

**U.S. Department of Labor**

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**Issue Date: 20 October 2009**

CASE NO. 2002-CAA-00022

In the Matter of:

HUGH B. KAUFMAN,  
Complainant,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
Respondent.

**APPEARANCES:**

Regina Markey, Esq.  
For the Complainant

Charles G. Starrs, Esq.  
For the Respondent

Before: THOMAS M. BURKE  
Administrative Law Judge

**DECISION AND ORDER**

This matter involves a complaint by Complainant, Hugh B. Kaufman, with the Occupational Safety and Health Administration, (OSHA) United States Department of Labor (DOL) on April 3, 2001, and a second complaint on May 2, 2001, against Respondent, the United States Environmental Protection Agency (EPA). Kaufman requests relief under the employee protection provisions of seven environmental protection statutes: the Clean Air Act (CAA), 42 U.S.C. § 7622; the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9; the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971; the Federal Water Pollution Control Act (FWCPA), 33 U.S.C. § 1367; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610; the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622; and the Energy Reorganization Act (ERA), 42 U.S.C. § 5851.

Kaufman is an employee of the EPA assigned to the Office of Solid Waste and Emergency Response (OSWER). Kaufman complains that EPA retaliated against him because he engaged in protected activity under the aforementioned environmental protection statutes while he was performing Ombudsman duties.

## **PROCEDURAL HISTORY**

OSHA ruled on July 12, 2002, that EPA unlawfully retaliated against Kaufman in reprisal for doing ‘too effective job’ in support of the Ombudsman Program. EPA appealed the ruling to the Office of Administrative Law Judges on July 22, 2002.

EPA filed a Motion to Dismiss or, in the Alternative, for Summary Decision on the two complaints. The motion requested that the complaints be dismissed on the grounds of lack of subject matter jurisdiction, sovereign immunity, failure to state a claim and statute of limitations. Kaufman filed a response to the motion and EPA filed a reply thereto. An Order Granting Partial Summary Decision was issued on September 30, 2002. The order agreed with EPA’s argument that it has immunity from an action under the Toxic Substance Control Act and the Energy Reorganization Act because the United States has not waived its sovereign immunity from suit under those statutes. Specifically, the Administrative Review Board (ARB) held in Stephenson v. NASA, 1994-TSC-00005 (Dec. & Order of Remand, July 3, 1995) that the United States has not waived its sovereign immunity from suit under the Toxic Substance Control Act, and the ARB held in Williams v. Lockheed Martin Energy Systems, Inc. ARB No. 98-059 (ARB Jan. 31, 2001), Teles v. Department of Energy, 94-ERA-22 (Sec’y, Aug. 7, 1995) and Johnson v. Oak Ridge Operations Office, ALJ Case Nos. 1995-CAA-00020, 21 & 22, ARB Case No. 97-057 (Sept. 30, 1999) that the DOL does not have jurisdiction over the EPA under the ERA because the United States is not included within the ERA’s definition of employer. Thus, Congress did not unequivocally waive the government’s sovereign immunity.

The Order Granting Partial Summary Decision rejected EPA’s argument that the Department of Labor did not have jurisdiction because the complaints are grievances which fall exclusively within the scope of a collective bargaining agreement (CBA). The order interpreted relevant case law and legislative history as observing that the government has an important interest in CBA not being an exclusive remedy because the whistleblower protection statutes not only protect the employees but they promote public safety. The order also denied EPA’s argument that Kaufman’s complaints were untimely as they were not filed within the thirty day statute of limitations proscribed by CERCLA, CAA, FWPCA, SWDA, and SDWA. The order held that whether the complaints were timely is a question of fact, and upon a motion for summary judgment all doubts as to the existence of a genuine issue as to a material fact must be resolved against the party moving for a summary judgment.

The Order Granting Partial Summary Decision sustained EPA’s argument that Kaufman’s allegation of “badmouthing” does not support an independent adverse employment action, that is, a claim of a tangible job detriment, under the employee protection provisions of the seven environmental protection statutes. However, the order did find that Kaufman could present evidence of “badmouthing” in that it could be considered evidence of illegal animus by EPA toward Kaufman.

A hearing was scheduled but continued on three occasions to allow the parties to pursue discovery. A Discovery Order was issued on October 17, 2002, granting EPA's Motion for Protective Order from the deposition of high government officials at EPA, including the Secretary of EPA, the Acting Inspector General of EPA and the General Counsel of EPA. The Order cited In Re United States, 985 F.2d 510, 512 (11<sup>th</sup> Cir. 1993) (per curiam) cert. denied, Faloon v. United States, 510 U.S. 989 (1993), and In Re Federal Deposit Insurance Corp., 58 F.3d 1055, 1060 (5<sup>th</sup> Cir. 1995), for the rule that the deposition of high government officials requires a heightened showing that they actually have personal information regarding discoverable matters and that a deposition was the only way such information could be obtained, and the order found that the Complainant had not met that burden. The Discovery Order granted the Motion for Protective Order until such time as Complainant was able to make the requisite showing.

A subsequent Discovery Order was issued on January 31, 2003, granting EPA's Motion for a Protective Order from the deposition of two additional high government officials, the Deputy Administrator and the Administrator's Chief of Staff, as Complainant had not shown that the officials had personal information relevant to his complaint. Complainant filed for reconsideration, and an order granting reconsideration was issued vacating, in part, the Protective Order. See Order of Reconsideration, Vacating Protective Order In Part, dated April 2, 2003. The order vacated the protective order with regard to the Administrator's Chief of Staff as it was determined that Kaufman had made the requisite showing that she had personal knowledge. The motion to vacate the protective order as to the Deputy Administrator was denied because it was determined that the matters of which she had personal knowledge, the transfer of the Ombudsman function to the Office of the Inspector General, was irrelevant to this proceeding.

EPA filed a third Motion for Protective Order on March 26, 2003, arguing privilege. EPA argued that Kaufman's intention to depose witnesses concerning EPA's response to production of documents requested by Kaufman was privileged as communications between EPA and its counsel. EPA's motion was denied as Kaufman's request was found to inquire about general agency procedures, not legal advice in the course of litigation. See Order Denying Motion for Protective Order, dated May 9, 2003.

A Second Motion to Compel Discovery filed by Kaufman on May 7, 2003 was denied because the motion requested information irrelevant to this claim. Kaufman requested information relating to a memorandum from Kaufman's supervisor reminding of a government wide ethics regulation that precludes employees from testifying in a judicial proceeding as an expert witness where EPA is a party. The requested information was found to be irrelevant because Kaufman did not show that the memorandum altered the conditions of his employment. See Order Denying Complainant's Second Motion to Compel, dated June 6, 2003.

Another Protective Order was issued on June 26, 2003, requiring Respondent to protect backup computer tapes, and an Order Denying Complainant's Third Motion to Compel was issued on August 5, 2003, because the deponent was a former EPA official over whom EPA no longer exercised any control.

Kaufman requested reconsideration of the April 2, 2003 Order denying Kaufman's request to vacate the Protective Order for the deposition of the EPA Deputy Administrator, in so

far as the order was based on a finding that the transfer of the Ombudsman office within the EPA was irrelevant because the transfer of the office did not affect the terms and conditions of Kaufman's employment. An August 8, 2003 Order denied reconsideration of the denial of the request to depose the Deputy Administrator, but it rescinded the finding in the April 2, 2003 Order that the transfer of the Ombudsman office was irrelevant. The August 8, 2003 Order found that the transfer of the Ombudsman duties were relevant in light of Kaufman's allegations, made for the first time in his Motion for Reconsideration, that the transfer of the Ombudsman office adversely affected the terms and conditions of his employment because from January 12, 2002 through April 12, 2002, Kaufman was performing Ombudsman responsibilities, i.e., alleged protected activity, and that his resumption of ombudsman duties was hindered by the transfer of the Ombudsman office within the EPA. See Order Denying Complainant's Motion For Reconsideration Regarding Vacating the Protective Order For Linda Fisher, dated August 8, 2003.

An Order was issued on October 31, 2003, granting Complainant's Fourth Motion To Compel Discovery. Kaufman's fourth motion requested information and records relating to pay grades and employment opportunities in the Ombudsman office relocated at the Inspector General Office of the EPA. The Order recognized that the transfer of the ombudsman office was found to be relevant in the August 8, 2003 Order and discovery would be permitted in this issue. EPA's objection that Kaufman's request for documents would include privileged communications between EPA counsel and EPA officials was overruled as Kaufman's Motion to Compel stated that Kaufman does not seek information covered by the deliberative process, attorney-client, and attorney work product privileges. See Order Granting Complainant's Fourth Motion to Compel, dated October 31, 2003.

An Order Regarding Fifth Motion To Compel was issued on June 23, 2004, wherein EPA was ordered to supplement certain interrogatories, and amend answers to interrogatories to clarify the affirmation.

Kaufman filed a Motion in Limine on January 21, 2005, arguing for an exclusion of all evidence relating to allegations of disciplinary problems related to Kaufman's employment. Kaufman's argument was rejected, reasoning that otherwise, an acceptance of Kaufman's argument would require a finding that a satisfactory performance rating conclusively equates to a finding of no performance deficiencies, even without knowing the basis for the rating. Also, because Kaufman was never placed on a Performance Improvement Plan does not mean that he was never communicated with about concerns related to his conduct or performance of Ombudsman-related work. His not being placed on a Performance Improvement Plan was found to not mean that any communication regarding his conduct of performance of Ombudsman-related work must be considered irrelevant.

Kaufman moved for a default judgment and for further sanctions against EPA for repeated violations of the rules and orders of this proceeding. Kaufman asserted that over the course of discovery, EPA pursued a willful pattern of obstruction and deceit by refusing to conduct basic document searches, abusing the conferral process, and failing to preserve electronic and paper evidence. An Order Denying Default Judgment and Granting Request for

Backup Tapes was issued on December 8, 2005. Initially, the order observed that at that point discovery had been extensive:

Complainant has engaged in extensive and prolonged discovery in this case. He has filed some twenty-two formal discovery requests commencing on July 31, 2002 with Complainant's First Notice To Take Deposition upon Oral Examination and for Production of Documents and concluding on September 29, 2004 with Complainant's Sixth Set of Interrogatories. Complainant has also filed some seven motions to compel discovery and is presently in U.S. District Court for the District of New Jersey with a petition to enforce an Administrative Subpoena served on Eileen McGinnis, a former Chief of Staff of Respondent's Administrator.

In response to Complainant's discovery requests, Respondent has filled over twenty-one formal responses, providing over fifty-eight hundred pages of documents, and eight witnesses for deposition, one of whom Complainant deposed twice.

The order found that EPA failed to comply with discovery orders in some respect, but that Kaufman had not met his burden of showing that EPA should be found to be in default for deliberate discovery misconduct. The order also found that Kaufman misinterpreted the November 18, 2002 discovery order, as EPA was not required to produce documentation related to events that occurred after the removal of Ombudsman duties from Kaufman, such as the February and March 2002 World Trade Center proceedings; as such actions would be irrelevant here. Although, the order required EPA to produce documents created up to the present time, they had to be related to the substance of his claims filed on April 3, 2001 and May 2, 2001. Also, searches prior to August 8, 2003 would not have turned up documents related to the transfer of Ombudsman duties, as those documents were not considered to be relevant prior to that order. On the other hand, Kaufman's assertion that EPA had failed to preserve documents responsive to the 2002 discovery orders was found to be correct, in that EPA took no affirmative actions to instruct employees to retain appropriate documents and to preserve backup tapes. Accordingly, the order required EPA to restore the backup tapes known as the "Landmark" litigation tapes and turn over to Kaufman the documents on those tapes relevant to the issues in this case. It was had been revealed during discovery that EPA had preserved backup tapes in response to separate litigation known as the "Landmark litigation."

Kaufman sought an order from U.S. District Court to enforce a subpoena for the deposition of the former Chief of Staff of the Administrator. His request was denied by Order & Judgment and Memorandum Opinion issued by the United States District Court for the District of New Jersey at Hugh B. Kaufman v. Eileen McGinnis, Civil Action No. 05-2325 (MLC) denying enforcement of the Office of Administrative Law Judge subpoena for Eileen McGinnis.

A Notice of Hearing was issued on March 10, 2006, setting the hearing for the following June as it appeared that the matter was ready for hearing in light of the order from the U.S. District Court, as well as a March 6, 2006 Order denying a motion from Kaufman requesting procedures for restoration of backup tapes and denying EPA's Motion For Reconsideration of a

December 8, 2005 Order Denying Default Judgment and Granting Request for Backup Tapes. See Notice of Hearing dated March 10, 2006.

EPA subsequently requested certification for immediate, interlocutory review by the ARB of three orders: a September 30, 2002 Order Granting Partial Summary Judgment; a December 8, 2005 Order Denying Default Judgment and Granting Request for Backup Tapes; and a March 6, 2006 Order Denying Motion For Reconsideration of the December 8, 2005 Backup Tapes Order. The request was denied by Order issued on April 3, 2006, since none of the orders were the subject of substantial disagreement, and since the hearing was scheduled for June 12, 2006, it was unlikely that an appeal would advance the ultimate determination. See Order Denying Motion to Certify Orders for Interlocutory Review, issued April 30, 2006.

A joint request was filed for an extension of time for EPA to restore and search the Landmark Tapes, and for the hearing to be postponed because the parties commenced discussions relating to possible settlement. The request was granted in Order Granting Second Extension & Rescheduling Hearing, dated May 9, 2006. Four further extensions of the hearing date were granted, leading to joint motion for the appointment of a settlement judge. On November 7, 2006, an Order Appointing Settlement Judge was issued, and the matter was stayed pending completion of the settlement judge process. Unfortunately, the settlement discussions were unsuccessful, and a Notice of Conclusion of Settlement Judge Proceeding was issued by the settlement judge on February 6, 2007.

EPA requested on March 22, 2007, an extension of time of at least two months to restore the Landmark backup tapes. Attached to the request was a Declaration by an Information Specialist explaining the need for the extension. Over the strong objection of Kaufman, an Order was issued granting the extension, and providing that if the restoration is not completed by that time a hearing would be scheduled to determine the additional time and steps needed for compliance. See Order Granting Extension In Part, dated April 30, 2007. A hearing on the restoration of the back up tapes was scheduled for June 20, 2007, when EPA moved for a further extension of time to restore the back up tapes. Following the hearing an Order was issued granting EPA an extension until July 13, 2007, to produce the back up tapes, and allowing Kaufman 120 days to review the documents produced by the restoration. See Order Granting Extension and Allowing Complainant Additional Discovery, dated June 29, 2007.

Both parties filed motions stemming from the June 29, 2007 order. Kaufman moved that he be permitted an additional 90 days beyond the 120 days allowed by the June 27, 2007 order to complete discovery, and EPA moved for a protective order providing that it need not respond to Kaufman's Request for Production of Certain Specific Documents because the documents' requested were outside the parameters of the June 27, 2007 order. In response, an Order was issued on November 29, 2007, rejecting Kaufman's position that he was entitled to unlimited discovery. His position on discovery was found to be difficult to reconcile with the posture of this case, as the sole matter to be resolved, prior to hearing, was follow up discovery by Kaufman on the documents produced by EPA from the backup tapes. Kaufman was found to have had ample opportunity to engage in discovery, and did take advantage of the opportunity. Based on the same reasoning, Kaufman's request for an extension of discovery was denied except for requests for admissions and requests for authentication of documents obtained in discovery.

Kaufman had not shown why he should be able to seek additional documents, file additional interrogatories and take more depositions. See Order Granting Respondent's Motion For Protective Order And Denying Complainant's Motion To Continue Discovery Period, dated November 29, 2007.

EPA again filed for a protective order in response to the November 29, 2007 discovery order permitting Complainant to file requests for admissions. Kaufman's request for admissions included a First Request for Admissions, consisting of 793 requests and over 86 pages, and a Second Request for Admissions consisting of an additional 1037 requests, over 115 pages. EPA argued that Kaufman's requests were so grossly excessive that they were oppressive, and subjected EPA to undue burden and expense. An order was issued on March 7, 2008, holding that service of 1830 requests and a promise of more to come was excessive per se for the present case, particularly since a hearing on the merits was set for the weeks of May 19 and June 9, 2008, and discovery essentially was concluded by the November 29, 2007 order. Kaufman's requests for admissions, other than the requests to authenticate documents, was reduced to 100. See Order Granting Respondent's Motion For Protective Order In Part, dated March 7, 2008.

Kaufman moved for leave to amend his two complaints with an amended complaint, 122 pages in length with 449 separate numbered paragraphs, plus attachments and exhibits. EPA opposed Kaufman's leave to amend because of the length of time that lapsed since the original complaints, and because allowing the amendments now would result in further significant delays, as the amendments encourage further discovery and additional motions, since they add new claims which post date the original complaints, and address the conduct of present and former officials of EPA. An order was issued on February 5, 2008, denying leave to amend except as to add the claims of pattern of refusal to promote, pattern of hostile work environment, and the transfer of the ombudsman position to the OIG. See Order Granting In Part And Denying In Part Motion To Amend Complaint, dated February 5, 2008.

As the date for the hearing approached, a flurry of motions were filed by Kaufman. They included Complainant's Second Motion For Default Judgment filed on March 20, 2008, his second motion in limine, Motion In Limine Regarding Irrelevant Information, filed on March 25, 2008, Motion To Schedule Evidentiary Hearing and Reschedule Hearing On Merits, dated May 5, 2008, Motion To Determine the Sufficiency of Agency Responses, dated May 16, 2008, Motion To Prevent the Appearance of Agency Witness Linda Fisher, dated June 2, 2008, and Notice of Admitted Matters, dated May 15, 2008.

Complainant's Second Motion for Default requested that a default judgment be entered against EPA, and that Kaufman be awarded all relief requested because EPA did not file an answer to an amendment filed by Kaufman to his original complaints. Kaufman's motion was denied in Order Denying Second Motion For Default Judgment because Kaufman cited no authority for his argument that a party should have its case defaulted because it did not file an answer to an amendment to a complaint when the assertions in the amendment are within scope of the original complaint, and an answer was not required to the original complaint.

Kaufman's Motion In Limine requested that an order be issued finding that evidence related to whether Kaufman performed his assigned duties properly prior to January 1, 1999, be deemed irrelevant to this proceeding and inadmissible because he received a "Superior Accomplishment Recognition Award." This was Kaufman's second Motion In Limine moving for the prohibition of evidence. He had filed a Motion In Limine on November 23, 2004, requesting the exclusion of evidence on a similar basis, that is, that evidence of allegations of disciplinary problems and allegations of deficiencies related to Kaufman's employment with EPA should be excluded because EPA took no disciplinary action against Kaufman after January 1, 2001, and therefore any adverse action could not be the result of misconduct. This motion was denied for the same reason the earlier motion was denied. The Order Denying Motion In Limine issued on April 16, 2008, held that Kaufman's receipt of an award is relevant evidence of Kaufman's performance in his job, but it does not form the basis for a conclusive finding that Kaufman's job performance prior to April 13, 1999, is irrelevant.

Kaufman's request that an evidentiary hearing be scheduled prior to the hearing on the merits asserted that such an evidentiary hearing was necessary to focus on the admissibility of evidence, particularly the authentication of documents. EPA opposed a special evidentiary hearing and a postponement of the hearing. Kaufman's motion was denied in Order Denying Motion To Schedule Evidentiary Hearing And Reschedule Hearing on Merits, issued on May 19, 2008. Kaufman was advised to identify his proposed exhibits on or before May 23, 2008, in order to place the onus on EPA under 29 C.F.R. § 18.50 to object to the authenticity of the documents and to provide reasoning to support its objection.

Kaufman filed a Motion to Determine the Sufficiency of Agency Responses on May 16, 2008, requesting a determination of the sufficiency of EPA's response to certain requests for admissions. After a review of EPA's objections, and Kaufman's argument, EPA was required by Order Regarding Motion To Determine Sufficiency of Agency Response, issued on June 4, 2008, to answer certain specified Requests for Admissions.

Kaufman's motion to prevent the appearance of Linda Fisher, former Deputy Administrator of EPA, as a witness was granted by Order Granting Motion To Prevent The Appearance of Agency Witness, dated June 4, 2008. Kaufman's motion was in response to EPA's pre-hearing submission naming her as a witness. He argued that permitting Fisher's testimony would be highly improper as he had been denied the ability to take her deposition. Kaufman had previously noticed Fisher's deposition, but EPA's Motion For Protective Order was granted because Fisher, as EPA's second highest ranking official, was a high ranking government official not subject to deposition, and the deposition of Fisher sought irrelevant information not reasonably calculated to lead to the discovery of admissible evidence.

Kaufman submitted a Notice of Admitted Matters by letter dated May 15, 2008, wherein he asserted that EPA violated 29 C.F.R. §18.20(b) in responding to Kaufman's Requests for Admissions, and as a result, Kaufman was "notify[ing] the tribunal" that he deems all responses that provided more than one response, namely an objection and an answer, as admitted. In Order Sustaining Respondent's Objection To Complainant's Notice, dated June 5, 2008, Kaufman's argument was found to have no merit, as EPA's objections and denials conformed to the requirements of 29 C.F.R. §18.20 and do not constitute admissions.

The hearing on the merits of the claim was held From June 9 – June 20, 2008, June 24, 2008, July 1, 2008, and July 23 and 24, 2008. Kaufman filed Complainant’s Post-Hearing Brief on January 20, 2009 and EPA filed Respondent’s Post-Hearing Brief on January 16, 2009. Complainant’s Reply To Agency’s Post-Hearing Brief was filed on February 24, 2009. On March 11, 2009, Kaufman filed a letter enclosing a brief filed before the United States Supreme Court by respondents in AT&T Corp. v. Hulteen et al., No. 07-543 relating to the interpretation of the Lilly Ledbetter Act of 2009.

## **FINDINGS OF FACT**

Kaufman is employed by the EPA as a Program Analyst at EPA’s headquarters, located in Washington, D.C. He is and was at all times relevant to this proceeding an employee of EPA’s Office of Solid Waste and Emergency Response (OSWER). OSWER is headed by an Assistant Administrator (AA) who is appointed by the President and confirmed by the Senate. Kaufman has been employed by EPA since its creation in 1971. Tr. 846.

In late 1997 or early 1998 Kaufman was “administratively assigned” to the AA’s immediate office from the Office of Emergency and Remedial Response (OERR). Tr. 2002, The assignment was made permanent on January 3, 1999. Tr. 1747, 1748. Both offices are within OSWER. CX 380, 381. Tr. 1751. Kaufman’s position description was changed from Environmental Protection Specialist to Program Analyst. Id.

Timothy Fields and Michael Shapiro were responsible for the reassignment of Kaufman from OERR to the AA office. Tr. 1749. Fields was the Acting Assistant Administrator and Kaufman’s second level supervisor at that time. CX 382. Shapiro was the Acting Deputy Assistant Administrator. CX 382; Tr. 1749. Kaufman’s transfer from OERR was requested by Steve Luftig, the Director of OERR, as well as others within OERR. Tr. 1750.

Fields knew Kaufman for many years. Kaufman had been his section chief in the mid-1970s. Kaufman was the section chief and Fields was the staff engineer. Tr. 1744. Fields initiated Kaufman’s transfer from the Superfund Office, OERR to OSWER, initially on a temporary basis but subsequently on a permanent reassignment. Tr. 1753. Fields signed the paperwork approving the transfer on November 25, 2008, eight months after Shapiro had signed in March of 2008. Fields delayed signing the paperwork because he wanted to “think through” what Kaufman’s duties and responsibilities would be. Tr. 1752. Kaufman was transferred from an Environmental Protection Specialist to a Program Analyst position. CX. 380, 381. His position description described his major duties as including responsibility for analyzing assigned policy issues, assisting in development of national and local policy and synthesizing the policy analysis into precise documents for OSWER managers. The description also provided: “As assigned, incumbent provides assistance to the OSWER Ombudsman. Incumbent will provide a weekly report of Ombudsman related activities to ensure full work integration and coordination.” Shapiro assumed that the majority of Kaufman’s duties in the position would be in support of the Ombudsman, but would include other various responsibilities such as serving as an analyst,

evaluating information, researching issues, as well as providing advice to the Deputy Assistant Administrator or the Assistant Administrator. Tr. 2004.

The Ombudsman testified that before Kaufman was assigned Ombudsman work, Fields discussed with him the assignment. The Ombudsman asked the reason for the assignment and Fields replied that Kaufman had skills and talents that had not been used well in preceding years but that they could be put to good use through assisting the Ombudsman. Fields also acknowledged that Kaufman was a controversial figure. "...Mr. Fields kind of smiled and threw up his hands and said, 'Well, you know, Hugh is Hugh, and but (sic) I think he would be of use to you.'" Tr. 691.

Shapiro became the immediate supervisor of Kaufman and of Robert Martin, the Ombudsman, when he became the Acting Principal Deputy Assistant Administrator for OSWER in 1997. Tr. 1999, 2003.

Robert Martin's title was National Ombudsman. Tr. 246. He assigned Kaufman the Ombudsman work but was not his supervisor. Kaufman's supervisor was Shapiro even while his tasks were assigned by Martin. The OSWER Ombudsman office was small. Typically, Martin's staff included a number of interns, two retired persons from a program known as the SEE program who were uncompensated, "perhaps a consultant," and Kaufman. Tr. 250. Martin also had the ability to request the assistance of specified employees to assist him, and he often did. Tr. 262. The Ombudsman typically had about 20 to 30 open cases during the period 1999-2001. Kaufman facilitated between 10 and 20 hearings for the Ombudsman. Tr. 1404

Kaufman assisted the Ombudsman at the Bunker Hill Superfund site in Coeur D'Alene, Idaho; the Shattuck Superfund site in Denver, Colorado; the Marjol Battery site in Throop, Pennsylvania; the Industrial Excess Landfill (IEL) Superfund site in Uniontown, Ohio; the Stauffer Superfund site in Tarpon Springs, Florida; and sewage sludge being laid on properties in or about Augusta, Georgia.

#### FARMLAND SLUDGE, AUGUSTA GEORGIA

The Augusta farmland sludge case involved complaints by two families asserting that they had been encouraged by EPA to apply sludge from the City of Augusta waste water treatment plant to their dairy farms, which they felt had harmed their soils and their cows. Tr. 99, 292. Robert McElmurray, one of the farm owners, testified that the sludge resulted in "distorted crops" in the mid to late eighties and on into 1990, and cattle becoming sick and dying. Tr. 68, 69. McElmurray met with the Ombudsman and Kaufman in his Congressman's office in Washington, D.C. Tr. 75. Kaufman assisted the farm owners in contacting the appropriate people and obtaining the appropriate resources within EPA. Id. Kaufman conducted an investigation of the problem. Id. McElmurray testified that Kaufman treated both families very well and went out of his way to help and to get to the bottom of the situation. Tr. 76-78.

Edwin Hallman, Esq. represented McElmurray and the other family to assist them in evaluating problems with their dairy herds and crops were that related to contaminants in the sewage sludge. Tr. 99. Hallman had previously served as regional counsel and chief enforcement attorney for the U.S. Department of Energy from 1976 until 1980. Id. He testified

that his investigation showed high levels of contaminants such as chloramine, mercury, cadmium, chromium and PCPs in the sludge. He also testified to discovering that the City of Augusta was altering the laboratory reports of the analyses of the sludge placed on the farm land. Tr. 101-104. Hallman brought this information to the attention of the EPA, but found them to be “bizarrely disinterested.” Tr. 105. Hallman filed separate lawsuits on behalf of the two dairy farmers against the City of Augusta and the U.S. Department of Agriculture. Tr. 101, 108. Hallman testified that communications from himself and his clients got nowhere with EPA, but they did receive valuable assistance from the Ombudsman’s office and Kaufman in having EPA address the issue. Tr. 111 He described the Ombudsman and Kaufman as being very effective, but they could not get EPA to take care of the problem. Tr. 118. He testified that the Ombudsman’s response was the first recognition from EPA of the existence of a problem, and a willingness to look at the documentation. Tr. 109.

### IEL SITE

IEL is a Superfund site located in Uniontown, Ohio. Complaints to the Ombudsman office concerned the adequacy of EPA’s remedy for the site because of the potential for contaminants going into the groundwater below the landfill and neighboring residences whose drinking water was served by well water. Tr. 294-295. The Ombudsman assigned Kaufman to investigate. Kaufman accompanied the Ombudsman to the community to conduct a public hearing in January 1999, at which much of the questioning was by Kaufman. Tr. 296, 762. The Ombudsman issued Preliminary Recommendations and the Region V office of EPA responded to the recommendations by explaining the remedy that it was pursuing. CX 425.

### SHATTUCK SUPERFUND SITE, DENVER COLORADO

The Shattuck Superfund Site is a 10 acre industrial site of a former radioactive extraction facility owned and operated by S.W. Shattuck Chemical Company, Inc in the city limits of Denver, Colorado. From the 1920s to 1984, the property was used to treat and process molybdenum ores, radium slimes, and uranium compounds and ores. As a result, radioactive contaminated soil was found to be widely scattered throughout the site. CX 438 at 4. The remedy chosen by EPA in 1992 was to treat the soils in a mixture of cement and fly ash and cap the treated soil at the site. CX 421. The citizens of the community surrounding the Shattuck Superfund site expressed concern that the remedy would not be adequate to protect the environment. Tr. 2100. As a superfund site, EPA had full authority over it.

A request to the Ombudsman to investigate the site was made in January of 1999 by area citizens. It was later joined by U.S. Senator Allard, Governor Bill Owens, Mayor Wellington Webb of Denver and U.S. Representative Diana DeGette. Kaufman was given the role of investigator. Public hearings chaired by the Ombudsman along with Senator Allard and Mayor Webb of Denver were held on September 18, 1999 and October 16, 1999. CX 4, 406, 407.

The Ombudsman authored preliminary recommendations dated October 25, 1999. The recommendations called for the removal of the wastes from the site rather than capping the site. CX 4.

A third public hearing was held on January 29, 2000. The hearing was described as “very controversial” by an inter-agency report titled “Hot Sites Report for this week.” The report was distributed throughout the Agency, including to high OSWER officials, Fields, Shapiro and OERR Director Luftig. CX 418. The report characterized the hearing as controversial because, “the EPA Region 8 was painted as a bad actor for withholding documents, not properly documenting the findings from the five year review in the remedy selection discussion of the proposed plan, and taking too long to get top (sic) the cleanup,” as well as an Ombudsman assertion that EPA Region 8 might be in collusion with the responsible party. CX 418.

A Record of Decision Amendment was issued on June 16, 2000, amending the original remedy by providing for removal of the contaminated soils from the site. The Amendment explained possible alternative remedies, the reasons for the chosen remedy and the objectives of the remedy. CX 421. The Ombudsman and Kaufman believe that the remedy was changed based on the Ombudsman’s October 25, 1999 preliminary recommendations. Tr. 327; 1009.

Kaufman informed a reporter from the *Denver Post* about the debate within EPA over the location of the site where the wastes from the Shattuck site would be sent. The debate concerned the nature of the wastes and whether the wastes included radioactive depleted uranium. If the wastes were found to include radioactive contaminants, they would have to be shipped to a site licensed to handle radioactive waste, at a greater expense. The debate, including a quote from Kaufman was the subject of an article in the *Denver Post* dated February 19, 2001. CX 146; Tr. 2537, 2538.

EPA announced on December 12, 2001, that a proposed consent decree had been agreed to between Shattuck, the federal government and the state of Colorado. CX 284. The Consent Decree was approved on March 4, 2002, by the United States District Court for the District of Colorado. CX 438 at 5.

### MARJOL BATTERY SITE

The Marjol Battery site is a former battery processing facility located on a 43.9 acre parcel in the Borough of Throop, Lackawanna County, Pennsylvania. CX 434. The processing involved battery crushing, lead reclamation and on-site disposal of spent battery casings. The ground surface of the site became contaminated with lead. Fugitive dust emissions and lead contained in on-site soils were carried off-site by prevailing winds. Storm water runoff carried lead contaminated soil off-site into adjacent drainage ways. Id.

Susan Shortz, a neighboring property owner of the site, testified that a citizen group of which she was a member requested through the Office of Senator Arlen Specter of Pennsylvania that the Ombudsman become involved in the site. Tr. 897. Shortz testified that the citizens group distrusted EPA and were unhappy with the direction the clean up was taking, and “were looking for someone to hopefully listen and advocate for us.” Tr. 898. The Ombudsman agreed to become involved and shortly thereafter scheduled a public hearing on August 8, 2000. CX 432. Kaufman attended and participated in the meeting. Tr. 900. The Ombudsman office provided technical assistance and provided the citizen group with documents about the site cleanup from EPA that they had not seen. Tr. 904-906. Shortz was complimentary of Kaufman’s involvement. She described Kaufman as assisting in navigating through the bureaucracy as he either obtained requested information or directed them in the right direction. She described him

as a tough investigator, a people's advocate. Tr. 908. She testified that Kaufman appeared to make the representatives of EPA, Pennsylvania Department of Environmental Protection and Gould Electronics, the owner of the Marjol site, uncomfortable at times with his questioning. Tr. 909.

The Ombudsman held a public hearing on August 8, 2000. On October 19, 2000, U.S. Senators Specter and Rick Santorum of Pennsylvania and U.S. Representative Don Sherwood requested that the Ombudsman "convene a meeting of all involved parties to mediate a final decision regarding the cleanup at the Marjol Battery site." CX 56. The reason for the request as expressed in the letter was that over a year after EPA had issued a draft Statement of Basis for the clean up of the Marjol site, it had yet to release a final remediation statement for the implementation of the clean up. Id.

Shortz testified that after the Ombudsman's August 8, 2000 hearing, the Ombudsman announced that his office would take six months to review the documentation developed through the hearing process and propose a response, but that EPA announced a couple of months later that a decision on remedy had been made. Shortz testified to being upset that EPA would make a final decision on a remedy before the Ombudsman's investigation was complete. Tr. 910.

EPA proposed its final remedy in early December 2000 for a partial cap of the site, without allowing for completion of the Ombudsman investigation. The Executive Director of Senator Specter's office expressed disappointment in a December 7, 2000 letter to Borough officials and residents of the neighborhood in the area of the site because Region III of EPA released its final decision on the remedy without input from the Ombudsman. CX. 61. The Region III Administrator agreed to suspend implementation of the remedy until March 31, 2001, to allow the Ombudsman's office time to complete its review. CX 434. The Ombudsman revised his schedule several times, finally issuing its preliminary report on October 10, 2001. The Region provided a full response on November 29, 2001. Id.

The disagreement was over the proper remediate measures. EPA's remedy included partial removal of contaminated soil and partial cap of the remaining contaminated soil. CX 424. Kaufman believed that the proposed remedy of a partial cap violated the environmental statutes, and he communicated those concerns to Congress, the media, and at the Ombudsman hearing. Tr. 1013, 1015. Also, Kaufman testified that he thought the site should be declared a Superfund site rather than a Resource Conservation and Recovery Act (RCRA) corrective action because the cleanup requirements for a Superfund site are stricter. Tr. 1015, 1022.

Kaufman testified that, in the spring of 2001, he reported to the Inspector General a possible conflict of interest with Administrator Whitman in that he believed that Gould Electronics was owned by Citigroup. Tr. 1273. He also testified that he spoke to a reporter about Whitman's conflict of interest. He identified a story published in the Scranton, Pennsylvania *Sunday Times* reporting that Whitman's husband had a financial connection to the firm responsible for lead cleanup in Thorp as having resulted from his discussions with the reporter. CX. 199. Specifically, Kaufman testified that he told the reporter that Whitman's stopping the Ombudsman from giving him Marjol assignments was hindering the Ombudsman,

and therefore reducing the chances of bringing the case into compliance with the environmental laws. Tr. 1276.

A report by the Inspector General stated that the Inspector General's office investigated the alleged conflict of interest and found the allegation to not be substantiated, with no further investigation warranted. CX. 438.

### BUNKER HILL SITE

The Bunker Hill Superfund site is within the Silver Valley, a geologic region responsible for producing lead, zinc, silver and other ores. A lead smelter operated in conjunction with a zinc refinery at the site of the Bunker Hill Mining properties. Intensive mining resulted in tailings impoundments, waste rock piles and smelter dust that were the subject of superfund cleanup. The site contained contamination from historic metal mines that threatened public health and drinking water. CX. 423, at 11.

One controversy involved an expressed intention by EPA Region X to include the entire Coeur D'Alene Basin, an area of approximately 1,500 square miles, as part of the Superfund site. Complainants objected that such an inclusion was unwarranted in light of the contamination. Tr. 442, 443. A second issue was a landfill created by EPA to handle highly toxic wastes. Tr. 1011.

The Ombudsman became involved in the Superfund site when four members of Congress, Senator Crapo, Senator Craig, Representative Chenoweth-Hage and Representative Simpson, wrote May 22, 2000 letters to the APA Administrator requesting that EPA delay further proceedings toward listing the Coeur d'Alene River Basin on the Superfund National Priorities List until an investigation of the listing issue was undertaken by the Ombudsman. The Ombudsman held a public hearing on August 19, 2001. Kaufman chaired the hearing. Fields testified that some of Kaufman's remarks at the public hearing caused undue anxiety by people in attendance. Tr. 1902.

Fields testified that he received complaints from EPA Region X personnel and industry representatives about the Ombudsman's involvement with the Bunker Hill Super Fund site because "the ombudsman public hearing would not be done in a creditable fashion...was not going to be an objective meeting that they could participate in." Tr. 1903.

Kaufman testified that he was concerned that violations of the environmental statutes were occurring at the Bunker Hill Super Fund site and communicated those concerns to EPA management, Congress and to the news media. He also testified that sometime after the public hearing in the year 2000, he reported to the Inspector General's office his concern about possible criminal misuse of government funds by EPA related to the Bunker Hill Super Fund site. He does not know of any follow up by the Inspector General's office. Tr. 510, 511; 1126-1128.

## TARPON SPRINGS FLORIDA SUPER FUND SITE

The Stauffer Chemical Plant in Tarpon Springs, Florida, began operation in 1947, producing elemental phosphorous using phosphate ore mined from deposits in Florida. CX. 420. The plant was originally constructed and operated by Victor Chemical Company. Stauffer Chemical Company obtained the plant from Victor in 1960 and operated it until 1981. Id. The 130 acre site is situated on the Anclote River, approximately two miles from the Gulf of Mexico. During its operation a number of processing wastes were disposed of on the site, including over 500,000 tons of chemical processing wastes disposed there between 1950 and 1979. CX. 443. The primary contaminants were arsenic, radium-226, and elemental phosphorous. Contamination was found on site in the surface soil and in the waste lagoons. They were measured at elevated levels in the ground water. CX. 420.

EPA declared it a Superfund site to be cleaned-up under the Superfund Act. Tr. 1029. The remedy provided by the Record of Decision in July 1998 included excavation of radiologically and chemically contaminated material/soil, consolidation of excavated material, solidification/stabilization of all materials in the consolidation area, capping the consolidation material with top cover system, and placing controls on the site. CX. 420.

The site became an Ombudsman case in late 1999 as a result of a request from a resident of the adjacent community. Tr. 159. Concerns raised by complainants in the community were that the wastes at the Superfund site were going to stay on the site rather than being removed, that the hydro-geology around the site had not been adequately analyzed, in that there might be sink holes around the site that could transport waste and otherwise disrupt the hydro-geology of the site, and whether the party identified as the responsible party for the remedial work would have the financial ability to pay for it. Tr. 368.

Mary Mosely testified that she resides in the area of the Superfund site, and that she filed the complaint with the Ombudsman's office after not receiving satisfactory answers from EPA to her questions and concerns about the site. She stated that the performance at the public hearing by the Ombudsman and Kaufmann "were wonderful because they clearly indicated a care for the communities." Tr. 164.

A public hearing was held on December 2, 1999, that was co-chaired by the Ombudsman and Congressman Michael Bilirakis. CX. 419. A second public hearing was held on February 12, 2000, and a third public hearing was held on June 5, 2000.

Shapiro testified that he received complaints from the Region IV staff about Kaufman's conduct in handling the first two public hearings. The concerns involved how their work and professionalism was being characterized, and that the hearings were not handled professionally. Tr. 2015, 2016.

Joanne Benante, Chief of the North Florida Section of EPA's Region IV, sent an email to other Region IV personnel including John Blanchard, Remedial Project Manager, stating that she thought the region should reconsider their attendance at the upcoming Ombudsman hearing

scheduled for June 5, 2000. Her email included an email from Steve Luftig responding to an email from Joan Fisk. CX. 17. Luftig's email read:

Joan, you and I have the same opinion regarding the Stauffer site. At this point, the region should reply courteously to congressman B. by saying that EPA has opened an official public comment period on the consent decree, has participated in two recent public meetings on the topic and will, therefore, not participate in the next (June 5<sup>th</sup>) meeting. (I understand that Stauffer is also not planning to participate). Instead EPA should say we will await the close of the comment period and, if comments received justify it, hold a public meeting afterward. I think that we should not send EPA employees to another performance intended to ridicule them as the video tapes showed in the previous meeting chaired by Mr. K.

CX. 17.

Blanchard responded to Benante's email by stating that he agreed. CX. 17.

One of Shapiro's responsibilities regarding the Ombudsman was approval of travel requests and contract support for hearings such as court reporter or transcriber. Tr. 2015. Shapiro testified that he was requested by Fields to hold off approving the travel for the third Tarpon Springs hearing scheduled for June 5, 2000, until Fields obtained information explaining the need for another hearing as Fields was looking for assurances that the Ombudsman had a plan for the investigation, such as how many hearings would be necessary. Tr. 2016. Shapiro stated that he approved the travel request after Fields received an explanatory memorandum concerning the need for another hearing from either the Ombudsman or Kaufman. Tr. 2016, 2017. According to Shapiro the travel request was delayed only a few days. Id.

The Ombudsman testified that he remembered hearing "something about the state of the budget" affecting the travel request. He believed that the travel request was approved after intervention by Congressmen Bilirakis, Michael Oxley and Billy Tauzin. Tr. 380, 381.

Kaufman testified that he felt that the travel request was not approved in due course because of EPA's intent to interfere with the Ombudsman function, as the Ombudsman hearings were producing information that the Consent Decree signed by the parties in this Tarpon Springs matter was "fraudulent." Tr. 947, 948. He testified that he was told that there might not be budget resources to pay for the travel. He testified that he believed the explanation to be a ruse, so he contacted Congressman Bilirakis and subsequently met with Congressmen Bilirakis, Tauzin and Oxley to explain that without their intervention, the hearing would have to be cancelled. Tr. 944. The congressmen placed a conference call to the EPA Administrator on May, 19, 2000. In a May 30, 2000 memorandum to Shapiro, Kaufman referred to the conference call. The memo stated that on the conference call the Administrator incorrectly told the congressmen that the Ombudsman has his own budget. The memo concluded by Kaufman recommending to Shapiro that he either abandon his proposed Ombudsman guidelines and allow the Ombudsman to operate as he had the prior eight years under aegis of the EPA Ombudsman Handbook and consistent with USOA guidelines, and provide the Ombudsman office a budget or:

Notify EPA Administrator Browner that she has provided material information that is false, misleading, and inaccurate to the three (3) House Subcommittee Chairman in her teleconference with them on May 19, 2000, and suggest that she expeditiously apologize to them and correct the record with them in another conference call.

CX. 20.

In response to Kaufman's memo to Shapiro, Fields wrote a memo to Shapiro dated June 7, 2000, with copies to Kaufman, the Ombudsman and the Administrator, entitled "May 30, 2000 Statement by Hugh Kaufman." Fields' memo noted that Fields was present on the May 19, 2000, conference call, and the memo expressed concern about Kaufman's statement that the Administrator provided false, misleading, and inaccurate material information during her conference call with the three members of Congress. Fields' memo detailed the explanation provided to the congressmen about Kaufman's request for travel to the Tarpon Springs hearing as follows: "We discussed [Kaufman's] resource request of May 16, 2000, and indicated that EPA management would get back to him (as requested) by May 22, 2000. We indicated that a meeting between EPA management and the National Ombudsman would occur to respond to this resource request on May 22, 2000. ([Shapiro] did in fact meet with the National Ombudsman on that date.)" The memo concluded: "[Kaufman's] misleading characterization of these events is counterproductive to what I believe is an important part of OSWER and the Ombudsman function, and one I take very seriously – making sure the public is involved in our programs. His statements are untrue and hurt both the Agency and the Ombudsman program." RX. 45.

Kaufman's travel request was approved. Fields described the delay: "...it was a short duration. He asked that we get back to him by May 22<sup>nd</sup>, 2000. And I – well, May 22<sup>nd</sup>, we approved his request. So I didn't see this as being any kind of hindrance on a hearing that was coming up on June 5<sup>th</sup>" 2000. Tr. 1771.

The public hearing was held on June 5, 2000. Congressman Bilirakis opened the hearing and introduced the subject of the meeting as to, "specifically discuss the revisions to the consent decree." CX 408 at 633. It was chaired by Kaufman. Id. at 638. Kaufman started by placing his May 30, 2000 memo in the record with the comment:

This is not the former Soviet Union. And I will fight with everything I've got – and I know Congressman Bilirakis has already – to assure that the EPA does not turn into the former Soviet Union. And so I want to put this May 30 memo on the record as Exhibit 1.

Id. at 640.

Two representatives of EPA appeared at the hearing, Joanne Benante, Chief of the North Florida Section of EPA's Region IV, and Michelle Staes, Assistant Regional Counsel and the attorney from Region IV assigned to the Stauffer Chemical Superfund Site. Tr. 641. Benante requested that they be permitted to offer a presentation in its entirety without interruption, and be available for a short period of time of approximately ten minutes to answer clarification questions. Tr. 643. A discussion ensued over the appropriateness of the EPA

representatives limiting their question and answer time to ten minutes. The following colloquy then occurred:

KAUFMAN: So only one of the individuals who signed the consent decree is present. I'm assuming that Ms. Staes' presentation – and the only questions I will have will be for Ms. Staes, since she's the only person who has firsthand knowledge since Ms. Benante did not sign the consent decree. So –

BENANTE: I thought this was an open town meeting. Excuse me. I'm sorry.  
KAUFMAN: Excuse me, Ms. Benante. I'm speaking now. Thank you very much. This is not New York.

BENANTE: I take exception to that remark. Please, your rudeness is uncalled for. Please discontinue it.

KAUFMAN: Ms. Benante, the record will show who's rude and who's not. Before we begin, I'll be happy to hear from Ms. Staes. I request that EPA stay to answer questions related to the amended consent decree. I will assume that if you do not stay to answer questions – and this is only going to be two hours, and you're not going to have the whole two hours – I will assume that you are not in good faith planning to answer questions.

Id. at 647, 648.

Kaufman at that time read a Miranda warning to the two EPA representatives.

KAUFMAN: Ms. Staes. Are you familiar with the Miranda warning, so I don't have to read it?

MICHELLE STAES: Please read it.

HUGH KAUFMAN: Okay. You have the right to remain silent. You have the right to counsel. Anything you may say may be used against you in a court of law. Proceed, Ms. Staes.

Id. at 648.

Later in the proceedings, Kaufman described his actions: "I Miranda'd this lady." Id. at 753. And he gratuitously offered: "And believe me, as an attorney and a youngster, if I was Miranda'd, I would tell the truth about that..." Id. at 756.

Kaufman subsequently portrayed EPA officials:

HUGH KAUFMAN: I would like to jump in for a quick second. I would be very concerned right now that the Region 4 has decided basically not only to

stonewall you but to stonewall Congressman Bilirakis and what he stands for, the Congress of the United States.

And I think we're in a terrible situation right now that has ramifications far beyond the Tarpon Springs case. I mean, this – this is very serious. It's bigger than Region 4, with the Justice Department stonewalling, with some of the testimony we have today, as limited as it was in the first two. And I know Congressman Bilirakis, when he goes back to Washington, is going to be very concerned.

... And frankly, I think the democracy is more powerful than a bunch of bureaucrats hiding behind youngsters like these – like this little girl here, who's only been with them for a year. The one next to you.

RON WILSON: Oh, okay.

KAUFMAN: That youngster who I think has only been there for a year.

Frankly, all these big shot men and big shot women who have been in it for 20, 30 years have to hide behind the skirts of a little black girl just out of law school that infuriates me.

Id. at 755, 756.

Response to Kaufman's performance was swift. Stephen Luftig, Director, Office of Emergency and Remedial Response (OERR) wrote a letter to the Ombudsman dated June 12, 2000, to express "concern over the reports of abusive, bullying tactics and the lack of impartiality shown by your office at recent public meetings regarding Superfund sites." Luftig stated that OERR had provided considerable support to investigations conducted by the Ombudsman office over the years, but expressed shock over the reading of Miranda rights to an EPA employee at a public meeting. His letter concluded that he considered the Miranda rights incident to be part of a pattern of inappropriate behavior, reflecting abusive, bullying, "thug-like" tactics aimed at EPA employees, as well as cooperative responsive parties at Superfund site public meetings, and requested an explanation of these events, the rationale for reading the Miranda rights to EPA employees, and a plan for eliminating the abusive behavior in future actions. RX. 48, att. 4.

Staes sent a letter to Fields on June 19, 2000, voicing her "serious concern regarding the extremely inappropriate conduct" of Kaufman. She described his reading of Miranda rights to her as a flagrant and arrogant misrepresentation and misuse of his position, and she found his description of her as "a little black girl" just out of law school to be an "appalling degradation of me," as well as "personally humiliating, demeaning and patronizing."<sup>1</sup>

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<sup>1</sup> Staes' letter to Fields introduced herself: "Before I convey to you how profoundly offensive these comments are, allow me to first tell you who I am. As opposed to a "little black girl," I am a 31 year old African American woman, a honors graduate of Spelman College and a graduate of Tulane Law School. I have for over five years competently, with pride and sincere enthusiasm represented the government and served the public. I am a wife and

Also, on June 19, 2000, Phyllis Harris, Regional Counsel of Region IV, and supervisor of attorney of Staes, directed a letter to W. Michael McCabe, Acting Deputy Administrator, complaining about Kaufman's conduct. Initially, she observed that "throughout this investigation, Ms. Staes, as well as every Region IV employee associated with this site, has been repeatedly subjected to abusive and bullying tactics by Mr. Hugh Kaufman." She condemned the Miranda warning as egregious, and the conduct of Kaufman as "events...that no one in this Agency can comprehend or understand." She emphasized that words could not express how deeply offended she personally was by Kaufman's remarks. She found troubling that Kaufman's remarks were "applauded by the public and condoned by all who attended including a Congressman and the National Ombudsman."

Kaufman testified that he subsequently apologized to Staes and Harris. Tr. 956. His apology to Staes took the form of a message in her voice mail. Tr. 961. The letter he testified to being his only written apology was a letter to Harris in response to her letter to the Acting Deputy Administrator. The letter does not have the feel of an apology. Instead, it is an accusatory letter demanding an immediate apology from Harris for implying that he is a racist, and charging that she was making "false implications of racism" as "a ruse...to thwart and obstruct an on-going Federal investigation and a knowing attempt to harm the Federal Official performing this investigation." He continued, "I will be turning over the facts of this case to the applicable US Attorney for potential criminal prosecution." RX. 49.

Luftig's letter to the Ombudsman complaining of Kaufman's conduct at the Tarpon Springs June 5, 2009 hearing was answered by Kaufman on June 15, 2000. The letter requested that Luftig provide evidence of the "abusive, bullying, and thug-like tactics" of which he referred in his June 12, 2000 letter to the Ombudsman. Kaufman's letter concluded:

I await either the substantiating evidence that I have requested or a written apology from you Steve, by COB Monday, June 19, 2000. Without either, I can only conclude that your memorandum of June 12, 2000, was a knowingly reckless, false, misleading, and inaccurate document intended to thwart and obstruct an ongoing Federal Investigation and a knowing attempt to harm the Federal Officials performing the investigation.

CX. 34.

Kaufman asserted in his letters to Luftig and Harris that he gave the Miranda warnings to the EPA representatives on the advise of counsel to the IG. His letter to Luftig stated: "...the Counsel to the EPA Inspector General, in a witnessed meeting, advised me to provide a Miranda warning to EPA Officials before any on-the-record questioning where the Ombudsman case may potentially go criminal." CX 34. He repeated the assertion in his letter to Harris: "I was advised by the counsel to the Inspector General of the EPA to provide a Miranda warning to EPA Officials before any on-the-record questioning where an EPA Ombudsman case may go criminal." RX 49.

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mother. My husband and I have been married for over 6 ½ years and have two small children, ages 3 ½ and 11 months. Proudly, this is who I am."

Mark Bialek, IG Counsel to EPA, denied ever giving such advice to Kaufman. He testified that he never advised Kaufman that it was appropriate to give advise-of-rights warnings, but to the contrary, he warned Kaufman about the Ombudsman's office acting outside the scope of its authority in ways that would impinge on the IG's office authority. He testified that he told Kaufman that the Ombudsman office was obligated to refer matters of criminal misconduct or criminal issues to the IG's office. He warned that a person not trained in the conduct of criminal investigation could "bullox up" a criminal investigation. Tr. 1697, 1698.

Bialek had previously met with Kaufman at Kaufman's request for a dialogue about the Ombudsman office as it related to the IG office, and a desire by Kaufman to coordinate or share information. Bialek testified that he became uneasy at the tenor of the meeting when it turned to "reference to criminal matters." "...it was when [Kaufman] used reference to criminal matters that some bells and whistles went off in my head, because that is notoriously work that is done by the IG's office...once that became clear to me that there was a concept that had criminal implications, that was the time in which I got uneasy and the tenor of the conversation changed a bit." Tr. 1697, lines 3-13.

Bialek describes his reaction as "befuddled" when he became aware that Kaufman had provided the Miranda warnings. "I was befuddled. I could not believe, after just a couple of months of a very clear conversation, that this was done." Tr. 1700, lines 15-19. Consequently he discussed the matter with the IG, who advised him to bring the matter to the attention of Kaufman's superior. Tr. 1700, 1701. Bialek brought the matter to the attention of Shapiro by a letter dated September 12, 2000. Bialek informed Shapiro about his meeting with Kaufman, and explained that, "I told Hugh Kaufman at that meeting that the OIG is the EPA's statutory internal investigator. As such, only the trained OIG investigators are officially authorized to provide Miranda and other 'advice of rights' warnings in interviews with employees and others in internal EPA investigations involving criminal violations or administrative misconduct..." Bialek's letter to Shapiro concluded: "[b]ecause the Ombudsman does not possess legal authority to conduct such investigations, Hugh Kaufman should not be using these 'advice of rights' warnings." CX 48. Kaufman responded to Bialek eight days later. He wrote to Bialek insisting that Bialek's letter misrepresented what occurred at the meeting. "At no time during this meeting did you state that the reason you were bringing this up was because the OIG and/or CID were the only entities that you believed should issue these warnings. Quite the opposite, you were only concerned that individuals be warned if there was the slightest chance that the National Ombudsman's Office might have to refer part of a case it is working on to OIG or other appropriate law enforcement bodies." His letter confided, "I have no first hand information why you would misrepresent what occurred at our meeting, but do have suspicions." Kaufman concluded the letter by asking Bialek to set up a meeting between Bialek, the I.G., Shapiro, the Ombudsman and himself. CX. 49.

Shapiro reprimanded Kaufman for "disrespectful and unprofessional conduct displayed during the June 5, 2000 Town Hall Meeting in Tarpon Springs, Florida" by an "Official Reprimand" dated September 29, 2000. Shapiro characterized Kaufman's statements toward EPA attorney Staes as disrespectful and unprofessional, and warned that they would not be tolerated. Shapiro warned that any further occurrences of misconduct might result in more

severe disciplinary action. The reprimand notified Kaufman that if he was dissatisfied with the action, he had the right to file a grievance. CX. 50.

Fields testified that he began to hear complaints about Kaufman's conduct in performing Ombudsman work soon after the assignment of Kaufman to the OSWER immediate office. The complaints were from internal and external sources during the two year period, 1999 and 2000. Tr. 1762, 1763. Both Fields and Shapiro discussed with Kaufman and the Ombudsman the concerns that were being raised by the complaints. Tr. 1763, 1764. Included among those concerns was the May 30, 2000 letter Kaufman wrote to Shapiro asserting that the EPA Administrator provided false, misleading, and accurate information to members of Congress during a May 19, 2000 conference call. CX 20. Fields had written a follow-up letter dated June 7, 2000, to Shapiro stating that he was a party to the conference call and that Kaufman's statements were untrue and hurt both the agency and the Ombudsman program. RX 45. Another concern was the letter from attorney Staes, to which Fields responded by a telephone call to apologize for Kaufman's comments. Tr. 1775, 1776. Additional concerns to Fields included Harris' letter and Kaufman's response to it. Tr. 1777.

Fields also had concerns over two memos Kaufman sent to Luftig in response to Luftig's complaint to the Ombudsman about Kaufman's conduct. As previously noted, Kaufman's June 15, 2000 letter accused Luftig of an intent to obstruct an ongoing federal investigation. Kaufman followed it up with a June 20, 2000 memo to Luftig threatening criminal action as a result of his complaint to the Ombudsman. The June 20, 2000 memorandum charged that since Luftig had not apologized for his "serious and false allegations" related to the Ombudsman hearing on Tarpon Springs, Kaufman had no choice but to conclude that his complaint to the Ombudsman was a violation of civil and criminal statutes. Kaufman embellished:

As you are aware by my June 19, 2000 memo to Phyllis P. Harris, Regional Counsel EPA Region IV, I will be making a criminal referral to the applicable U.S. Attorney for potential criminal prosecution of her and other EPA Officials where evidence has shown that they have violated the Criminal Statutes of the United States in their handling of the Tarpon Springs Superfund Site. Because of your actions in this regard, I am also notifying you that I will be referring your name to the applicable U.S. Attorney as a potential target in this case.

RX. 50. Incredulously, Kaufman continued:

It is my understanding that you are planning to accept a promotion to Deputy Assistant Administrator of EPA, and your major duties will include coordination with members of Congress. I ask you to consider not accepting this promotion at this time for the good of EPA.

As you know, Subcommittees of the House and Senate as well as Senior Members of those two bodies are presently investigating EPA's activities in the area where you are a potential target in a potential criminal probe. For you to then represent the Agency officially before these same two bodies of Congress would have the

halo effect of bringing the whole Agency under the same credibility difficulties that you are now in. It is for this reason that I ask you to reconsider not accepting this promotion now or any time in the near future.<sup>2</sup>

RX. 50.

Fields testified that these concerns led him in the fall of 2000 to the realization that having Kaufman support the Ombudsman function was not working and needed to stop. Tr. 1784. His concerns culminated in a meeting with Kaufman on December 14, 2000, where he relieved Kaufman of his Ombudsman duties, effectively immediately. Fields expressed his regret, explaining that no one more than him wanted the position to work, but since it was not working, he decided that removing Kaufman from Ombudsman duties would be in the best interests of the EPA, OSWER, and the credibility of the Ombudsman function. During the meeting, Fields presented Kaufman with a memorandum dated the same day prohibiting Kaufman from performing Ombudsman work. Tr. 1784, 1360.

The December 14, 2000 memorandum informed Kaufman that he would no longer perform Ombudsman duties, effective immediately, because his Ombudsman related actions undermined the credibility and effectiveness of OSWER and EPA. The memorandum initially reviewed the duties of the Ombudsman as receiving and investigating complaints from the public, and, as appropriate, making recommendations to decision officials to remedy the complaints. The memo continued that the work requires someone with good judgment, objectivity and mediation skills. It concluded that Kaufman's manner of carrying out his duties did not further the interests of the Agency because his lack of impartiality and lack of professionalism damaged the credibility of the function. The memorandum detailed specific instances that it characterized as "just a few of the many examples of the inappropriate and unprofessional behavior, which have, unfortunately, become a continuing pattern."

The memorandum informed Kaufman that his supervisor, Shapiro, would contact him to provide alternative assignments consistent with his Program Analyst position. *Id.* Kaufman told Fields that he thought the decision was a mistake but he very clearly understood the decision. Tr. 1785. He also told Fields that he would stop doing Ombudsman work. Tr. 1360.

#### After December 14, 2000 Memorandum Removing Ombudsman Duties

Kaufman testified that he resumed Ombudsman duties after January 22, 2001, when the new administration took office. Tr. 1070. He testified that he did not believe that the Fields December 14, 2000 memorandum was implemented because he did not receive a SF-50 or SF-52 personnel form showing a different position description. Tr. 1080, 1081. However, it is unclear how much Ombudsman work Kaufman actually did after he received Fields' memorandum. The Ombudsman does not recall whether he gave Kaufman any work in January. He recalled asking Kaufman in February to help in preparation of interrogatories in the Marjol Battery case,

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<sup>2</sup> Luftig reacted to these memos with a memorandum to the Ombudsman expressing surprise at receiving these "inaccurate and offensive" memoranda from his staff program analyst, and expressing his expectation that the Ombudsman would ensure that he would not receive any further offensive communications from Kaufman as a representative of the Ombudsman office. RX. 51.

and in March giving Kaufman “probably more Marjol Battery type work, research, work of that sort.” Tr. 753, 754. The Ombudsman could not remember whether he gave Kaufman any Ombudsman-related work after March of 2001. Tr. 754, 755.

Both Kaufman and the Ombudsman testified that the Ombudsman work was given to Kaufman because they found a lack of clarity regarding whether Kaufman was prohibited from performing the Ombudsman work. However, the record does not show a lack of clarity. The record is clear that Kaufman was prohibited from performing Ombudsman work, and Kaufman and the Ombudsman knew it.

The Ombudsman was on vacation at the time the memo was given to Kaufman. He was not at that time provided a copy of the memo, but he cut short his vacation for a January 19, 2001 meeting with Shapiro over the matter. Tr. 699. Kaufman had informed him about Fields’ action sometime around the first of the year. Tr. 701. On January 5, 2001, the Ombudsman suspended work on ongoing Ombudsman cases for reasons that included the transfer of Kaufman from Ombudsman duties. RX. 9. He issued the suspension while on leave by dictation to his secretary. Fields and Shapiro replied on January 8, 2001, to the Ombudsman expressing surprise and concern over the Ombudsman’s suspension of pending investigations. RX. 9. They explained that OSWER was committed to providing adequate resources to conduct an effective Ombudsman program, and requested a meeting as soon as possible to discuss the matters. A consequence was the January 19, 2001 meeting between Shapiro and the Ombudsman to discuss the staffing for the Ombudsman function in light of Kaufman’s unavailability. Tr. 2039. The meeting focused on resource needs of the Ombudsman. The Ombudsman withdrew his suspension. Tr. 2035; CX. 128. The Ombudsman testified that Shapiro told him during the meeting that Kaufman was no longer doing Ombudsman work. He was not told by Shapiro of any change in Fields’ decision to prohibit Kaufman from performing Ombudsman work. Tr. 730, 731, 737; CX. 139.

The Ombudsman issued a memo on January 29, 2001, stating that he was unable to perform substantial Ombudsman tasks, and that one of the reasons he was limited was because Kaufman had been reassigned from doing Ombudsman work. Tr. 745, 746; CX. 130.

Shapiro met with Kaufman on January 31, 2001, to discuss his job performance. Tr. 2026. Kaufman asked Shapiro at this meeting if he was withdrawing Fields’ December 14, 2000 memo in light of Fields’ retirement on January 29, 2001. Tr. 2029. Shapiro told Kaufman that he was not withdrawing the memo and confirmed that the December 14, 2000 memo was still in effect. Tr. 2028, 2029. They discussed non-Ombudsman projects that Kaufman would pursue. Shapiro presented Kaufman with a list of three possible activities and discussed two of them. Tr. 2028-2030. Shapiro authored a memo to the record stating that Kaufman indicated interest in the two projects but repeated his desire to be assigned back to Ombudsman support work. Tr. 2027, 2028; RX. 31; CX 224.

Shapiro had discussions with the Ombudsman on February 8, 2001. The Ombudsman requested the use of Kaufman’s support in the Marjol case. According to the Ombudsman, Shapiro rejected his request as “not responsive”, “not acceptable” and “not honorable.” Tr. 738, 739; CX 139. Shapiro again discussed this matter with the Ombudsman on February 13, 2001,

and February 21, 2001. On these occasions he reiterated that Kaufman would not be assigned Ombudsman support work. Tr. 740, 2049, 2050; CX. 139.

Notwithstanding the numerous communications between Shapiro and Kaufman and Shapiro and the Ombudsman, on or about February 15, 2001, Kaufman submitted a request for travel authorization to Luftig to attend a hearing the Ombudsman was holding on the Marjol case. Tr. 2044. Shapiro was notified of the request by a telephone call from Luftig. Tr. 2045. Shapiro told Luftig to deny Kaufman's request because his status had not changed as he was prohibited from supporting the Ombudsman. Tr. 2045, 2046. Shapiro did not contact Kaufman himself about the matter because he believed that the denial in travel request spoke for itself. Tr. 2046.

Shapiro summarized in a February 22, 2001 memorandum to the Ombudsman their agreement that the Ombudsman would provide a revised schedule for conducting the Marjol Battery review based on the assumption that Kaufman would not be available to work on the Marjol Battery case, and that the Ombudsman would be able to request an additional staff person to provide the support previously provided by Kaufman. CX 149, 160; Tr. 741, 742, 2050. On February 23, 2001, Shapiro telephoned Kaufman to tell him that he continued to be prohibited from doing Ombudsman support work. Tr. 1381, 2047. The February 23, 2001 telephone call was prompted by a telephone call from an EPA Region III employee asking if Kaufman had returned to Ombudsman work because Kaufman had co-signed with the Ombudsman a set of questions sent to various parties in the Marjol Battery case. Tr. 2046, 2047. Kaufman answered by asking Shapiro to put the proscription in writing. Tr. 2048. Shapiro said he would as soon as he could. Shapiro testified that he agreed to put it in writing even though the reassignment had previously been put in writing because, "[I]t appeared to me that we were possibly heading into a situation where we would have to consider insubordination, and it was time to put communications into writing." Tr. 2048. "[T]o establish a record." Tr. 2048.

Shapiro had yet to follow through with his agreement to put the proscription in writing when on March 6, 2001, he received a four page memorandum from Kaufman. CX 159. The memorandum stated that certain issues had arisen between them since the Bush Administration came into office and Governor Christine Todd Whitman took over helm of EPA that needed to be worked out. The memorandum continued that its purpose was to lay out certain facts and provide Shapiro the option of making a decision. The first "fact" laid out by the memorandum was that Fields had asked him to not perform any more investigations or aid the Ombudsman, but that subsequently "you and I agreed that this was not an adverse action since no official change in my duties had occurred, and no adverse personnel action was engendered by Mr. Fields. He left office on January 19, 2001." A subsequent "fact" in the memorandum was that Kaufman went back to his duties aiding the Ombudsman on the first business day after the inauguration of President Bush, January 22, 2001. The memorandum referenced the February 13, 2001 letter from the Ombudsman to Shapiro requesting the services of Kaufman, the February 22, 2001 letter from Shapiro to the Ombudsman asking for revised schedule for conducting the Marjol Battery review without Kaufman, and the February 23, 2001 conversation between Kaufman and Shapiro when Shapiro told him he was not to perform Ombudsman duties. The memorandum concluded by requesting an "unequivocal clarification from you as to whether you are going to take an adverse action against me or not, by prohibiting me, with your

signature below, from performing my Official duties as Chief Investigator for National Ombudsman cases in general and Marjol Battery Case in particular.” Kaufman’s memorandum added: “If you are going to take any adverse action against me, I need an unequivocal decision so that I can take any and all legal actions, if necessary, as it relates to you (my primary level supervisor) and if necessary, Governor Whitman (my secondary level supervisor) to protect myself from harm and/or make me whole.” The memorandum ended with a place for signature and the statement, “Absent this signature from you below, I will continue to perform my Official duties as I have for the last three years.”

Not surprisingly, Kaufman’s March 6, 2001 memorandum spawned a flurry of back-and-forth letters. Shapiro responded by letter dated March 14, 2001 asserting that the March 6, 2001 memorandum contained many factual inaccuracies. Shapiro took particular umbrage at Kaufman’s claim that “[O]n the first business day after the inauguration, January 22, 2001, I went back to my duties...in aiding the National Ombudsman on work that he needed my help on.” Shapiro expressed concern that the statement was “a direct contradiction of personal discussions we have had in the last several weeks regarding your official duties. As I have reiterated, you are not authorized to perform any Ombudsman-related work.” Shapiro attached a copy of Fields’ December 14, 2000 memorandum, for “information and clarification,” and stressed that “Mr. Fields’ decision has remained in force without interruption since its issuance and remains in effect until specifically remanded in writing. Further, it is my understanding that Mr. Fields, at the time of issuance, also personally discussed the contents of the memorandum with you.” CX 171

Shapiro’s memorandum also attached a copy of an amendment to Kaufman’s position description, which removed Ombudsman-related duties from authorized Agency duties. Finally, he instructed Kaufman to schedule a meeting with him within the next week to discuss progress on non-Ombudsman work assignments that were discussed in Kaufman’s January 31, 2001 performance appraisal session.

Kaufman replied on the same day by memorandum, which began “Mike, it is with a heavy heart that I am forced to respond to your memorandum of March 14, 2001.” CX 173. Kaufman’s memorandum went on the offense and directed a two-prong attack. It characterized Shapiro’s statement that Kaufman’s duties do not include Ombudsman related duties as a false claim. “This false claim is predicated on the existence of a document that you falsely claim is in my Official Personnel File, and you falsely claim Tim Fields discussed with me.” His second thrust was to intimate that Shapiro’s demand that he abide by Fields’ December 14, 2000 memorandum reassigning Ombudsman duties was a response to activities by Kaufman on the Shattuck/Citigroup National Ombudsman Case. He stated:

Thus I am surprised that just three (3) days after the Denver Post published a story about Administrator Whitman’s potential conflict-of-interest on the Shattuck/Citigroup Superfund Site (Attachment 4), and two (20) days after I sent out Interrogatories and Requests for Production of Documents for that investigation (Attachment 5), you send me a document that purports to provide me the unequivocal clarification I requested. However, that memorandum instead produces an apparently manufactured document as the basis for a false assertion

by you that I was not authorized to issue Interrogatories and Requests for Production of Documents on the Shattuck/Citigroup National Ombudsman Case, and that I am not authorized to assist the National Ombudsman.

CX 173. p. 2.

Kaufman's memorandum concluded by announcing that he would not comply with any proscription against him performing Ombudsman duties, and by threatening criminal referral if Shapiro continued to insist that he not perform such activities. Kaufman ended his memo with the following list of five measures that he referred to as "Next Steps."

1. I will continue to perform my official Position Description, which is in my official personnel folder, maintained by the Office of Human Resources and Organizational Services. There continues to be no OSWER management decision prohibiting me from assisting the National Ombudsman (despite your false claims to the contrary). I will continue to do so.
2. Because I take your actions in this regard as threatening communication (potential for insubordination) potentially intended to obstruct, impede, and/or endeavor to influence my assistance to the National Ombudsman in a Federal investigation, I respectfully request that you cease and desist.
3. Because you are using apparent false writings and documents that contain knowingly false and fictitious information to potentially obstruct my assistance of the National Ombudsman in a Federal investigation, I respectfully request that you cease and desist.
4. Based on Mr. Fields' apparent false writing, and your false writings, it appears on its face that you and Mr. Fields may have conspired to produce and apparent false document to obstruct my assistance of the National Ombudsman in a Federal investigation. I respectfully request that you cease and desist.
5. If you do not cease and desist, I will have no choice but to make a Criminal Referral of this matter to the Department of Justice for violations of, at a minimum, 18 U.S.C. 371, 18 USC 1001, and 18 U.S.C. 1505.

CX 173.

Shapiro's answer, coming two days later on March 16, 2001, was restrained. His March 16, 2001 memorandum stressed to Kaufman the prohibition against him performing the Ombudsman-related duties set out in Fields' memorandum. CX 174. Shapiro noted that Kaufman continued to mischaracterize specific written and oral instructions prohibiting him from those duties, and he again referenced and quoted from the December 14, 2000 memorandum. He then explained the history of Kaufman's position description amendment's journey through the Human Resources offices. Finally, he directed Kaufman to cease using the title "Senior Engineer/Principal Investigator" since his official EPA title is "Program Analyst," and use of any other title is inappropriate and unauthorized. Shapiro emphasized that OSWER does not employ any personnel titled "Investigator" as that office is not an investigatory office, as investigatory responsibility lies with the Inspector General Office and Office of Enforcement and Compliance Assurance.

Shapiro also sent a memorandum to the Ombudsman on March 16, 2001, reminding the Ombudsman that since mid-December 2000, Kaufman had been officially directed both in writing and verbally, to cease his activities on behalf of the EPA OSWER Ombudsman function.

RX. 16. Shapiro explained to the Ombudsman that this memo was prompted by his receipt of a copy of a memorandum, dated March 12, 2001, signed by Hugh Kaufman, transmitting “interrogatories” and requests for production of documents concerning the Shattuck Chemical Company Superfund Site in Denver, Colorado. The memo concluded, “As we have discussed previously, unless otherwise directed by me, you should not involve Mr. Kaufman in any National Ombudsman-related activities as part of his EPA responsibilities.”

Shapiro addressed the issue again with Ombudsman in memoranda dated April 16, 2001 and May 22, 2001, when he denied requests from the Ombudsman to have Kaufman reassigned to Ombudsman duties. Shapiro reiterated in both instances that “OSWER has since December 14, 2000, prohibited Mr. Kaufman from participating in Ombudsman-related duties.” CX. 203, 205, 215, 222.

One reason Kaufman offers for his belief that he could continue Ombudsman-related work was that he was not assigned non-Ombudsman duties. This reason has some validity. When Fields met with Kaufman on December 14, 2000, and gave him the memo removing the Ombudsman-related duties, the memo informed Kaufman that his supervisor, Shapiro, would contact him to provide non-Ombudsman assignments consistent with his Program Analyst position. CX. 66. Shapiro did not discuss such assignments with Kaufman until he met with him on January 31, 2001. Shapiro testified that they discussed a number of projects that Shapiro thought Kaufman might have an interest, including projects examining criteria and rationale for selecting sites to be chosen as Superfund sites, and reviewing the procedures for characterizing sites that were in investigation as part of the Superfund process. Tr. 2027, 2028; RX. 31. Shapiro testified that his expectation after the January 31, 2001 meeting was that Kaufman would provide feedback within a month about his thoughts on the two projects, or on other ideas he might want to work on. Tr. 2030.

After the January 31, 2001 meeting, Shapiro did not address the issue of non-Ombudsman work assignments for another three months. He met with Kaufman on April 24, 2001, to discuss non-Ombudsman work. According to Shapiro, Kaufman maintained that neither project was suitable, as work on listing criteria for Superfund Sites would not be useful, and the second project called for a person with more specific expertise. RX. 31.

Shapiro testified that the reason he let three months lapse before he again discussed the non-Ombudsman projects with Kaufman was other demands on his time. He had recently become the Acting Assistant Administrator for OSWER, and he was heavily involved in the transition to a new administration. There were whole hosts of people to be briefed, issues to be addressed, and a lot of transition work being done. He also expected that Kaufman as a senior staff person would not need supervision other than instruction to focus on an area. Tr. 2031, 2032.

A second reason that Kaufman offers for ignoring Fields’ December 14, 2000 memorandum was that he did not receive an SF-50 or SF-52 showing a change in the description of his duties by removal of the Ombudsman duties. He checked his personnel files and found no

change in his position description. Tr. 1080-1082. Kaufman acknowledges that such a change in his duty description would not require the issuance of an SF-50 or SF-52, but that he expected the personnel form changed because Fields' December 14, 2000 memorandum stated that reference to Ombudsman duties would be removed from his position description. CX 66. Thus, he testified, EPA's failure to provide him with a position description change was part of the reason that he resumed duties. Tr. 1082.

Laurie May was Director of Organizational Management and Integrity Staff (OMIS) for OSWER. Tr. 1436, 1437. She testified that no SF-50 or SF-52 was issued because a change in position description does not involve an SF-50 or SF-52. Rather, she assisted Fields in preparing a form for amending the position description, form 3150-6. Tr. 1491, 1492; RX. 5. She testified that even preparing that form is not required, but Fields wanted to make sure that there was no chance of a misunderstanding. Tr. 1493. The form was prepared and signed by Fields on December 8, 2000, before his December 14, 2000 meeting with Kaufman. The form was submitted to the Office of Human Resources and Organizational Services for classification, and was officially classified and signed on December 15, 2000, by Denise Mims, a human resources person who serviced OSWER. However, according to a signed statement by Mims, the form was not filed in Kaufman's official folder until March 15, 2001, "because of a filing backlog." RX. 5.

#### Background of Ombudsman and Transfer to Office of Inspector General

A history of the Ombudsman function at OSWER is instructive. The Ombudsman was established in OSWER by the RCRA in 1984. Tr. 1755, 1756, 2000. The purpose of the Ombudsman function was to be an objective gatherer of facts on issues raised by citizens and to make recommendations to management on how to address those issues. Tr. 1755. The statutory requirement expired in 1988, but the Ombudsman function was kept in place because OSWER managers considered it to be a valuable function that should continue. Tr. 1755-1757. Fields explained, "I think it was a good idea to have an objective finder of facts and a place where citizens could go to when they felt that their concerns were not adequately being addressed by regional managers or staff, and the Ombudsman would provide that mechanism that they could contact to evaluate whether there were issues here that needed some other involvement by headquarters management, or even regional management." Tr. 1757, 1758. The OSWER managers decided not only to continue the Ombudsman, but to expand the function to include, not just RCRA, but also the Superfund and other OSWER programs. Tr. 1755, 2001.

As Director of OMIS, May had responsibility for all human resource matters, including employee relations, pay, executive recruitment, appraisals and anything having to do with human capital. She had responsibility for employee relations and labor relations issues within OSWER, liaison with IG and Government Accountability Office (GAO), Congressional and other correspondence management, and any organizational or management matters across OSWER. Tr. 1438. May at one time had managerial responsibility for the Ombudsman position as it had previously been organized as part of OMIS. Tr. 1451. She assisted in the recruiting and hiring of Martin as the Ombudsman, and was his first line supervisor. Martin was part of her staff at OMIS. Tr. 1452. The Ombudsman was never provided supervisory authority. Tr. 1452. The

functional title was Ombudsman for Solid and Hazardous Waste, although the position was environmental protection specialist. Tr. 1457.

Approximately two and one half years after Martin became the Ombudsman the position was moved from OMIS to report directly to the Deputy Assistant Administrator for OSWER. The move was suggested by May because the position was not a good fit in her organization since her organization had responsibility for management and administrative issues, whereas the Ombudsman was dealing with technical matters and had a higher visibility than management functions. Tr. 1459. The Deputy Assistant Administrator for OSWER in 1994 was Fields. Tr. 1728. Fields became the Acting Assistant Administrator for OSAM in 1997, and became the Assistant Administrator when he was confirmed by the Senate in 1999.

Shapiro became the Acting Deputy Assistant Administrator for OSWER in February of 1997. He was permanently assigned to the Deputy Administrator position in August, 1999. Tr. 1997, 1998. After Fields left EPA in January of 2001, Shapiro became the Acting Assistant Administrator for OSWER, and remained in that position through October of 2001, when he returned to the position of Deputy Assistant Administrator. Tr. 1998. During the period relevant to this matter Shapiro was the first line supervisor of the Ombudsman and of Kaufman. Tr. 1999.

Shapiro testified that during the year 2000 and early 2001, he considered it to be a good idea to formally establish an office of Ombudsman within OSWER with Martin as a supervisor. Tr. 2040, 2041, 2179. Guidelines were published on January 3, 2001, in the federal register on a draft basis. CX 429; TR. 2033, 2040, 2041. He discussed the guidelines with the Ombudsman in a January 2001 meeting, and he turned over to the Ombudsman the preliminary draft for review. However, the issue of reorganization of the Ombudsman within OSWER became subsumed in the larger issue of its future within the agency as a whole, and its location, whether it even should be in OSWER. Tr. 2041, 2042.

The Government Accountability Office (GAO) was requested to do a study on the Ombudsman function within EPA. The study commenced about March or April of 2001. Tr. 1503. The request was made in the context of increasing interest by the Ombudsman and Congress of a more independent Ombudsman function. There was also legislation introduced in Congress to create a more independent Ombudsman within EPA. Tr. 2042. The GAO produced a report to Congressional Requestors dated July 27, 2001, titled EPA's National and Regional Ombudsman Do Not Have Sufficient Independence CX 430. Its two principle recommendations were that the independence of the Ombudsman should be strengthened by locating it outside of OSWER, and that the Ombudsman should be provided with a separate budget and the authority to hire and supervise his own staff. Id. The report reasoned that the Ombudsman function needed to be separate from OSWER because of an inherent conflict if the Ombudsman reports to officials whose actions might be questioned by the Ombudsman. Tr. 1514; 2063.

Shapiro testified that in response to the GAO report EPA began a process to evaluate options for restructuring the Ombudsman function. He participated in a series of meetings that included the EPA Deputy Administrator and a representative of the Office of the Inspector General. Shapiro recalls the process considering three options: 1) creating a separate

management unit, an office of the Ombudsman within OSWER; 2) creating an office outside of OSWER, possibly reporting directly to the Administrator's Office; and 3) moving the Ombudsman function to the Inspector General's Office. Tr. 2063, 2064. The first option, establishing a management unit within OSWER, that Shapiro had worked on and had been the subject of the proposal published in the federal register, would not have satisfied the independence criteria of the GAO report. Tr. 2064. May testified that, in reality, once it was decided to place the Ombudsman function outside of OSWER, the only logical choices were the Administrator's Office and the IG's Office. Tr. 1515.

May testified that she was involved in the process as a liaison with GAO. She helped to coordinate discussions between OSWER representatives and those from other entities within EPA when decision making was beyond the purview of OSWER. Tr. 1516. She recalled discussions about the location within EPA where the Ombudsman function would function best and have visibility and independence. She recalls the concerns that if it were in the Administrator's Office, given that the Administrator and the Deputy Administrator are presidential appointees, it could be perceived by others as not having an aura of independence and impartiality, as being in an atmosphere that was too political. Tr. 1517, 1518. She recalls a meeting in September of 2001, at the Deputy Administrator's Office, when the discussion turned to whether the IG's Office was a viable option. The issue was not decided that day because of questions raised by the IG and others. At a meeting on October 2, 2001, the Deputy Administrator and IG agreed that the IG Office would be an appropriate place for locating the Ombudsman function. Tr. 1519; CX 245 at 2.

The Ombudsman's recommendation was that the Ombudsman office should be located in the Administrator's office. In a memorandum to the Administrator dated October 2, 2001, the Ombudsman recommended that the Ombudsman function should be placed outside of OSWER and inside the Office of the Administrator because location within the Administrator's Office would provide the most structural independence. The memorandum also declared that its location within the IG's Office "would only serve to give the false appearance of Ombudsman independence while confusing the very different missions of these offices and the Ombudsman function." CX. 244.

The option that was decided upon was the transfer of the Ombudsman function to the Office of the Inspector General. Shapiro testified that he agreed with that decision because, among the options that were available, it was the most effective way of addressing its independence which had become the driving issue for the reorganization. Tr. 2064, 2065.

The Administrator issued a Memorandum on November 27, 2001, titled Organizational Placement of the Solid and Hazardous Waste Ombudsman Function, declaring that:

...the Inspector General and I have agreed to adopt the recommendations of the GAO and relocate [the ombudsman] function from the Office of Solid Waste and Emergency Response (OSWER) to the Office of Inspector General (OIG)...It will serve to distance the ombudsman function from the program office that is subject to its inquiries. This move to the OIG will give the function the independence and impartiality recommended by a number of Members of Congress, and

necessary to conduct inquiries in an organization dedicated to these professional activities.

CX. 263.

On the morning of the day that the memorandum announcing the transfer was issued, Shapiro told the Ombudsman of the transfer and that the Ombudsman would be moved to the Office of the IG, effective the following January. The Ombudsman asked Shapiro if he would have his own budget, be able to supervise his own employees, and be able to choose his own cases. The Ombudsman testified that Shapiro answered “no” to all three questions. Tr. 602, 603; CX. 265. The Ombudsman followed up the conversation that day with a letter to the Administrator requesting a written notification of his reassignment to the IG’s Office. In the letter, he referred to the Administrator’s decision as a decision “to dissolve the National Ombudsman function.” CX. 265.

May testified that Kaufman was never a factor in the decision to transfer the Ombudsman function to the IG’s Office, as he had been barred from Ombudsman duties since the prior December. Rather, the positions being discussed during the reorganization were the incumbent position of Martin, Douglas Bell, who had been reassigned to work on the Ombudsman function, a vacant FTE, and interns assigned to the program. Tr. 1500. Shapiro recalled only one discussion involving Kaufman during the transfer process. He recalled receiving a telephone call from someone from the IG’s Office asking if Kaufman was being transferred as part of the move, and he replied that he was not, since he was no longer associated with the function. Tr. 2066.

Kaufman questioned Gary Johnson, Deputy Inspector General, about whether he would be detailed to the IG’s Office because of the transition. Johnson answered no, he would not be one of the persons detailed. Tr. 1301. Kaufman testified that he was told by Johnson that the IG for all intents and purposes would be responsible for the staffing and functioning of the Ombudsman function. Tr. 1300.

The Office of the IG established the Ombudsman in a newly-created Office of Congressional and Public Liaison, headed by a soon to be appointed Assistant Inspector General. The Office of Congressional and Public Liaison was made up of the Ombudsman function and the Congressional and Media Relations function. The Ombudsman function was proposed to be staffed by Martin as a permanent assignment, Bell on a detail, an SEE employee, a vacant grade 13, and an OIG Hotline staffer. The role of the Ombudsman function was expanded to accept complaint/inquiries for all EPA programs. CX. 310. The Ombudsman function was funded at the IG Office at \$750,000. CX 310. The prior year at OSWER it had been funded at \$518,000. CX 414 at 1613.

The Administrator’s announcement of the relocation stated that it would become effective January 2002, following union review. However, the transfer did not become effective until April of 2002, because of a stay issued by a U.S. District Court for the District of Columbia. Tr. 2067. The Ombudsman and the Government Accountability Project filed a motion for a Temporary Restraining Order (TRO) before the United States Court. The motion was granted

and a TRO was issued by U.S. District Court Judge Richard W. Roberts on January 11, 2002, in Martin et al. v. United States Environmental Protection Agency, CA No. 02-055 (Jan. 11, 2002), enjoining EPA from proceeding with the transfer. CX. 448. After the issuance of the TRO, the Ombudsman resumed assigning Ombudsman function tasks to Kaufman. The TRO was lifted and the case dismissed on April 12, 2002. CX 361. The Ombudsman function was transferred to the Office of the Inspector General.

#### Discussions with Congress and Media during the period post December 14, 2000

Kaufman testified that he talked with members of Congress about his disagreement with draft guidelines changing the operation of the EPA Ombudsman office. He testified that he discussed proposed legislation concerning the EPA Ombudsman office with Senator Wayne Allard from Colorado, Senator Michael Crapo from Idaho, Senator Larry Craig from Idaho, Senators Specter and Santorum from Pennsylvania, Congressman Bilirakis from Florida, Congressman Jim Traficant from Ohio and Congressman Norwood from Georgia, in January, February and March of 2001. Tr. 1038-1047, 1194.

Kaufman also talked to reporters about his removal from Ombudsman duties, as well as about draft Ombudsman guidelines.

An article in the *Environmental News Service* dated January 8, 2001 headlined the Ombudsman's suspension of investigations after Kaufman was relieved of his Ombudsman duties. Kaufman was quoted extensively in the article as saying that his ouster was political revenge for Democratic candidate Al Gore losing the election to Republican George W. Bush because an Ombudsman report that was released five days before the election called Gore's environmental record into question. He was also quoted as stating that EPA's proposed guidelines on the operation of the Ombudsman office was a major step in killing the Ombudsman office. CX. 98.

Kaufman was quoted in an article in the *Canton Repository* dated February 11, 2001 involving the draft EPA guidelines on the Ombudsman. Kaufman was quoted as stating that the guidelines would make it more difficult for the Ombudsman to initiate and conduct an investigation. CX 138.

Kaufman was interviewed by the *Denver Post* regarding whether Christine Todd Whitman, the recently appointed Administrator of EPA, could have a conflict of interest in the decision over which remedy should be imposed by the Agency at the Shattuck Superfund site. A March 11, 2001 article by the *Denver Post*, titled "EPA Chief has ties to Shattuck" reported that the Administrator's husband was managing partner of a venture capital firm spun off and backed by CitiGroup. An EPA spokesman was quoted as saying that no conflict existed because Whitman did not have a direct hand in local Superfund decisions, and that Superfund sites in general were not before the Administrator at that time for any reason. The spokesman also offered that if the situation changed, Whitman would seek advise on how to proceed. CX. 162; Tr. 1018-1021. Kaufman disagreed. He suggested to the newspaper that Whitman's family ties

to CitiGroup might be causing her to decline to reverse decisions of her Clinton Administration predecessors regarding the Ombudsman office, including a refusal to reassign Kaufman to Ombudsman duties.<sup>3</sup> CX. 162.

Kaufman testified that he talked to a reporter from the *Scranton Times* about the same issue. An article in the *Scranton Times* dated April 8, 2001, addressed the question of whether Whitman had a conflict of interest in the lead cleanup of the Marjol Battery Superfund site as her husband had a financial connection to Gold Electronics, the firm responsible for cleanup. CX. 199. Kaufman testified that he told the reporter before the article was written that he believed Whitman was stopping the Ombudsman from giving Kaufman Marjol Battery assignments, and such action slowed down and inhibited the Ombudsman from performing his review, which gave the appearance of a conflict because it prevented the Ombudsman from improving the chances of bringing the firm into compliance with the environmental laws. Tr. 1276.

An article in the *Scranton Times* on February 24, 2001, discussed the status of the Ombudsman's review of the Marjol Battery Superfund site. Kaufman testified that he talked to the reporter to provide background information. Tr. 2540. The article reported that completion of the Ombudsman's review would be delayed because Kaufman was removed from the case. The article continued that independence of the Ombudsman has been a concern since Kaufman was taken off the case in December of 2001, and since EPA issued draft Ombudsman guidelines that the Ombudsman believes would compromise his independence. CX. 151.

On April 9, 2001, the *Associated Press* and the *Denver Post* ran separate articles about Kaufman's filing of a whistle blower complaint. CX 200 & 201. Both articles quoted Kaufman as saying that he was retaliated against because of whistle-blower activities and that the retaliation came from Whitman, "straight from the top." The *Denver Post* article quoted Kaufman:

She's made it personal. She's going after me personally," Kaufman said last week. "Sometimes you have to teach former governors about the democratic process, too. This is a country of laws. She's not a monarch." Kaufman also has threatened to ask the Department of Justice to bring criminal charges in connection with the EPA's handling of his situation.

CX. 200, p. 2.

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<sup>3</sup> The Office of the Inspector General commenced an investigation on January 16, 2002 of whether Whitman had violated 18 U.S.C. § 208(a) by taking official actions affecting a personal financial interest with respect to the Shattuck site. CX 438. The investigation concluded that the decisions pertaining to the Shattuck site were made in December of 2000 by EPA regional personnel prior to her taking office, and that Whitman did not sign any document, make any decisions or recommendations, direct anyone to take any action, or participate in any matter involving the Shattuck site. Thus, the allegations were found to be not substantiated, criminal prosecution was declined, and no further investigation was found to be warranted. CX 438 at 11.

The Associated Press article also quoted Kaufman as characterizing Whitman as the source of retaliation against him by saying, “she made it personal. She’s going after me personally.” The article also reported Kaufman saying that he expected his whistleblower complaint to result in a hearing in which he would subpoena Whitman, her husband and top EPA managers.

CX. 201.

## CONCLUSIONS OF LAW

### Exclusivity of Collective Bargaining Agreement

EPA initially argues that the Civil Service Reform Act of 1978, as amended (CSRA), 5 U.S.C. § 7121(a)(1) precludes review of Kaufman’s complaints by the DOL because the complaints are grievances which fall within the scope of a collective bargaining agreement, and resolution of those grievances is exclusive to the negotiated grievance procedures of the collective bargaining agreement (CBA).

The CSRA requires the CBAs of labor unions representing federal employees to provide procedures for the settlement of grievances, and “those procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.” 5 U.S.C. § 7121(a)(1). Here, Kaufman is a member of a bargaining unit covered by a CBA between EPA and the American Federation of Government Employees. The CBA contains a grievance procedure covering grievances by the employee “concerning any matter relating to the employment of any employee” or concerning “[a]ny claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment.” The CBA also provides that the grievance procedure “constitutes the sole and exclusive procedure for the resolution of grievances by employees of the bargaining units.”

EPA made the same argument in its Motion To Dismiss filed prior to hearing. The argument was rejected in the Order Granting Partial Summary Decision. The Order reviewed the legislative history of the CSRA and the relevant case law, and determined that the procedures of the CSRA are not meant to be the exclusive remedy for employees asserting claims under whistle blowing protection statutes. See e.g., Pogue v. United States Department of the Navy, No. 87-ERA-21, 8-9 (ARB May 10, 1990) (finding the DOL had jurisdiction to hear whistle blowing retaliation claims arising from CERCLA, and denying the Navy’s claim that CERCLA does not cover federal employees because the CSRA established a comprehensive scheme to address all claims concerning adverse personnel actions). In Pogue, the Secretary of Labor concluded that “the legislative statement in the [Whistleblower Protection Act] makes it clear that Congress does not intend that a Federal whistleblower [sic] should be barred from remedies available under CERCLA.” Pogue, at 9. The Order Granting Partial Summary Decision reasoned that the courts have not specifically considered the impact of a CBA on the statutorily created whistle blowing remedies, but the Secretary’s rationale in Pogue that the CSRA does not provide an exclusive remedy for whistle blowing claims would necessitate a finding that a CBA would not either.

The Order Granting Partial Summary Decision also referenced case law providing that the government has an important interest in assuring compliance with whistleblower protection statutes because those statutes not only protect employees from the effects of discrimination and deter future similar conduct, but they promote public safety and government efficiency. It concluded that a CBA can not be found to deprive the DOL of jurisdiction because private arbitration of such grievances would impermissibly omit the government from the case and extinguish its ability to vindicate the public interest in a resolution of the matter. See Beliveau v. DOL, 170 F.3d 83, 88 (1<sup>st</sup> Cir. 1999); Hoffman v. Fuel Econ. Contracting, 97-ERA 33, n.4 (Sec.y Order Denying Request to Reconsider, August 4, 1989).

EPA renews its motion by arguing that the evidence at hearing established that Kaufman is the member of a bargaining unit covered by a CBA with a grievance procedure. Tr. 1527; RX 59-62. However, the reasoning supporting the Order Granting Partial Summary Decision was not dependent on the whether Kaufman was a member of the bargaining unit, or whether he had attempted to resolve his claims through the grievance procedures. The Order Granting Partial Summary Decision accepted that Kaufman was the member of a federal union subject to a CBA containing a mandatory grievance procedure. EPA's motion as denied because it was determined that the procedures of the CSRA are not an exclusive remedy that would deprive the DOL of jurisdiction over these whistleblower complaints.

EPA's argument that the CBA deprives the DOL of jurisdiction over claims of whistleblower retaliation is rejected.

#### Statute of Limitations

#### December 14, 2000 Memorandum

EPA moved for summary judgment in its Motion To Dismiss on the basis that the whistleblower retaliation occurred outside the statute of limitation period proscribed for such violations. The Motion To Dismiss was denied by the September 30, 2002 Order Granting Partial Summary Decision for reason that Kaufman's opposition to the motion in the form of affidavits by Kaufman and Ombudsman Robert Martin presented genuine issues of material fact. A motion for summary judgment cannot resolve issues of fact, but rather its function is to determine whether an issue of fact exists to be tried. Hunter v. Mitchell, 180 F.2d 763, 764 (D.C. Cir. 1950).

EPA renews its motion for dismissal arguing that the preponderance of the evidence shows that Kaufman's claims alleging violations of the employee protection provisions of the environmental protection statutes were not filed within the statute of limitation period.

Kaufman's complaints allege violations of the employee protection provision of CERCLA, CAA, FWPCA, SWDA, and SDWA, all which have a 30 day statute of limitations period for filing a violation. 42 U.S.C. § 9610(b); 42 U.S.C. § 7622(b); 33 U.S.C. § 1367(b); 42 U.S.C. § 6917(b); 42 U.S.C. § 300-9(i)(2)(A). Kaufman also asserts violations under the Toxic Substances Control Act and the Energy Reorganization Act, which have statute of limitations periods of 30 days and 180 days, respectively. 15 U.S.C. § 2622(b); 42 U.S.C. § 5851(b)(1).

However, because the claims under the TSCA and ERA were dismissed for lack of subject matter jurisdiction, they are not considered for purpose of the statute of limitations analysis.

Kaufman filed his first complaint with the DOL on April 3, 2001. He filed his second complaint on May 3, 2001. The second complaint reasserted the allegations of the first complaint and added a claim under the ERA. As there is no jurisdiction for the ERA claim, only the filing date of the first complaint will be considered in this statute of limitation analysis. To be timely, a violation of the employee protection provisions of these statutes must have arose on or after March 5, 2001.

Kaufman alleges in his complaint that on March 16, 2001, an adverse employment action took place in violation of the whistleblower statutes. Kaufman alleges that on March 16, 2001, he was prohibited from performing investigations for the EPA Ombudsman. However, EPA contends that the December 14, 2000 letter from Fields, which informed Kaufman that he would no longer receive any Ombudsman-related assignments, and that the references to Ombudsman duties would be deleted from his position description, was a “clear, unmistakable, and final decision,” and thus any subsequent employment actions aggrieved by Kaufman, including the March 16, 2001 incident, “were merely the continuing effects or consequences of the Agency’s final December 14, 2000 decision not new, discrete occurrences.”<sup>4</sup>

Kaufman agrees that Fields’ December 14, 2000 letter removed his Ombudsman duties and thus was an actionable adverse action under the Whistleblower Acts.<sup>5</sup> Actually, Kaufman could take no other position as Fields’ letter is unambiguous. Early in the letter, Fields informed Kaufman:

I continue to believe strongly in the Ombudsman function and will continue to provide resources and staff to support it as a creditable and viable entity. I am, however, by this memo informing you that, effective immediately, you will no longer be assigned Ombudsman-related duties and reference to such duties will be removed from your position description.

CX 66.

Fields’ letter continued by explaining the reasons for his decision to remove from Kaufman the Ombudsman duties. He then concluded, “[a]ccordingly, you will no longer perform any Ombudsman-related duties, effective immediately.” Id.

Kaufman’s April 3, 2001 appeal was filed more than thirty days after Fields’ December 14, 2000 letter. Kaufman argues that the thirty-day appeal period is tolled by both equitable estoppel and equitable tolling.

Equitable estoppel operates when an employer acts affirmatively to prevent a complainant from suing in time. Equitable tolling applies where a complainant, despite due diligence, is unable to secure information supporting the existence of a claim. See Ilgenfritz, Jr. v. U.S. Coast Guard Academy, ARB No. 99-066, ALJ Case No. 99-WPC-3 (August 28, 2001) citing School Dist. of the City of Allentown v. Marshall, 657 F.2d 16, 18 (3d Cir. 1981).

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<sup>4</sup> EPA’s Post-hearing Brief, pp. 36, 54.

<sup>5</sup> Complainant’s Post-hearing Brief, p. 204.

Kaufman argues that EPA is estopped from raising the statute of limitations because he “could not have been reasonably certain that the Fields memorandum was EPA’s official position until March 16, 2001.”<sup>6</sup> He points to the following to support his argument: 1) EPA allowed the Ombudsman to utilize whatever EPA employees he needed, and the Ombudsman continued to assign Ombudsman-related work to him; 2) No procedures were followed to implement the Fields Memo; 3) A new administration would set its own course; 4) Shapiro was pursuing the creation of an Office of the Ombudsman in which Ombudsman Martin could hire Kaufman as Principal Investigator; and 5) A February 15, 2001 *Scranton Times / Tribune* article paraphrased a conversation Shapiro had with the reporter that “it’s uncertain whether he’ll let Mr. Kaufman work again for the ombudsman’s office.”

Initially, Kaufman could not have any uncertainty about the meaning of the Fields memo. The memo is unambiguous, and Fields met with him personally to deliver the memo and to explain that he was no longer to do Ombudsman-related work. Both Fields and Kaufman testified that Kaufman understood the decision, and both testified that Kaufman responded that he would stop doing Ombudsman work. Tr. 1360, 1785.

Kaufman argues that he only was prohibited from doing Ombudsman work “[s]o long as Fields was my boss.” Tr. 1360. Fields’ meeting with Kaufman to require the cessation of his Ombudsman-related duties occurred during the final two weeks of President Clinton’s term, and Fields retired from EPA effective January 31, 2001. Kaufman implies that the effect of an incoming administration would cause the memo to become null and void. “A new administration would set its own course.”<sup>7</sup> However, there is nothing in the record to support such an implication. In fact, the record supports the opposite. The memo was never rescinded. Claimant’s immediate supervisor was Shapiro. He advised and assisted Fields in creating the memo, and he agreed with it. Tr. 2019, 1783.

Shapiro met with the Ombudsman on January 19, 2001, to discuss the staffing of the Ombudsman function as a result of Kaufman’s unavailability. The Ombudsman testified that Shapiro told him Kaufman was no longer doing Ombudsman-related work. The meeting was a result of the Ombudsman suspending work on ongoing Ombudsman cases, in part, because of the transfer of Kaufman from Ombudsman duties.

Shapiro met with Kaufman on January 31, 2001, to discuss his job performance. Kaufman asked Shapiro at this meeting if he was withdrawing Fields’ December 14, 2000 letter. Shapiro responded that he was not withdrawing the memo, and confirmed that the memo was in effect. The meeting then turned to a discussion of non-Ombudsman projects that Kaufman could pursue.

Shapiro met with the Ombudsman on February 8, 2001. The Ombudsman requested the use of Kaufman in the Marjol Battery case. Shapiro rejected the request. A memo by the Ombudsman quoted Shapiro’s characterization of the request as “not responsive,” “not acceptable” and not honorable.” Shapiro discussed this matter again with the Ombudsman on February 13, 2001, and February 21, 2001. He reiterated that Kaufman would not be assigned

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<sup>6</sup> Complainant’s post-hearing brief, p. 207, 208.

<sup>7</sup> Id.

Ombudsman support work. Shapiro summarized in a February 22, 2001 memorandum to the Ombudsman their agreement that the Ombudsman would provide a revised schedule for conducting the Marjol review based on the assumption that Kaufman would not be available to work on the Marjol case, and that the Ombudsman would be able to request an additional staff person to provide the support previously provided by Kaufman.

When Shapiro was informed by Steven Luftig, Director of OERR, on February 15, 2001, that Kaufman had submitted a request for travel authorization to Luftig to attend a hearing the Ombudsman was holding on the Marjol case, Shapiro instructed Luftig to deny Kaufman's request because his status had not changed as he was prohibited from supporting the Ombudsman.

Shapiro telephoned Kaufman on February 23, 2001, to tell him that he was prohibited from doing Ombudsman support work. The telephone call was in response to a telephone call Shapiro received from an EPA Region III employee earlier that day asking if Kaufman had returned to Ombudsman work because Kaufman had co-signed with the Ombudsman a set of questions sent to parties in the Marjol Battery case. Kaufman asked Shapiro to put the proscription in writing. Shapiro replied that he would as soon as he could.

Shapiro wrote to Kaufman on March 14, 2001, again stressing to Kaufman that he was not to perform Ombudsman work. He attached Fields' December 14, 2000 memorandum "for information and clarification." Shapiro's letter stressed that "Mr. Fields' decision has remained in force without interruption since its issuance and remains in effect until specifically remanded in writing."

Shapiro wrote to Kaufman again on March 16, 2001, stressing that he was prohibited from performing Ombudsman duties. He also directed Kaufman to cease using the title "Senior Engineer/Principal Investigator" since its use was inappropriate and unauthorized. On March 16, 2001, Shapiro also sent a memorandum to the Ombudsman, reminding the Ombudsman that since mid-December 2000, Kaufman had been officially directed both in writing and verbally, to cease activities on behalf of the EPA OSWER Ombudsman function.

Thus, Kaufman's argument that he was receiving mixed signals about his status from Shapiro and that he was uncertain about whether he could perform Ombudsman related duties strains credibility. Nevertheless, Kaufman focuses on the February 23, 2001 telephone conversation where he requested and Shapiro agreed that he would put in writing the removal of Ombudsman duties. Kaufman's post-hearing brief argues that Shapiro agreed that Kaufman could continue to perform the Ombudsman duties until he received that writing. However, the record does not support Kaufman's contention. Shapiro testified that he did not tell Kaufman that he could perform Ombudsman duties pending the writing. Tr. 2049. Nor did Kaufman testify that Shapiro said he could. Kaufman testified that he asked that the removal of duties be put in writing. He did not testify to asking Shapiro to permit him to perform Ombudsman duties, or that Shapiro said he could perform Ombudsman duties.<sup>8</sup> The only difference in their

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<sup>8</sup> On cross-examination, Kaufman testified

Q: Isn't it true that when you had that conversation with Mr. Shapiro, he told you

testimony about the conversation was the reason for putting the removal of Ombudsman duties in writing. Shapiro testified that he agreed to put it in writing because “[I]t appeared to me that we were possibly heading into a situation where we would have to consider insubordination, and it was time to put communications into writing.” Tr. 2048. “[T]o establish a record.” Id. Kaufman testified that he wanted the removal in writing to file a whistleblower complaint, and to show it to members of Congress.

Thus, the actions of Shapiro left no reason for Kaufman to have any uncertainty about his status. Kaufman’s argument that he could not have been reasonably certain that the Fields memo was EPA’s “official position” until March 16, 2001, or March 14, 2001, at the earliest, has no support in the record.

### Estoppel

Kaufman also contends that EPA is estopped because it allowed the Ombudsman to utilize whatever EPA employees he needed, and the Ombudsman continued to assign Ombudsman-related work to him. Again, the record does not support Kaufman’s argument. Shapiro and the Ombudsman both testified that the Ombudsman was instructed not to give Kaufman Ombudsman-related work . Tr. 730, 736; CXs 139 at 1, 205, 222. Moreover, it is not all that clear that Kaufman did much Ombudsman-related work after receiving Field’s December 14, 2000 memo. He did not attend any public hearings. Kaufman testified that he did no Ombudsman work until after the administration changed on January 20, 2001. Tr. 1070. The Ombudsman testified that he was not sure whether he gave Kaufman any Ombudsman-related work in January of 2001. He recalled asking Kaufman in February to help with preparation of Interrogatories in the Marjol Battery case, and he recalled that in March, 2001, he asked Kaufman to do “more Marjol Battery type work, research, work of that sort.” Tr. 754. The Ombudsman testified that he does not remember if he asked Kaufman to do any Ombudsman

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orally you could not do ombudsman work?

A: Yes.

Q: He did not say that you could do ombudsman work until he got around to putting it in writing?

A: He didn’t say one way or the other. We agreed that he would put it in writing.

Q: But he did not agree that until he put it in writing, you could do ombudsman work?

A: He didn’t. I took it as I would – I would continue doing Mr. Martin’s assignments until such time as I got the writing that he agreed he would produce.

Q: He did not say that, though?

A: I don’t know specifically what he said or what I said to him. I’m giving you my impressions of that discussion that he and I had on the phone, Mr. Starrs. If you have a tape recording of that discussion or a transcript to refresh my memory, I’d be happy to review it.

Tr. At 1381.

work after March of 2001. Tr. 754, 755. Further, whenever Kaufman's supervisor discovered that he was doing Ombudsman work, he was instructed to stop.

Kaufman contends that he was unsure about the effect of the Fields' memo because no steps were taken to implement the Fields memo. However, as acknowledged by Kaufman, no steps or procedures needed to be taken to implement the memorandum. See discussion at page 31. Kaufman testified that he looked at his personnel folder and found no position description change. According to May's testimony, Form 3150-6, a form for amending position description was prepared and signed by Fields, but it did not make it to his personnel file until March 15, 2001, because of a filing backlog.

Kaufman is correct that his personnel file did not reflect the change of duties, but Kaufman does not explain how that would lead him to believe he could assume Ombudsman duties in the face of Shapiro's continual unequivocal instructions to him that he was not to do Ombudsman work.

Shapiro's testimony and the memos he directed to Kaufman and the Ombudsman show him to be unequivocal in his stance of Kaufman not doing Ombudsman work. Thus, it is difficult to give credence to Kaufman's argument that Shapiro's pursuit of an Office of Ombudsman, or an article in the February 15, 2001 Scranton Times, would cause him to believe he could resume Ombudsman work. Kaufman's argument is not creditable and he has not shown equitable tolling or equitable estoppel.

#### Discrete Retaliatory Acts

Kaufman also argues that his complaint is timely because he was the victim of discrete retaliatory acts after the Fields' December, 2001 memo that occurred within thirty days of his complaint to DOL. He identifies the discrete retaliatory acts as: 1) March 5, 2001 detail of Barry Stolls from the OIG to assist the Ombudsman; 2) removal of hiring freeze on Ombudsman positions sometime in March 2001; 3) March 16, 2001 memorandum from Shapiro to Kaufman placing in writing the prohibition against him performing Ombudsman duties; 4) April 6, 2001 memorandum by Shapiro to the Ombudsman inquiring about the status of his recruitment to fill full time positions to support the Ombudsman function; 5) memoranda on April 16, 2001 and May 21, 2001 denying the Ombudsman's request to assign Kaufman Ombudsman duties; 6) November 27, 2001 decision to transfer the Ombudsman function from OSWER to the Office of Inspector General; and 7) transfer of Ombudsman function to the Office of the Inspector General.

However, the discrete acts referenced by Kaufman are not adverse actions to Kaufman. After issuance of Fields' December 14, 2000 memo prohibiting Kaufman from performing Ombudsman duties, Kaufman was in no position to be considered for assignment of Ombudsman functions. The detail of Stolls to assist the Ombudsman, and recruitment or hiring without considering Kaufman are the consequence of his preclusion. Kaufman's argument that future staffing by the Ombudsman would be an adverse employment action would make mincemeat out of the requirement to timely file. All employer adverse actions would be subject to reopening merely by continuing to request reinstatement, and then counting the time to file from each

denial. The courts and the ARB have refused to permit such eradication of the concept of finality. In Jarmon v. Powell, 208 F. Supp.2d 21 (D.D.C. 2002), citing Delaware State College v. Ricks, 449 U.S. 250, 258, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), the Court dismissed an argument that a failure to promote was a discriminatory act when the plaintiff failed to timely pursue his administrative remedy after an earlier non-promotion which was an eligibility prerequisite for a subsequent promotion. The Court reasoned “the proper focus is on the time of the **discriminatory acts**, not upon the time at which the **consequences** of the acts become most painful.” Id. at 10 (emphasis in original). (quoting United Airlines, Inc. v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977)). In English v. General Electric Co., 85-ERA-2 (Sec’y Feb. 13, 1992) the Secretary quoted London v. Coopers & Lybrand, 644 F.2d 811, 816 (9th Cir. 1981) for the proposition that “a single act by an employer adverse to an employee's interests, such as a discharge, layoff, or failure to transfer or promote, begins the running of the statute of limitations and the natural effects of the alleged discriminatory act are not regarded as 'continuing.'” In Greenwald v. The City of North Miami Beach, 78-SDW-1 (Sec’y Apr. 3, 1978), aff’d, Greenwald v. North Miami Beach, 587 F.2d 779 (5th Cir. 1979), cert. denied, 44 U.S. 826 (1979), the complainant's complaint under the employee protection provision of the SDWA was found to be time barred. Subsequently, the complainant reapplied for employment, and upon being told that there was no vacancy, filed a complaint alleging continuing discrimination. The Secretary held that: “[a] review of the statutory language, history, and cases provides no basis for a complaint by an applicant for a position, unlike Title VII of the Civil Rights Act, nor is there any basis for complaint by a former employee whose previous employment relationship has already been subjected to an opportunity for hearing and is now closed off by a final order. To find jurisdiction here it would be necessary to go behind the earlier case, Case No. 78-SDWA-1, to find the employment relationship requisite to this proceeding, and to reopen issues involved there. The doctrine of res judicata bars reopening such matters which have become final.”

See also Varnadore v. Oak Ridge National Laboratory, et al., 92-CAA-2, 92-CAA-5, 93-CAA-1, (January 26, 1996), where the Secretary held “[t]he courts and the Secretary have made it clear that the fact that a complainant continues to suffer the effects of a retaliatory act which took place outside the limitations period is not sufficient to render a claim timely. In United Air Lines v. Evans, 431 U.S. 553 (1977), the Supreme Court ruled that the mere fact that the effects of a discriminatory act continue into the limitations period does not provide a basis for concluding that a cause of action was timely filed.” See Belt v. United States Enrichment Corp., 2001-ERA-19 (Feb. 26, 2004) (exit questionnaire activity was not an adverse action but rather the logical effect of a discriminatory act).

Kaufman argues that this precedent case law has been superseded by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009). The Ledbetter Act abrogates the United States Supreme Court decision in Ledbetter v. Goodyear, 550 U.S. 618 (2007) holding by modifying the definition of "unlawful employment practice" to include paychecks received as a consequence of qualifying discrimination. However, the ARB held in Cante v. New York City Dept. of Education, 2007-CAA-004 (July 31, 2009) that the Ledbetter Act does not apply to matters arising under the environmental whistleblower statutes. The Ledbetter Act applies only to claims brought under Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, Americans with Disabilities Act of 1990, and the Rehabilitation Act of 1973. Thus, the Ledbetter Act has no effect on this matter.

Similarly, the detail of Barry Stolls to assist the Ombudsman; the removal of hiring freeze on Ombudsman positions, the recruitment to fill positions to support the Ombudsman function and the April 16, 2001 and May 21, 2001 memoranda denying the Ombudsman's request to assign Ombudsman duties to Kaufman are not adverse acts but rather the consequences of Fields' December memo precluding Kaufman from performing the Ombudsman duties.

Also, the March 16, 2001, memorandum from Shapiro to Kaufman was not a discrete adverse act. Rather, Shapiro stressed the prohibition against performing Ombudsman-related duties set out in Fields' memorandum. He rebuked Kaufman for continuing to mischaracterize specific written and oral instructions prohibiting him from those duties, and he again referenced and quoted from the December 14, 2000, memorandum.

Kaufman argues that EPA's decision to transfer the Ombudsman function to the Office of the I.G. was an illegal retaliatory action taken against him because it eliminates his position, eliminates the Ombudsman's future ability to hire him, eliminates the programmatic functions of the Ombudsman, eliminates the only real avenue of accountability for EPA actions to Congress and local communities, eliminates Kaufman's promotional ability within the Ombudsman function for which he was uniquely qualified, bars Kaufman from applying for any position at the transferred "Ombudsman" function, and removes any remedy that Kaufman would have in this current proceeding.<sup>9</sup>

However, the record establishes that the transfer of the Ombudsman function to the I.G. was not an action adverse to Kaufman. The motivation behind the transfer was interest by EPA officials and Congress in a more independent Ombudsman function. That interest spurred the GAO report recommending that the Ombudsman function be moved from OSWER. Kaufman offers much criticism of the transfer of the Ombudsman function to the Office of the I.G. rather than to the Office of the Secretary. He contends that placing the Ombudsman within the office of the I.G. does not provide the independence an Ombudsman needs to function effectively. Specifically, Kaufman argues that budget, hiring, and investigatory authority would go to the I.G. rather than to the Ombudsman in contravention of Ombudsman principles of independence. On the other hand, EPA argues that transfer to the office of the I.G. offers the Ombudsman the same independence from the Secretary as the I.G. has. In either event, the merits of the transfer, whether to the Office of the I.G. or to the Office of the Secretary is of no consequence here. Kaufman had been precluded from performing Ombudsman work since December 14, 2000. Kaufman has not shown that those duties would be reinstated after a transfer of Ombudsman functions to either the I.G. or the Office of the Secretary. Thus, the transfer of the Ombudsman had no effect on the future employment of Kaufman.

### Hostile Work Environment

Kaufman argues that from May 2000 to April 12, 2002, EPA created a hostile work environment in retaliation for his protected activity. To succeed on a hostile work environment claim, Kaufman must prove by a preponderance of the evidence that: 1) he engaged in protected activity; 2) he suffered intentional harassment related to that activity; 3) the harassment was

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<sup>9</sup> Complainant's Post-hearing brief, p. 215.

sufficiently severe or pervasive so as to alter the conditions of his employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect him. Lewis v. EPA, ARB No. 04-117, ALJ Nos. 2003-CAA-5 and 6 (ARB March 30, 2007) citing to Erickson v. EPA, ARB Nos. 03-002 – 004, 03-064; ALJ Nos. 99-CAA-2, 01-CAA-8, 13, 02-CAA-3, 18, (ARB May 31, 2006).

Kaufman alleges that EPA officials, including Administrator Whitman, Fields, Shapiro, and OERR Director Luftig, took a range of actions against him during the relevant period that were pervasive and regular and hostile.<sup>10</sup> The actions characterized by Kaufman as causing a hostile work environment include the December 14, 2000 memo from Fields removing the Ombudsman work and the consequences of that action such as the March 14, 2001 and March 16, 2001 letters from Shapiro reminding him that he was not authorized to undertake Ombudsman duties; the detail of Barry Stoll to Ombudsman function; instructions to Ombudsman Martin to recruit candidates to staff the Ombudsman function; denying Kaufman the opportunity to apply for any newly created position within the Ombudsman office, the OIG “Ombudsman;” and denying the Ombudsman the opportunity to utilize Mr. Kaufman on Ombudsman investigations, including the Marjol Battery site.

As previously explained, none of these actions constitutes harassment, but rather the obvious and necessary consequence of the removal of Ombudsman duties. It is difficult to fathom how EPA’s need to continually remind Kaufman to not perform Ombudsman duties constitutes harassment.

Kaufman argues that he experienced hostility within EPA from fellow employees, which increased in January 2001, when OERR Director Luftig widely circulated an article that was negative about Kaufman and resulted from information Luftig provided to a reporter. Tr. 1154-55 HK. He contends that he felt a great diminishment in reputation within the Agency, and felt from management he was *persona non grata* in the Bush administration EPA and that it would therefore be futile for him to attempt to advance within the Agency. Tr. 1318,1324-25.

The ARB in Hall v. United States Army Dugway Proving Ground, ARB Nos. 02-108 and 03-013, ALJ No. 1997-SDW-5 (ARB Dec. 30, 2004), cited Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986), for the proposition that a hostile work environment exists when supervisors or co-workers engage in hostile acts that do not tangibly alter the victim's conditions of employment, such as salary or promotion opportunity, but are sufficiently severe or pervasive to create an abusive work environment. Kaufman has not met his burden of demonstrating that Luftig’s act of circulating a newspaper article created an abusive work environment. The ARB in Hall also cited Faragher v. City of Boca Raton, 524 U.S. 775, 787-788 (1998) to instruct that: "Offhand comments and isolated incidents (unless extremely serious)" and "merely offensive utterances" are not the stuff of which hostile work environments are made. The "objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."

Moreover, Kaufman has not demonstrated that the reason Luftig circulated the newspaper article was in retaliation for Kaufman engaging in protective activity. Luftig, as does the

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<sup>10</sup> Id. p. 219-224.

newspaper article, criticizes Kaufman for his undermining the competence and credibility of APA employees, not for conducting Ombudsman investigations. Kaufman has not shown that he was retaliated against by EPA by being subject to a hostile work environment.

Kaufman's complaints filed on April 3, 2001 and May 2, 2001, under the employee protection provisions of the environmental protection statutes are dismissed as they were not filed within 30 days of Fields' December 14, 2000 memo precluding Kaufman from performing Ombudsman duties.

### Merits of Complaint

For the sake of completeness, and assuming, for the sake of argument, that Kaufman's complaint would be considered timely filed, the merits of Kaufman's complaint under the environmental protection whistleblower statutes is considered.

To prevail under the six whistleblower statutes Kaufman must prove by a preponderance of the evidence that he engaged in protected activity, that he suffered adverse employment action, and that the protected activity was a motivating factor in the adverse action, *i.e.*, that a nexus existed between the protected activity and the adverse action. 29 C.F.R. § 24.109; [King v. BP Products North America, Inc.](#), ARB No. 05-149, ALJ No. 2005-CAA-5 (ARB July 22, 2008); [Seetharaman v. Stone & Webster, Inc.](#), ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007).

### Protected Activity

The employee protection provisions of the environmental protection statutes prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, *i.e.*, take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding. [Jenkins v. United States Environmental Protection Agency](#), ARB No. 98-146, 88-SWD-2 (ARB Feb 28, 2003). The definition of protected activity should be construed broadly to effectuate the underlying remedial purposes. [Ferguson v. Weststar, Inc.](#), 1998-CAA-9 at \*7 (ALJ Jan. 27, 2000) citing [Jenkins v. U.S. Environmental Protection Agency](#), 92-CAA-6 (Sec'y May 18, 1994). For purposes of defining protected activity, the five environmental protection statutes govern the protection of the nation's environmental resources: SWDA governs the treatment, storage, transportation and disposal of dangerous waste (42 U.S.C.S. § 6902); SDWA protects the quality of drinking water in the U.S., focusing on all waters actually or potentially designed for drinking use, whether from above ground or underground sources (42 U.S.C. § 300f et seq.); CAA protects the quality of the nation's air resources (42 U.S.C.S. § 7401); CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States (33 U.S.C. § 1251); CERCLA addressing hazardous waste cleanup (42 U.S.C. § 9601 et seq.).

The employee protection provisions of these environmental statutes protect the reporting of violations of these statutes. Reporting of violations is protected when raised as part of an employee's normal job duties, and reporting of violations to employers is protected. Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159, 1163 (9th Cir. 1984); Willy v. Administrative Review Board, USDOL, 423 F.3d 483, 488 fn. 9 (5th Cir. 2005). Communications with the press are protected. Wedderspoon v. City of Cedar Rapids, Iowa, 80-WPC-1, (Sec'y July 28, 1980); Pooler v. Snohomish County Airport, 87-TSC-1 (Sec'y Feb. 14, 1994). Communications with elected officials are protected. Jenkins v. United States Environmental Protection Agency, *supra*.

Kaufman's position assisting the Ombudsman itself constituted protected activity. His Ombudsman-related duties required him to facilitate and hold public hearings on potential violations of the environmental statutes at the six sites where he conducted public hearings. He authored reports to EPA after the public hearings, and he addressed the reports to elected officials, news media and the public. Kaufman notes in his post-hearing brief that the record shows him having roughly a dozen interactions with Members of Congress, and hundreds of interactions with their staffs.<sup>11</sup> Kaufman wrote letters of complaint to the Inspector General. Kaufman communicated with the press, at time anonymously, on his opinions on actions by EPA. Thus, Kaufman engaged in a multiplicity of protected activities.

#### Adverse Employment Action

Kaufman suffered an adverse employment action when Fields took the Ombudsman related duties from him on December 14, 2000. Removal of those duties did not involve a loss of pay or benefits. Nevertheless, the action constituted an adverse employment action because it carried different responsibilities and, therefore, adversely affected the "terms, conditions [and] privileges of employment . . . ." 15 U.S.C. § 2622(a). Delaney v. Massachusetts Correctional Industries, 90-TSC-2 (Sec'y Mar. 17, 1995), Nathaniel v. Westinghouse Hanford Co., 91-SWD-2 (Sec'y Feb. 1, 1995).

#### Causation

The cardinal issue in Kaufman's complaint is whether Fields' December 14, 2000 memorandum removing his Ombudsman duties was in retaliation for Kaufman's protective activity. To be successful Kaufman must show that his protected activity was a factor for the adverse action, *i.e.*, that a nexus existed between the protected activity and the adverse action. See Jenkins v. United States Env'tl. Prot. Agency, *supra*. In Lopez v. Serbaco, Inc., ARB No. 04-158, ALJ No. 2004-CAA-5 (ARB Nov. 29, 2006), the ARB stated that "[t]o show that adverse action was taken 'because of' protected activity, [the Complainant] must show that his protected activity was a 'motivating' factor in [the Respondent's] decision to dismiss him."

The June 5, 2000 public hearing held in Tarpon Springs was the penultimate event in Kaufman's loss of Ombudsman duties. Kaufman and EPA see their actions there through different lenses.

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<sup>11</sup> Complainant's Post-hearing brief, p. 191, referencing Tr. 875, 876.

Kaufman argues that the hearing was a public relations disaster for EPA, causing embarrassment to the EPA Administrator, precipitating Congressional hearings in September and October of 2000 to examine Ombudsman independence, and precipitating a GAO study of the Ombudsman function within EPA. He asserts that EPA blamed the repercussions on him, and in reaction, retaliated against him by removing his Ombudsman responsibilities. EPA sees the public hearing as showing Kaufman's conduct to be unprofessional, inappropriate, lacking in impartiality and a discredit to the Ombudsman function.<sup>12</sup>

Initially, Kaufman asserts that EPA was displeased with even the scheduling the Tarpon Springs public hearing because its scheduling delayed the implementation of the remedy favored by EPA, and because Kaufman had discovered that the party required by a consent decree to clean up the site lacked the assets to accomplish the clean up. Kaufman contends that EPA's displeasure is evidenced by Fields' intervention to delay Kaufman's request for permission to travel to the hearing, and by EPA's encouragement of its own officials to not attend the hearing.

The evidence does not support Kaufman's contention that EPA's actions prior to the hearing were retaliatory in purpose. The June 5, 2000 Tarpon Springs public hearing was the third held by the Ombudsman. Shapiro testified that he was requested by Fields to hold off approving travel for the third Tarpon Springs hearing until Fields obtained information explaining the need for another hearing. Shapiro approved the travel request after Fields received an explanatory memorandum concerning the need for another hearing from either the Ombudsman or Kaufman. According to Shapiro, the travel request was delayed only a few days. Fields testified that the delay was of a short duration. He stated that Kaufman requested a response by May 22, 2000, and his request was approved on that date. Discussions did take place among EPA officials regarding whether EPA representatives should attend the Tarpon Springs hearing. Those discussions were a reaction to Kaufman's conduct in his handling of the first two public hearings. Region IV staff complained to Shapiro about the way Kaufman characterized their work and professionalism, and that Kaufman did not handle the hearings professionally. Joanne Benante of Region IV sent an email to other Region IV personnel stating that she thought the Region should reconsider their attendance at the upcoming June 5, 2000 Ombudsman hearing. Her email incorporated an email from Steve Luftig offering his opinion that EPA should not participate: "I think that we should not send EPA employees to another performance intended to ridicule them as the video tapes showed in the previous meeting chaired by Mr. K." John Blanchard, Remedial Project Manager, responded to Benante's email by stating that he agreed.

The performance of Kaufman at the June 5, 2000 hearing shows that the concerns of Benante, Luftig and Blanchard were justified. Kaufman chaired the hearing. As discussed at page 17, herein, he opened the hearing by marking as Exhibit 1 and placing into the record his May 30, 2000 memorandum addressed to Shapiro wherein he accused the EPA Administrator of providing false, misleading, and inaccurate information to three House Subcommittee Chairman in a teleconference with them on May 19, 2000. He placed the memorandum into the record with the comment:

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<sup>12</sup> Respondent's post-hearing brief, p. 79.

This is not the former Soviet Union. And I will fight with everything I've got – and I know Congressman Bilirakis has already – to assure that the EPA does not turn into the former Soviet Union. And so I want to put this May 30 memo on the record as Exhibit 1.

Id. at 640.

Two EPA representatives, Joanne Benante, and Michelle Staes, Assistant Regional Counsel and the attorney from Region IV assigned to the Stauffer Chemical Superfund Site, attended the public hearing, but limited their participation to a brief discussion of amendments to the consent decree and scope of work for superfund site, and limited their availability for taking of questions to about ten minutes.

Kaufman may have been upset because of EPA's decision to limit participation but, for what ever reason, he subjected the EPA in general, and the two EPA representatives in particular, to public ridicule. Kaufman first engaged in an argumentive exchange with Benante that is quoted at page 17, herein. Next, as described at page 18, he proceeded to read a Miranda warning to the two EPA representatives. Later in the proceedings, Kaufman described his actions: "I Miranda'd this lady." Id. at 753. And he gratuitously offered: "And believe me, as an attorney and a youngster, if I was Miranda'd, I would tell the truth about that..."

During the hearing he described the actions of EPA and the Justice Department as stonewalling the public, a United States Congressman and the Congress of the United States. He characterized EPA officials as "a bunch of bureaucrats hiding behind youngsters like these – like this little girl here, who's only been with them for a year," and as "big shot men and big shot women who have been in it for 20, 30 years [who] have to hide behind the skirts of a little black girl just out of law school..." Id. at 755, 756.

Kaufman is correct when he states that EPA was displeased with his actions at the June 5, 2000 Tarpon Springs hearing. However, EPA's displeasure was not a consequence of any investigation he may have undertaken, but rather the result of his performance. Letters expressing that displeasure soon followed from Luftig, Attorney States, Regional Counsel Phyllis Harris, as well as a reprimand by Shapiro.

Luftig wrote the Ombudsman on June 12, 2000, expressing "concern over the reports of abusive, bullying tactics and the lack of impartiality shown by your office at recent public meetings regarding Superfund sites." Luftig expressed shock over the reading of Miranda rights to an EPA employee at a public meeting, and expressed his conviction that the incident was part of a pattern of inappropriate behavior, reflecting abusive, bullying, thug-like tactics aimed at EPA employees as well as cooperative responsive parties at Superfund site public meetings. He requested the Ombudsman provide an explanation, and a plan for eliminating the abusive behavior in the future. RX. 48, att. 4.

Attorney Staes' letter to Fields on June 19, 2000, voiced her "serious concern regarding the extremely inappropriate conduct" of Kaufman. She described his reading of Miranda rights to her as a flagrant and arrogant misrepresentation and misuse of his position, and she found his

description of her as “a little black girl” just out of law school to be an “appalling degradation of me,” as well as “personally humiliating, demeaning and patronizing.

Attorney Harris directed her letter to W. Michael McCabe, Acting Deputy Administrator. She observed: “throughout this investigation, Ms. Staes, as well as every Region IV employee associated with this site, has been repeatedly subjected to abusive and bullying tactics by Mr. Hugh Kaufman.” She condemned the Miranda warning as egregious, and the conduct of Kaufman as “events...that no one in this Agency can comprehend or understand.” She emphasized that words could not express how deeply offended she personally was by Kaufman’s remarks.

Kaufman left an apology to Staes in her voice mail. Tr. 961. The letter he characterized as his apology to Harris is accusatory, demanding an immediate apology from Harris for implying that he is a racist, and charging that she was making “false implications of racism” as “a ruse...to thwart and obstruct an on-going Federal investigation and a knowing attempt to harm the Federal Official performing this investigation.” He concluded, “I will be turning over the facts of this case to the applicable US Attorney for potential criminal prosecution.” RX. 49.

Luftig did not receive a response from the Ombudsman to his letter requesting an explanation for Kaufman’s conduct at the hearing. As discussed at page 22, herein, he instead received a letter from Kaufman on June 15, 2000, requesting that Luftig provide evidence of the “abusive, bullying, and thug-like tactics” he referenced in his June 12, 2000 letter to the Ombudsman. He elaborated:

I await either the substantiating evidence that I have requested or a written apology from you Steve, by COB Monday, June 19, 2000. Without either, I can only conclude that your memorandum of June 12, 2000, was a knowingly reckless, false, misleading, and inaccurate document intended to thwart and obstruct an ongoing Federal Investigation and a knowing attempt to harm the Federal Officials performing the investigation.

CX. 34.

Kaufman wrote a second letter to Luftig on June 20, 2000, again threatening criminal action as a result of his complaint to the Ombudsman. Kaufman’s letter charged that since Luftig could not provide any evidence, and had not apologized for his “serious and false allegations” related to the Ombudsman hearing on the Tarpon Springs, he had no choice but to conclude that Luftig’s complaint to the Ombudsman was a violation of civil and criminal statutes. Specifically, Kaufman wrote:

As you are aware by my June 19, 2000 memo to Phyllis P. Harris, Regional Counsel EPA Region IV, I will be making a criminal referral to the applicable U.S. Attorney for potential criminal prosecution of her and other EPA Officials where evidence has shown that they have violated the Criminal Statutes of the United States in their handling of the Tarpon Springs Superfund Site. Because of

your actions in this regard, I am also notifying you that I will be referring your name to the applicable U.S. Attorney as a potential target in this case.

RX. 50. Kaufman continued:

It is my understanding that you are planning to accept a promotion to Deputy Assistant Administrator of EPA, and your major duties will include coordination with members of Congress. I ask you to consider not accepting this promotion at this time for the good of EPA.

As you know, Subcommittees of the House and Senate as well as Senior Members of those two bodies are presently investigating EPA's activities in the area where you are a potential target in a potential criminal probe. For you to then represent the Agency officially before these same two bodies of Congress would have the halo effect of bringing the whole Agency under the same credibility difficulties that you are now in. It is for this reason that I ask you to reconsider not accepting this promotion now or any time in the near future.<sup>13</sup>

RX. 50.

Fields testified that he came to the realization in the fall of 2000 that having Kaufman support the Ombudsman function was not working and needed to stop. He testified that his concerns included complaints from internal and external sources about Kaufman's conduct that started soon after his assignment of Kaufman to the OSWER immediate office. His concerns also included the May 30, 2000 letter Kaufman wrote to Shapiro asserting that the EPA Administrator provided false, misleading, and accurate information to members of Congress during a May 19, 2000 conference call; the letter from attorney Staes; the letter of complaint from Harris and Kaufman's response to Harris' complaint; and the two letters Kaufman sent to Luftig in response to the Luftig's complaint to the Ombudsman about Kaufman's conduct.

Fields testified that he worked for a couple of months with Shapiro and Laurie May, his "HR person," on a memorandum expressing that realization. Tr. 1783. His work culminated in a meeting with Kaufman on December 14, 2000, where he told Kaufman that he was relieved of his Ombudsman duties, effectively immediately. Fields expressed his regret, explaining that no one more than him wanted the position to work, but since it was not working, removing Kaufman from Ombudsman duties would be in the best interests of the EPA, OSWER, and the credibility of the Ombudsman function. During the meeting, Fields presented Kaufman with a memorandum dated the same day prohibiting Kaufman from performing Ombudsman work. Tr. 1784, 1360.

Fields' December 14, 2000 memorandum detailed specific instances that it characterized as "just a few of the many examples of the inappropriate and unprofessional behavior, which have, unfortunately, become a continuing pattern." The instances included: 1) the June 5, 2000

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<sup>13</sup> Luftig reacted to these memos with a letter to the Ombudsman expressing surprise at receiving these "inaccurate and offensive" memoranda from the Ombudsman's program analyst, and expressed his expectation that the Ombudsman would ensure that he not receive any further offensive communications from a representative of the Ombudsman office. RX. 51.

Tarpon Springs hearing, characterized as an “egregious attempt to intimidate Federal officials” by giving Miranda warnings, and by the offensive references to the EPA attorney; 2) the February 12, 2000 Tarpon Springs public hearing where Kaufman was alleged to have demonstrated a repeated lack of impartiality; 3) the January 25, 1999 hearing on the IEL landfill site in Ohio, where his questioning was “aimed at inciting public angst” rather than objective fact finding by asking at least three different hearing participants: “Do you believe there was and/or is evidence of a cover-up related to the IEL activities?” 4) the August 19, 2000, hearing in Coeur d’Alene, Idaho, where he stated that the public was being “used as pawns” and that “the Department of Justice has asked EPA to, basically, kill the Ombudsman program,” and later in same proceeding elaborated: “I grant you its not our intent, but the reality is they have a feeling they are being raped by the EPA and there are pieces of information that come out that you can understand why they would feel that way. I mean, a national newspaper, quoting EPA officials, basically, saying that health damaging pollution is ubiquitous to this whole Valley, to them it is a rape.” The memorandum concluded by reiterating that Kaufman’s inappropriate and unprofessional actions reduced his effectiveness and undermined the creditability and effectiveness of OSWER and EPA.

Kaufman disagrees. He characterizes the reasons given by the Fields’ memorandum as “false excuses,” that are pretextual and designed to cover up illegal and retaliatory motives. His complaint asserts that Fields’ true motive was to silence his legitimate airing of violations of the Environmental Acts, and his airing of EPA’s efforts to interfere with the Ombudsman function.

Kaufman contends the assertions of Fields are pretextual because they were never raised with the Ombudsman, even though they date from the January, 1999 IEL hearing to the August 19, 2000 hearing in Coeur d’Alene, Idaho. Kaufman is mistaken. Fields did testify that he had discussions about complaints over Kaufman’s actions from 1999 onward with Kaufman, with Shapiro, Kaufman’s immediate supervisor, and with the Ombudsman. Tr. 1762, 1763. Shapiro testified that he discussed complaints about Kaufman’s actions with Kaufman in the years 1999 and 2000. Tr. 2005, 2006. Shapiro also issued an “Official Reprimand” to Kaufman on September 29, 2000 for “disrespectful and unprofessional conduct displayed during the June 5, 2000 Town Hall Meeting in Tarpon Springs, Florida.”

Kaufman points out that Shapiro appraised his performance as successful at the end of the 12-month performance cycles in January of 2000 and January of 2001. Shapiro’s excuse for rating Kaufman as successful, notwithstanding complaints he had received and the concerns in Fields’ December 14, 2000 memo, was that his only other option was rating Kaufman as unsuccessful, and “it would be a difficult effort to try to make a finding of unacceptable performance and go down that road.” He also testified that in January of 2001 his emphasize was trying to look forward to Kaufman’s future work. Tr. 2008-2013. Fields gave Kaufman a performance award in April of 1999, notwithstanding complaints. Fields explained this apparent incongruity as “want[ing] to make this thing to work” since he was the person responsible for assigning Kaufman to the OSWER immediate office with Ombudsman support work. He referred to the assignment as an “experiment” and wanted to provide encouragement to Kaufman, and reward him for work on two specific sites. Tr. 1764-1766. The fact that Kaufman’s conduct in his Ombudsman-related work was not reflected in his performance appraisals is surprising, but does not show that Fields and Shapiro did not receive the complaints

they referenced, and that Kaufman's actions were not as described in the December 14, 2000 memo. The thrust of their testimony was that their focus with Kaufman until the Tarpon Springs public hearing was to encourage positive performance by working collaboratively with him rather than documenting and forcing him to respond to their concerns.

Kaufman argues that the six instances of "lack of impartiality and professionalism" in Field's memo are either inaccurate and/or highly suspect as credible EPA concerns. Initially, he finds Fields' characterization of the "advise of rights" warning to an EPA attorney as an example of "exceed[ing] the bounds of your official authority" to be strange because he had been instructed by Office of the Inspector General to give the warning as part of a collaborative effort. The record does not support Kaufman's argument. Mark Bialek, Counsel to the EPA Inspector General, who Kaufman testified had advised him to provide a Miranda warning to EPA Officials, denied ever giving such advice to Kaufman. He testified that, to the contrary, he warned Kaufman about the Ombudsman's office acting outside the scope of its authority in ways that would impinge on the IG's authority. In fact, on the advice of the Inspector General, he brought the matter to the attention of Shapiro by a letter dated September 12, 2000, explaining that he told Kaufman only trained IG investigators are officially authorized to provide Miranda and other "advice of rights" warnings. Kaufman also argues that he may have misunderstood Bialek, but once instructed, never again advised EPA employees of Miranda rights. This argument underscores EPA's argument that Kaufman lacks the understanding and temperament to be entrusted with Ombudsman duties. Kaufman does not appear to understand that reading Miranda rights to EPA employees in a public setting is broadcasting that they are the subject of a criminal investigation. That he never did it again does not lessen its consequences. Shapiro testified that, in his opinion, Kaufman's performance at Tarpon Springs "was designed to, at minimum, make [the EPA officials] extremely uncomfortable and put them in a very negative position relative to their audience." Tr. 2212. Shapiro's explanation might adequately portray Kaufman's design, but it very much understates its consequence.

Kaufman argues that the comments in the Fields' memorandum about his remarks at the August 19, 2000 Coeur D'Alene hearing are "wildly inflammatory" and false. A reading of the transcript of the hearing shows that Kaufman has a point. The intended meaning of Kaufman's remarks is changed because of the context in which they are placed by the memo. The Fields memo quotes Kaufman as describing the public as being "used as pawns." The transcript shows that Kaufman's intent was to state that the Ombudsman function would lead to a solution and not have the public be "used as pawn." It is not clear that Kaufman believed EPA was using the public as pawns. The Fields memo interpreting Kaufman's remarks as stating that EPA was raping the people of the valley is imprecise. A more nuanced interpretation of the transcript is Kaufman saying that the people of the valley believe they are being raped by EPA, not Kaufman saying the people of the valley are being raped by EPA. The Fields' memo's quote of Kaufman from the transcript is correct wherein it states: "Now you can be defensive and say it's not our intent. I grant you it is not our intent, but the reality is they have a feeling that they are being raped by the EPA and there are pieces of information that come out that you can understand why they would feel that way. I mean, a national newspaper, quoting EPA officials, basically, saying that health damaging pollution is ubiquitous in this whole Valley, to them it's a rape[.]"

Agreeing with Kaufman that these quotes from the Coeur D'Alene hearing are inexact does not necessitate a finding that Fields engaged in "truth twisting," or that the rest of the memo must be discredited and considered pretextual. In fact, Fields testified "we probably over-characterized that statement" about the IEL site proceeding. Tr. 1886. Rather, as explained herein, the occurrence of the other instances of unprofessional conduct in the memorandum are supported by the record.

Kaufman supports his argument that the memo is pretextual by arguing that the length of time from the occurrence of the described incidences, the most recent being in August of 2000, to the issuance of the memo by Fields in December 2000, is so lengthy as to be suspect. Kaufman's argument ties the timing of Fields' December 14, 2000 memo with the end of the Clinton administration. Kaufman argues in his post-hearing brief that the date of December 14, 2000, the date Fields handed the memo to Kaufman, is crucial in understanding the retaliation motivation because it is the day after Vice President Gore conceded defeat in the presidential election to George W. Bush. Kaufman explains that in the months prior to the election, major Florida newspapers cast EPA negatively as a result of his investigations and findings. He argues that the election having been resolved, Fields, a political appointee, would lose his position and enter employment with a private sector contractor that provided services to the EPA. His implication is that Fields terminated Kaufman to curry favor with EPA officials. Kaufman also testified to his belief that his Ombudsman-related actions in Florida angered some in the Administration because it cost them votes in the Presidential election. He testified:

... I felt some of the folks felt that we were playing politics, were angry with us because every vote counted in Florida. And I think they lost probably even in the Tampa Bay/St. Petersburg area, I think they probably lost a few thousand votes because of the bad publicity.

Tr. 2497-98

However, the testimony of Fields and May shows that the decision to take away Kaufman's Ombudsman duties was made long before December 14, 2000. As previously stated, Fields testified that he decided in the fall of 2000 that he would have to remove Kaufman's Ombudsman duties because it "was not working and needed to stop." Tr. 1784. Fields explained that he worked for a couple of months with Shapiro and May on the memorandum and had counsel review it before it was finalized. Tr. 1783. Fields' testimony differs somewhat from May on the time it took to finalize the memo. Fields testified that worked on the memo for about two and a half to three months. May testified that although she did not recall the amount of time she worked on the memo with Fields, "it certainly wasn't done, you know, over night, casually. It was a thought out process." She estimated the time to be "[p]robably a couple of weeks." Although their memories differ on the length of time it took to finalize the memo, it was a thought out process which had been in the works since the fall of 2000.

Although Kaufman blames Fields for eliminating his Ombudsman duties for political reasons, and to gain favor with EPA officials, he directs a greater share of the blame toward Luftig. He explained:

Tim Fields used to work for me. And he did really good work. He's a very hard working guy. This is back in the seventies. And because of his ability to work, et cetera, he got promoted up in the system. He's very good. He's got a very good style, very good presence and I thought continued to have a good career. I knew him, you know, for years, decades. I knew his wife. I knew his son. And I thought this was a political memo, small pea political, not partisan politics, a political memo that parts of it I recognized some of the language before in Mr. Luftig's memos. And I thought Tim was being used as a pawn in a bigger game and one of the things, my read of his personality, he's a very smart guy. But he's not a person who sees what goes on at the third level and the fourth level below, which on these issues when you're talking about billions of dollars of liability, that's where things are really going on. And Tim misses a lot of that, just, you know, he's got a lot of other skills. But that's not one of his strong skills.

Tr. 1048, 1049.

When Kaufman was asked why he thought he received the December 14, 2001 memo he answered:

I think there were a number of reasons. I think some of it was vindictiveness. And I'm still, I just -- Tim never struck me as a vindictive guy. So I just don't, I can't attribute that to him. And certainly Mike Shapiro is not a vindictive person, either. Mr. Luftig is. I attribute it to -- I think one of the other motivations was to deflect attention away from some of the allegations that were out there on some of these cases, farmland sludge case, the Shattuck case, the Tarpon Springs case that would be coming up when a new administration came in. And I think putting something like this out there for a new administration might be helpful.

Q Helpful in what way?

A It would be helpful to certainly Mr. Luftig and some of the other high level officials who are career bureaucrats who were going to be around to potentially survive because remember, when this came out, there was a lot of ombudsman controversy...So there was a (sic) ombudsman controversy issue out there that the new administration would have to deal with. And this memo also could make Tim Fields the fall guy if, if folks inside the bureaucracy at the high levels who had survived, if they wanted to try and continue to dismantle the ombudsman function and they can pin it all on Tim Fields and make him the fall.

Tr. 1067, 1068.

Stephen Luftig served as Director of OERR from at least 1998 to sometime in late 2001 or early 2002. Tr. 341, 342, 1739, 2078, 2079. OERR directed the Superfund, the major program office within OSWER. Superfund sites involved expensive and sophisticated cleanup operations financed through a separate fund. Tr. 451, 1737, 2088, 2089. From mid-June 2000 on, while he was Director of OERR, Luftig was also assigned to more senior duties in OSWER,

as he was elevated to Acting Deputy Assistant Administrator with OSWER. Kaufman argues that Luftig harbors animosity toward him because of his investigations of Luftig's programs, and as a consequence of that animosity, sought and obtained assistance from Fields to remove Kaufman's Ombudsman duties.

Luftig has openly and often expressed his dislike of the actions of Kaufman. Shapiro testified that Luftig was a frequent critic of the Ombudsman's work and Kaufman's work in particular. Tr. 2025. Shapiro explained that Luftig frequently characterized Kaufman's hearings and investigations as unprofessional, unbiased or unfair, and was critical of the Ombudsman for deferring to Kaufman and allowing Kaufman to conduct the hearings in such a manner. Tr. 2025. Shapiro also testified that Luftig and Kaufman had a "history of disagreements." Tr. 2076, 2077.

Kaufman refers to various actions of Luftig as revealing animosity toward him. He points to Luftig's e-mail to OERR official Joan Fisk advising that EPA officials should not attend the Tarpon Springs public hearing because, in his opinion, it constituted another opportunity for Kaufman to ridicule EPA officials. He references Luftig's June 12, 2000 letter to the Ombudsman where Luftig complained about Kaufman reading Miranda rights to the EPA representatives as another incident in a pattern of "inappropriate behavior," reflecting abusive, bullying, "thug-like" tactics. Kaufman references that part of Luftig's June 12, 2000 letter to the Ombudsman where he took issue with Kaufman's questioning of community participants at the public hearing on the IEL facility by repetition of a single question, "...do you believe there was and/or is a cover-up as it relates to the IEL case?" Luftig's letter decried that questioning technique as an attempt to stir up public angst rather than investigate the facts, reflecting a lack of impartiality.

Kaufman references a June 26, 2000 e-mail by Luftig relating to the Tarpon Springs hearing. The email voiced criticism of the Ombudsman's influence in getting EPA to suspend entry of the consent decree while agreeing to conduct a many-month hydro-geological investigation. Luftig's email then turned to heated criticism of Kaufman's performance:

After this bad experience (did you see the Hugh Kaufman racist quotes in the Tarpon Springs transcript about the region IV attorney being a "little black girl just out of law school"?) I hope we will be very cautious about future involvement with these guys and that you and I will consider any assignments from them in the future, scope them out carefully before responding. Time and again they are showing that they lack impartiality which is the "prime directive" for an "ombudsman" office ...I don't want our resources to be used for foul purposes, when we have so many other superfund assignments to handle throughout the country. Right?

Kaufman referenced a March 13, 2001 letter from Luftig that replied to Kaufman's request for information about a Superfund site. Luftig's letter characterized the request as "illegitimate" because Kaufman had been directed both in writing and verbally to cease activities on behalf of the Ombudsman, and because Kaufman, whose title is Program Analyst, represented himself as Principal Investigator for the OSWER Ombudsman. Luftig's letter also characterized

Kaufman's conduct prior to the December 14, 2000 letter as racist, sexist and abusive. The letter reminded Kaufman that his Ombudsman duties were removed because he tried to bully and intimidate persons at public meetings by reading their "Miranda rights" and consistently behaved in a biased manner.

Kaufman referenced emails dated January 16 and 17, 2001 by Luftig that distributed an article by a Denver Post columnist that was critical of Kaufman. The article reported that Kaufman had been transferred from Ombudsman duties by Fields "because he had discredited the EPA by being unprofessional and by not being impartial." The article was particularly critical of Kaufman.

Kaufman also referred to a January 11, 2001 email from Luftig to EPA officials discussing a public hearing conducted by Kaufman wherein Luftig referred to "Übergruppenfurer Herr Inquisitor Kaufman."

All these actions by Luftig show an obvious dislike for the actions of Kaufman, but they do not show a distain for the Ombudsman function or the Ombudsman. Rather, they show a dislike of what Luftig considered to be unprofessional and bias conduct, in particular Kaufman's insistence on denigrating other EPA officials. Kaufman has not shown that Luftig harbored an animus against Kaufman because of the investigatory functions of the Ombudsman, and has not shown that Luftig precipitated or in any way caused EPA to engage in any unlawful retaliatory action against Kaufman because of protected activity. Rather than support a finding of unlawful retaliatory action, Luftig's memoranda and emails document Kaufman's lack of professionalism. They, in fact, provide support for Field's December 14, 2000 memorandum removing Kaufman's Ombudsman duties.

Kaufman argues that the wording of the December 14, 2000 memorandum is itself evidence that Luftig must have influenced Fields because the language is similar to that used by Luftig in earlier memoranda. Kaufman states that Fields memo used words such as "unprofessional," "credibility," and "inciting pubic angst" that were "buzzwords" used previously by Luftig. Kaufman's argument is rejected. Fields testified that he reviewed the letters of Luftig during his decision to remove the Ombudsman duties. Thus, it would not be surprising if either he or May, who helped draft the meme, lifted words describing Kaufman's conduct from sources such as Luftig's complaints.

Kaufman presented testimony and letters from members of the public and Congress praising his Ombudsman-related work. Many saw him as advocate for their cause, and without question he provided valuable assistance in helping them to contact appropriate persons in EPA and investigating their concerns. The testimony of Robert McElmurray, Edwin Hallman, Esq., Susan Shortz and Mary Mosely is convincing that Kaufman provided valuable assistance to them. Further, Fields undoubtedly wanted Kaufman to succeed, as he was responsible for placing Kaufman in the Ombudsman support position. However, Fields found that Kaufman's actions, including his misguided attacks on his fellow EPA officials, were inappropriate and unprofessional and had the effect of undermining the credibility of OSWER, EPA and EPA employees.

Kaufman has not shown that the decision by Fields to remove his Ombudsman-related duties was caused by unlawful retaliatory motives. Rather, the record shows that Fields removed the duties for the very reasons set forth in the December 14, 2000 letter. Kaufman's performance when undertaking Ombudsman duties lacked impartiality and professionalism, and needlessly raised doubts about the competency and honesty of his fellow EPA employees.

## ORDER

The complaint of Complainant, Hugh B. Kaufman against Respondent, United States Environmental Protection Agency, is dismissed.

**A**  
THOMAS M. BURKE  
Administrative Law Judge

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

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

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

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