the

[7] A copy of the new and more streamlined application for alternate surface casing program form as authorized by District Director Teague and used by Ms. Jaroszewicz appears at RX-21. A copy of the older form that Complainant insisted that Ms. Jaroszewicz fill out in addition to the newer form appears as RX-23, pp. 4-5. Respondent admitted the older form required more detailed information.

[8] Fernandez testified about other instances of unprofessional conduct by Wright in April 2012 when Fernandez received unsolicited complainants from regulatory analysts alleging Wright was rude, called one stupid, and was impossible to work with. (Tr. 106, 131, 248). Fernandez also received other complaints about Wright being unable to work with by a former employee who had retired and was working for an outside contractor and from another contractor accusing Wright of calling him a liar. (Tr. 107-108, 247, 313-314). Fernandez cited another instance of Complainant not getting along with fellow employee, Terry Papak, when he complained about an instance when Papak was appointed to supervise the Houston office for several days. (Tr. 311-313). Former employee Doug Storey complained to Fernandez about Complainant unduly processing his applications after leaving Respondent and going to work for an outside contractor. (Tr. 315-316).

correct way to handle the problem. Instead, Complainant characterized Teague's efforts as incompetent and a disregard for rules by creating a hostile work environment. In his e-mail, Teague stated that Complainant's conduct was not professional and a manifestation of being difficult to work with, about which he had been warned during his counselling session on May 17, 2012. (CX-67; RX-20, 26; Tr. 289).[9]

Teague, who retired from Respondent on December 31, 2014, and was District Director for District 3 from May 1, 2012 to December 31, 2014, testified that he recommended additional disciplinary action (not necessarily termination) due to Complainant's refusal to follow the directives of his counselling session of May 21, 2013. Specifically, Complainant was directed to behave in a professional manner with Commission staff and industry representatives and to cease being arrogant, insolent, and insulting to Commission managers and operators, presenting unnecessary obstacles to getting paper work done or approval, holding up approval of requests form minor issues, issuing a vague request for information, telling individuals to refile applications when the simple solution would have been to get on phone, and advising operators of deficiencies. (Tr. 338-339).[10] Teague cited instances of misconduct by Complainant, including instances where Complainant made compliance unnecessarily difficult and unpleasant, especially the May 31, 2013 request by Ms. Jaroszewicz. (RX-34; Tr. 347-367, 369-378).

Teague testified that Complainant, rather than accepting his directive, accused him and Respondent of gross negligence and suggested it was not his job to diligently review alternative surface casing requests. (RX-25, p.2; Tr. 445- 450). Teague then cited Complainant's inappropriate treatment of former employee Doug Storey by demanding an apology for not allegedly calculating the correct number of centralizers, his refusal to work with Michael Simms, Respondent's Manager of Technical Permitting, on a mud pit issue in March 2013, and his humiliation operator Hendershott, who asked for his help in resolving compliance issues only to be met with threats of finding additional violations in April 2013. (RX-12, 14; Tr. 469-477).[11]

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[9] RX-26 sets forth Fernandez's reasons for terminating Complainant, which amounted to Complainant's unacceptable behavior with Commission staff and regulated industry personnel who had previously complained about Complainant's refusal to work with them in resolving regulatory issues as exemplified by his treatment of Ms. Jaroszewicz's May 31, 2013 surface application request wherein he challenged Teague's directive, accused Teague of changing criteria related to the approval process and accused Teague's action as gross negligence. Instead of following Fernandez's admonition to improve his working relationship with staff and outside contractors as directed in the May 21, 2013, counselling session, Wright ignored this advice knowing such conduct could lead to his termination. Fernandez summarized his position in a subsequent affidavit to DOL. (RX-33). Complainant also ignored the May 31, 2013 instruction of Gil Bujano, Director of Respondent's, Oil and Gas Division to improve his conduct or be terminated. (RX-24).

[10] After the counselling session of May 23, 2013, Complainant appealed what he had been told to Gil Bujano, Director of the Oil and Gas Division who concluded Complainant was continuing to reject the guidance of his supervisors. In turn, he advised Complainant that continued rejection could result in his termination. (RX-24). Complainant's subsequent treatment of Ms. Jaroszewicz on May 31, 2013 led to his termination on June 21, 2013. (RX-26-27).

[11] Storey cited other examples of Complainant's lack of professionalism. On June 15, 2010, Complainant arrogantly accused Storey of not correctly calculating the correct number of centralizers and demanded a letter apologizing and stated it would never happen again. (RX-17). On April 16, 2013, Storey informed Fernandez of Complainant unreasonably demanding a letter of apology from Storey for allegedly miscalculating the number of

Fisher (currently District Director for District 3 since August 17, 2015 and formerly Assistant Director for District 3) confirmed the Terry Papek and Hendershott incidents. (RX-11; Tr. 698-700). Fisher also testified that Complainant, in handling Ms. Jaroszewicz's May 31, 2013 alternate surface request, could have calculated the number of centralizers to be run, informed her of that number, and then approve that request as modified without having her complete the older form. Instead, Complainant turned a simple request into a more complex proceeding in disregard of Respondent's policy of streamlining the approval process while protecting ground water. (Tr. 704-709).

Bogan, the Human Resources Director for Respondent, testified that in response to internal complaints Complainant filed against Teague and Fisher for creating a hostile work environment, he learned that Complainant had occasional problems with co-workers concerning the location of thermostats and operators such that they went out of their way to avoid contact with Complainant because they found him difficult to work with. (RX-7-8; Tr. 760-762). Bogan testified Complainant was terminated for not following Respondent's procedures. (Tr. 752-753). Further, when terminated, Complainant did not claim he was being retaliated against for engaging in protected activity in violation of the Federal Water Pollution Act or the Safe Drinking Water Act. More importantly, Respondent did not terminate Complainant for engaging in such activities. (Tr. 754-755).

DISCUSSION

A. The Eleventh Amendment & Sovereign Immunity

Respondent contends administrative proceedings brought against states by private citizens are barred by the eleventh amendment, unless a state has waived its immunity. Respondent argues Congress has not abrogated state sovereign immunity with respect to claims brought under the whistleblower provisions of the Safe Drinking Water Act and the Federal Water Pollution Control Act. Thus, Respondent maintains Complainant's claims must be dismissed in their entirety. (Resp. Post-Hrg. Br., pp. 12-15).

In response, Complainant argues Respondent has waived its sovereign immunity with regard to whistleblower complaints for violations of federal and state laws. Specifically, Complainant contends Respondent acknowledged the Court's subject matter jurisdiction by litigating the merits of the case before and after filing its answer to the complaint. (Comp. Post-Hrg. Br., pp. 7-10).

The "whistleblower protection" provisions of 42 U.S.C. § 300j-9(i)(1) and (2) of the Safe Drinking Water Act ("SDWA") provide in pertinent part:

> (i)(1) 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

centralizers and holding up completion reports for punitive reasons. (RX-19). In essence, Complainant was refusing to work with operators.

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> employee (or any person acting pursuant to a request of the employee) has-
>
> (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,
>
> (B) testified or is about to testify in any such proceeding,
>
> (C) assisted or participated or is about to assist or participate in such a proceeding or in any other action to carry out the purposes of this subchapter.
>
> (i)(2) Any employee who believes that he has been discharged or otherwise discriminated against **by any person** in violation of paragraph (1) may, within 30 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor...alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the personal named in the complaint of the filing of the complaint.

(emphasis added).

The SDWA defines a person as "an individual, corporation, company, association, partnership, **State**, municipality, or Federal Agency (and includes officers, employees, and agents of any corporation, company, association, **State**, municipality, or Federal Agency." 42 U.S.C. § 300f(12). (emphasis added).

The "whistleblower protection" provision of 33 U.S.C. § 1367 of the Federal Water Pollution Control Act ("FWPCA") provide in pertinent part:

> (a) No **person** shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

(emphasis added).

The FWPCA defines a person as "an individual, corporation, partnership, association, **State**, municipality, commission, or **political subdivision of a State**, or any interstate body." 33 U.S.C. § 1362(5). (emphasis added).

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Based on a clear reading of the statues above, I find that Respondent is not entitled to sovereign immunity and that subject matter jurisdiction is proper in the instant matter. The SDWA and FWPCA whistleblower statutes and implementing regulations unequivocally *include* a State in the definition of "person." 42 U.S.C. § 300f(12); 33 U.S.C. § 1362(5) (emphasis added). Since both statutes define a State as a "person," I find Congress had the intent to abrogate sovereign immunity in regards to the whistleblowing provisions when enacting both statutes. Thus, the undersigned has subject matter jurisdiction to decide the merits of Complainant's claims.

In addition, the ARB has provided guidance on whether Congress has exercised its power to abrogate sovereign immunity. When determining whether sovereign immunity exists, the ARB has focused on the enforcement and remedial provisions of the whistleblower statute at issue to determine if the provisions include a governmental entity. If the enforcement and remedial provisions include a word that is defined to include a "State, agency, or municipal body," then the ARB has found no sovereign immunity under the Eleventh Amendment exists. However, if the enforcement and remedial provisions of the whistleblower statute do not include a word defined to include a "federal, state, or local governmental agency," then the ARB has concluded sovereign immunity exists, since Congress did not intent to abrogate sovereign immunity for that specific whistleblower statute.

In *Minthorne v. Commonwealth of Virginia*, the ARB held that Congress unequivocally intended the CAA's employee whistleblower protection provision to apply to the states. In *Minthorne*, the complainant alleged his employer, the Commonwealth of Virginia, violated the Clean Air Act's (CAA) employee protection provision by denying him compensation for his accrued annual leave in 2008. The administrative law judge dismissed respondent based upon sovereign immunity under the Eleventh Amendment. Specifically, the ALJ found Congress had not abrogated sovereign immunity in the CAA. *Minthorne v. Commonwealth of Virginia*, ARB No.09-098 (ARB July 19, 2011).

On appeal, the ARB found the CAA's inclusion of "State" in its definition of what constitutes a "person" indicated Congress's clear and unambiguous intent to abrogate State sovereign immunity regarding whistleblower protection provisions. *Id.* In support of its finding, the ARB cited the Tenth Circuit's analysis in *Osage Tribal Council v. Department of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999), which addressed sovereign immunity under the Safe Drinking Water Act's whistleblower protection provisions. *Id.*

However, in *Mull v. Salisbury Veterans Administration Medical Center*, the ARB held sovereign immunity is not waived under the Energy Reorganization Act (ERA), since the definition of word "person" is not defined within the statute. *Mull v. Salisbury Veterans Administration Medical Center*, ARB No. 09-107 (ARB. August 31, 2011). In particular, the ARB found the ERA's employee protection provisions did not contain any language that expressed Congress's intent to waive sovereign immunity. *Id.* The ARB supported its conclusion by stating the undefined term "person" under the ERA provided a lack of clarity in determining whether Congress abrogated sovereign immunity for ERA whistleblower suits. *Id.*

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Applying the holdings of the two cases above, it is clear that Congress waived sovereign immunity for whistleblowers suits under the SDWA and the FWPCA. Both statutes provide a clear definition of the term "person," which includes a State or an agency of the State. See 42 U.S.C. § 300f(12); 33 U.S.C. § 1362(5). Upon an examination of the enforcement and remedial provisions of both statutes at issue, the analysis in *Minthorne* and *Osage Tribal Council* applies to this matter. By including State and an agency of the State in the definition of the term "person" in both acts, Congress intended to waive sovereign immunity in regards to whistleblowers suits under the SDWA and FWPCA.

Respondent also contends dismissal is proper based upon the decisions in *Rhode Island Dept. of Environmental Management, State of Rhode Island v. United States of America, et al.*, 304 F.3d 31 (1st Cir. 2002) and *State of Ohio Environmental Protection Agency v. United States of America Department of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000). Specifically, Respondent contends the holdings in *Rhode Island* and *Ohio* bar Complainant's suit against Respondent, unless the Secretary of Labor intervenes in the proceeding or the state waives its immunity. *Rhode Island Dept. of Environmental Management*, 304 F.3d at 40. Respondent contends dismissal is proper since neither of the exceptions has occurred. However, Respondent's reliance on these two cases is misguided.

Contrary to Respondent's contentions, I find the decisions in *Rhode Island* and *Ohio* do not warrant dismissal of this case. First, both *Ohio* and *Rhode Island* involved a deferential review of a district court's order enjoining the administrative adjudication proceedings regarding the employees' claims. (121 F. Supp. at 1160; 304 F.3d at 31). Unlike those suits, this matter is not a review of an injunction, but rather a de novo evidentiary hearing on the merits. Second, the First Circuit in *Rhode Island* found nothing in the Solid Waste Disposal Act's whistleblower protection provision at issue expressed an intention to abrogate the states' sovereign immunity. (304 F.3d at 47-48). As discussed above, the employee protection provisions under the SDWA and FWPCA do express a clear and unambiguous intent to abrogate the states' sovereign immunity. Third, the court's holding in *Ohio* that a state's sovereign immunity can be defeated if the Department of Labor elects to intervene as a party in the matter violates the purpose and procedures of the SDWA and FWPCA as well as unduly prejudices a complainant whose employer is a state agency. (121 F. Supp. at 1167-69). An application of the *Ohio* court's decision would create a double standard for employees depending on whether their employer is a state or agency of a state, denying employees of a state or state agency access to a de novo evidentiary hearing afforded to them by the whistleblower statutes. Upon review of the SDWA and FWPCA, I am doubtful that Congress intended to create different procedures based on employer status that could potentially deprive a complainant the right to object to OSHA's findings and request a de novo evidentiary hearing.

Therefore, Respondent's argument that dismissal of the instant matter is proper under the doctrine of sovereign immunity fails, and this Court has subject matter jurisdiction to decide the merits of Complainant's claim.

B. Elements of Safe Drink Water Act (SDWA) and Federal Water Pollution Control Act (FWPCA) Violation

To establish a violation of either the SDWA or FWPCA, Complainant must establish by a preponderance of evidence that (1) he or she engaged in protected activity; (2) Respondent was aware of the protected activity; (3) he or she suffered an adverse action, and (4) the protected activity caused, or was a motivating factor in, the adverse action. Relief may not be ordered if Respondent demonstrates by a preponderance of evidence that it would have taken the same adverse action in the absence of the protected activities. 29 C.F.R. § 24.109(b)(2).

An employee engages in protected activity if he or she:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in §24.100(a) or a proceeding for the administrative or enforcement of any requirement of any requirement impose under such statute;

2. testified or is about to testify in any such proceeding; or

3. assisted, 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.

29 C.F.R.§ 24.102(b).

Protected activities include external and internal complaints, written or oral, and extends to the filing of complaints under OSHA when such complaints touch on the concerns for the environment and public health and safety that are addressed by the statute. (*Melendez v. Exxon Chemical Americas,* ARB No. 96-051, ALJ 1993-ERA-6, slip op. at 17 (ARB July 14, 2000)). Whistleblower protection requires an employee's complaints be grounded in conditions constituting violations of the environmental acts. (*Powell v. City of Ardmore, Oklahoma,* ARB No. 09-071, ALJ No.2007-SDW-1 at 5 (ARB Jan 5, 2001)). The reasonableness of a whistleblower's belief regarding statutory violations by an employer is determined on the basis of the knowledge available to a reasonable person in the circumstances within the employees training and experience. (*Melendez,* ARB No 96-051, ALJ No. 1993-ERA-006, at 27).

In this case, there is no evidence that Complainant (1) ever referred to SDWA or FWPCA in any communication to Respondent, (2) notified or accused Respondent of any violation of the SDWA or FWPCA, (3) refused to engage in any practice made unlawful by the SDWA or FWPCA, or (4) filed or testified before Congress or at any federal or state proceedings regarding any provision of the SDWA or the FWPCA. 29 C.F.R. § 24.109 (c)(1)-(3).

Complainant nonetheless contends that his use of the older January AFCS form which requested more information than the February AFCS form as well as his follow-up June 5, 2013 e-mail to Teague questioning whether Teague was instructing him not to use due diligence in reviewing operator application constitutes protected activity. Further, Complainant asserts that

Teague knew he was referring to violation of the SDWA and the CWA when he objected to use of the February AFCS form by his comments.

The undersigned does not agree with Complainant's assertion, especially since Complainant, from the undersigned's observation of his behavior, appears to be a person who prides himself on attention to detail. If Complainant was concerned about Respondent's alleged disregard of the SDWA or FWPCA, then it is only logical that he would have referred to such in his correspondence with Respondent, which he failed to do. Accordingly, I find no credible evidence of protected activity.

Assuming for sake of argument that Complainant did engage in protected activities as asserted (a position I do not credit), then I find that Respondent obviously knew about such action. Further, Respondent admits that Complainant suffered adverse action when he was terminated. Thus, the only remaining question to be resolved is whether Complainant proved by a preponderance of evidence that the alleged protected activity was a motivating factor in Complainant's discharge. To answer that question, I have looked at Complainant's entire employment record, including his most recent evaluations. From these evaluations which clearly preceded his discharge, I note a documented history of interpersonal conflicts with operators and Respondent's own staff. Indeed, Complainant demonstrated an unwillingness to work with operators in identifying alternative ways to become compliant such that operators went out of their way to avoid dealing with Complainant by calling outside Complainant's schedule hours of work. (RX- 6, 9, 16; Tr. 105-109, 631, 633-634, 640-641, 691-693, 746-747).

Teague observed Complainant's behavioral problems when he became District 3 Director. Teague found Complainant to be arrogant, insulting, and insolent in dealing co-workers, supervisors, and operators. (RX-17; Tr. 335, 338-340, 465, 466, 477). Instead of helping operators obtain specific information to process applications, he instead would locate a piece of missing or inaccurate information, issue a vague request for more information, or ask operators to refile their applications without providing any guidance. (Tr. 340). Teague cited examples of Complainant's inappropriate conduct with former employee Doug Storey, to whom he demanded an apology for submitting incorrect centralizers and observed Complainant's laughing at operator Paul Hendershott when Hendershott asked for help in resolving well violations. (RX-12, Tr. 476-477). Teague also testified about Complainant's inability to work with Respondent employee Michael Simms on a technical issue. (RX-14, Tr. 469-470).

Fernandez testified that he continued to receive complaints about Complainant in 2013 from Storey and two regulatory analysts who found Complainant rude and impossible to work with. (Tr. 106, 130-131, 318). One of these analysts, Carla Martin, e-mailed Fernandez on April 12, 2013, and complained about Complainant sending her an old alternate surface casing request to fill out when Teague had already sent her a new form. (RX-18, Tr. 314).

On May 21, 2013, Complainant received a P-112 employee counseling from Fernandez warning Complainant of his misconduct and telling him further misconduct could result in disciplinary action including termination. (RX-20, Tr. 320). Despite this admonition, Complainant continued to require operators to submit the old form. The new form required less information from operators than the old form but nonetheless provided sufficient information for

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Respondent to approve Rule 13 requests. On May 31, 2013, Complainant received an alternate surface request from a consultant to an operator. Complainant determined that the application lacked a sufficient number of centralizers and directed the consultant to fill out the old form and indicate the appropriate number of centralizers although the correct number could be determined from the new application. (RX-25, Tr. 155-156, 347-348, 350-353, 369-372, 383-384, 441-442, 520, 597-598).

The e-mail sent to Teague by Complainant on June 5, 2013 constitutes a dispute with Teague over the manner in which Complainant preferred to process an alternate surface casing request. This dispute showed Respondent that Complainant was not heeding his instructions from Teague and Fernandez to cooperate and work with operators. Had Complainant been compliant, he would have told Ms. Jaroszewicz the correct number of centralizers to be used, modify or correct the application in the designated place(s), and sign and approve the form as modified. Instead, he instructed the consultant to fill out another form which was not necessary, which left the consultant guessing the correct number for compliance. Thus, as Teague and others with Respondent observed, Complainant was making compliance with the regulations much more complex than needed and thereby wasting Teague's and Fernandez's time in dealing with such issues.

Complainant's conduct was not protected activity. If anything, it constitutes anti-compliance, insubordination, and anti-protected activity. Teague's decision to impose additional discipline and Fernandez's decision to terminate Complainant were based solely on Complainant's misconduct and had nothing to do with any alleged protected activity (which is not limited to 30 day filing limitation as was his termination came within 30 days of Complainant's filing of his complaint).

In discharging Complainant, Respondent treated Complainant in the same manner it would any other employee who refused to follow directions. (Tr. 763-764). As such, I am convinced because of the severity of Complainant's misconduct which hampered and impeded his supervisors in dealing with an overload of problems associated with the proper enforcement of a booming regulatory business, Respondent has proven by clear and convincing evidence it would have terminated Complainant in the absence of any protected activity. (Tr. 127-136).

Accordingly, I find Complainant's complaint lacks merit and dismiss it for the failure to prove any act in violation of the employee protection provisions of the Federal Water Pollution Control Act or the Safe Drinking Water Act.

ORDERED this 19th day of May, 2016, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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United States Court of Appeals for the Fifth Circuit

No. 19-60561

FREDERICK B. WRIGHT,

Petitioner,

versus

ADMINISTRATIVE REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Review of an Order of the United States Department of Labor
Agency No. 2019-0011

ON PETITION FOR REHEARING EN BANC

(Opinion November 13, 2020 , 5 CIR., _____ , _____ F.3D _____)

Before OWEN, *Chief Judge*, and SOUTHWICK and WILLETT, *Circuit Judges*.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court

having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.