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**Issue Date: 01 November 2005**

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**Seema Bhat**  
Complainant

v.

Case No. 2003 CAA 00017

**District of Columbia Water and  
Sewer Authority**  
Respondent  
.....

Before: Stuart A. Levin  
Administrative Law Judge

For: Complainant:  
Bryan J. Schwartz, Esq.; Joseph V. Kaplan, Esq.;  
and Ken Wu, Esq.  
Passman & Kaplan  
Washington, D.C.

For: Respondent:  
Mary E. Pivec, Esq. and Julia H. Perkins, Esq.  
Sheppard Mullin, LLP  
Washington, D.C.,

**Decision and Order**

Introduction

This case arises under the whistleblower provisions of the Safe Drinking Water Act (SDWA) of 1974, Public Law 93-523, Section 1450(i)(1)(A-C), 42 U.S.C. §300j-9(i). The Act prohibits an employer from discharging or otherwise discriminating against any employee with respect to compensation, or the terms, conditions, or privileges of employment, because the employee assists or

participates in any action to carry out the purposes of the Act. 42 U.S.C. §300j-9(i)(C). Seema Bhat, formerly the Manager of the Water Quality Division of the Washington, D.C., Water and Sewer Authority (hereinafter WASA), filed a complaint alleging that she was the target of retaliation and discriminatory personnel action when she was fired for engaging in activities protected by the Act.

Respondent, WASA, admits Bhat was fired, but claims her termination had nothing whatsoever to do with any protected activity covered by the statute. In fact, it initially argued that Bhat never really engaged in any protected activity and that the adverse personnel action imposed was amply warranted because she received two successive unsatisfactory performance evaluations. According to WASA, Bhat was technically proficient, but abrasive and confrontational in dealing with supervisors, co-workers and subordinates, and lacked the teamwork and communication skills WASA expected in its managers. Thus, Respondent contends that it rid itself of a problem manager for good, sufficient, and lawful reasons.

Complainant Bhat, rebuffs these contentions and challenges WASA's conclusions. She specifically denies the allegations of sub-par performance either in her communications or as a team player. She claims that WASA fired her because she blew the whistle on the lead levels in the D.C. water supply by informing the federal Environmental Protection Agency (EPA) about the problem. WASA terminated her, she contends, for engaging in activities encouraged and protected by the SDWA, and the rest of the alleged grounds are merely pretexts.

At a hearing which lasted eight days, the parties litigated every element of a whistleblower case.<sup>1</sup> Bhat worked at WASA from March 29, 1999, to March 5, 2003. Virtually every aspect of her professional life over that entire period was scrutinized in exquisite detail. Her interactions with subordinates, co-workers, peers, and supervisors were laid bare and examined. Her job performance was evaluated by her boss and her subordinates, and her alleged teamwork and communications deficiencies were placed under the microscope of a vigorous adversarial process.

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<sup>1</sup> Findings of Fact 1-402 are set forth in Appendix A, which is annexed hereto, commencing at page 102, and are incorporated herein by reference.

## Summary of Findings and Conclusions

Shortly after her arrival at WASA, and from time to time thereafter, Bhat found herself in disagreement with her supervisor and others over personnel and staffing issues involving her division. In the decision which follows, these disagreements are explored in considerable depth in the context of WASA's personnel policies and practices. It should initially be noted that a whistleblower is entitled to no special treatment or immunity from discipline. Although protected from discrimination, the whistleblower statutes, including the SDWA, render whistleblowers no less accountable than others for their infractions or oversights. These statutory measures ensure only that whistleblowers are held to no greater accountability than other workers and are disciplined fairly.

Consequently, no personnel policies need be watered-down in the interest of shielding otherwise protected activity or accommodating the policies promoted by any of the whistleblowers statutes. No matter how tough the personnel standard or how drastic the discipline, an employer who applies its rules in an even-handed, consistent way and demonstrates that the protected worker was treated as a non-whistleblower would be or has been treated in the same or similar situations can take the adverse action warranted by its personnel policy. The protected worker's performance and behavior must satisfy the same standards both before and after the whistle is blown. Conversely, however, uncharacteristically harsh or disparate treatment of a protected worker tends to indicate that an adverse personnel action may have been discriminatory.

In this instance, as shall be discussed in considerable detail in the decision which follows, WASA's rating of Bhat as unacceptable in teamwork and communications in her 2001 performance evaluation was not unfounded. Her brash, caustic manner of communication justified the unsatisfactory rating she received and the Personal Improvement Plan (hereinafter PIP) which followed, and neither personnel action was unwarranted or discriminatory. The decision notes further, however, that while these initial personnel actions are not specifically challenged in this proceeding, Complainant's initial performance deficiencies must be placed in perspective both in terms of her 2002 performance review and as grounds for termination.

Although WASA argued that Bhat's performance deficiencies alone motivated the decision to discharge her, the record shows that by the end of July, 2002, her career prospects at WASA were declining even as her performance was improving. Bhat was no longer the employee who rudely challenged her

supervisor. She had, however, become an unwelcome whistleblower. Thus, on July 30, 2002, Bhat advised EPA about the lead levels in the D.C. water supply and necessitated an increase in the level of operational attention WASA management accorded the problem. By reaching out to EPA, she forced the lead issue to the forefront of her supervisor's agenda, and shortly thereafter, he recommended that she be fired. As such, the ultimate question discussed below is whether WASA would have terminated Bhat notwithstanding her protected activity.

Reduced to its essence, the evidence is clear that WASA did indeed discriminate against Seema Bhat in the way it handled the performance issues and in the way it pursued the charges of misbehavior against her. Evaluated alone and in combination, the reasons WASA advanced for firing her were not sustainable on this record: first, because her performance in categories previously deemed unsatisfactory improved during the PIP as measured by Respondent's own performance criteria and her supervisor's testimony; second, she was not advised during the PIP of any continuing performance deficiencies in accordance with Respondent's established personnel policies; and lastly, because Respondent failed to show that Bhat's PIP and her second unsatisfactory performance rating, which led to her termination, were executed by her supervisor in a manner consistent with WASA's personnel policies and procedures. Indeed, WASA's General Manager knew Bhat's supervisor failed to comply with WASA's personnel practices regarding Bhat's PIP when he upheld the decision to fire her.

In summary, a crucial crack in WASA's defense was its inability to establish that it followed its own personnel policies, practices, and procedures in dealing with the whistleblower's alleged performance deficiencies. Simply put, WASA failed to demonstrate that Bhat would have been fired in the absence of her protected activities. The record shows, to the contrary, that she was terminated not because she incurred the displeasure of her supervisor over the abrasive tone she exhibited toward him and others before she was placed on a PIP, she was fired because she engaged in activities protected by the SDWA. As a consequence, the decision holds that the termination constituted discriminatory treatment of a protected employee in violation of the SDWA and concludes, in view of WASA's failure to sustain its allegations that the whistleblower committed fraud and perjury, that relief is warranted.

## Background

The record shows that Respondent, WASA, is an independent authority of the District of Columbia, created by the Water and Sewer Authority Establishment

and Department of Public Works Reorganization Act of 1996, and the District of Columbia Water and Sewer Authority Act, 110 Stat. 1696 (1996). WASA provides water to the nation's capitol and sewer services to the residents of the greater Washington metropolitan area.

Complainant, Seema Bhat, came to the United States from India in 1977. She earned a Master's Degree in analytical chemistry at the University of Maryland and began working in the water quality industry in 1991 as a chemist for the Army Corps of Engineers, Washington Aqueduct (WA), a supplier of water to WASA. At the time she was selected by WASA for the position of Water Quality Manager, Bhat was a lead chemist at the WA water treatment facility. When she joined WASA on March 29, 1999, she was briefly supervised by Melvin Lewis and then by Michael Marcotte, WASA's Deputy General Manager. Beginning in August, 2000, and continuing until the time she was discharged, Kofi Boateng, Director of the Department of Water Services (DWS), was Bhat's supervisor. Marcotte was Boateng's supervisor, and Jerry Johnson, WASA's General Manager, was Marcotte's supervisor. WASA's Director of Human Resources, Barbara Grier, reports to Johnson.

As Water Quality Manager, Bhat was responsible for WASA's compliance with the water quality requirements of the SDWA. Her job description included interaction "with other units and agencies within and outside WASA in developing and coordinating water quality programs." Among the essential duties and responsibilities listed in her job description were the planning and management of water quality parameters to achieve compliance with the SDWA and management of the lead monitoring program pursuant to the EPA's Lead and Copper Rule. 40 C.F.R. §141.80, *et seq.*

### Regulatory Environment

The record shows that the Lead and Copper Rule (LCR) governs the methods and procedures for monitoring lead levels in a municipality's water supply. The LCR provides that if test results on the water distribution system exceed the Lead Action Level (LAL) for a given monitoring period, the system is required to take corrective action to reduce lead levels in the water. The extent of the monitoring is determined by EPA. In carrying out her assigned duties, Bhat regularly communicated with the EPA, the D.C. Department of Health (DCDH), and others interested in the quality of the water supply.

Shortly after her arrival at WASA, at the direction of her first supervisor, Bhat secured EPA's approval to relax WASA's lead-copper monitoring status beginning with the 2000-2001 monitoring year. With EPA's permission, WASA reduced the number of approved volunteer sites tested from 100 every 6 months to 50 every 12 months. Under the LCR, the LAL was 15 parts per billion for the 90th percentile sample. Thus, for example, if 100 sites are sampled, no more than 10 samples should yield more lead than 15 ppb. Under reduced monitoring, if WASA had 50 samples, the 90th percentile is .9 multiplied by 50, so that the 45th sample should not have a lead level greater than 15 ppb. If it did, Bhat explained, WASA would exceed the LAL. If it is below 15 ppb, WASA is in compliance.

The LCR requires that lead monitoring samples be taken during the warm weather months of July, August, September and the following June because warmer temperatures contribute to the maximum level of lead solubility in water. If a utility exceeds the 15 ppb, the required corrective actions include implementation of a public notification campaign, a program to replace seven percent of the utility's lead service lines each year; and if it is on reduced monitoring, it must return to standard monitoring.

Marcotte and Boateng requested that Bhat keep them informed, within the parameters they defined, about water quality issues and advise them about WASA's compliance with the LCR. She attended monthly senior management meetings and was expected to report on major developments in her area of responsibility. She submitted monthly water quality reports to General Manager Jerry Johnson, through Boateng, which Johnson relied upon to make water quality reports to the WASA Board of Directors; and she provided technical data and analysis of water quality matters for inclusion in WASA's annual Consumer Confidence Report as required by the SDWA. Bhat defined her primary responsibility as "policing water quality..." and Boateng agreed that she was "very focused" and conscientious about water quality issues; at times, even "overzealous about water quality."

The record shows that Bhat communicated frequently with George Rizzo, EPA's Program Manager for Washington, D.C. She relied upon Rizzo and depended on him for help in understanding EPA's complex regulations. He was her EPA consultant, and he guided her on various projects, clarified EPA regulations, and explained EPA's new programs. Rizzo did not testify in this proceeding, but confirmed during an interview with OSHA that he had "an informal relationship with [Ms.] Bhat in which she was free to contact him with

questions or to request his input about water quality issues.”<sup>2</sup> Indeed, the record demonstrates in abundant detail that Bhat communicated with EPA, local agencies, D.C. elected officials, and internally to WASA management about water quality issues including the lead and copper monitoring data.

The record also shows, however, that the manner in which Bhat carried out her duties and responsibilities was occasionally abrupt and abrasive and created internal staff and management frictions that allegedly prompted her supervisor to rate her unsatisfactory on a performance evaluation and place her on a PIP. Thereafter, she received a second unsatisfactory performance evaluation, and her supervisor eventually recommended her discharge, which WASA accepted and implemented on March 5, 2003.

Bhat responded to her termination by filing a complaint with OSHA alleging that she was subjected to discriminatory treatment and terminated for reporting to the EPA that the D.C water supply exceeded EPA’s LAL. On August 14, 2003, OSHA determined that Bhat timely filed her complaint and that Respondent did, indeed, terminate her for blowing the whistle. WASA rejected OSHA’s determination and this proceeding followed.

Before turning to the merits of this matter, however, it is first necessary to address WASA’s contention that Bhat’s complaint, contrary to OSHA’s finding, was not timely filed and, accordingly, must be dismissed.

### Timely Filing

Under the whistleblower provisions of the SDWA, an administrative complaint must be filed no later than 30 days after an alleged adverse employment action,<sup>3</sup> and WASA contends Bhat missed the deadline. It argues that she was notified of the termination decision by Marcotte, who, on January 30, 2003, told

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<sup>2</sup> Although it appears that EPA allowed a member of its staff to provide a statement to the OSHA investigator, as an employee of an agency which was not a party to this proceeding, Rizzo was unavailable to the parties by compulsory process in this proceeding. I am, of course, mindful that the ARB has expressed the view that compulsory process in whistleblower proceedings is available against third parties; however, it appears the Board’s observations are dicta. Childers v. Carolina Power & Light Co., ARB No. 98-077, ALJ No. 1997-ERA-32 (ARB Dec. 29, 2000). Subpoenas issued by ALJ’s are, when necessary, enforced in U. S. District Court, not by the Board. While the Secretary of Labor has delegated to the Board authority to decide the merits of appeals in these matters, in collateral proceedings involving enforcement matters in District Court, the Secretary of Labor has delegated the representation of that office to the Solicitor of Labor. It is the position of the Solicitor in third-party enforcement proceedings that unless a statute contains express subpoena issuance authority, such authority, which the SDWA lacks, cannot be implied, and the courts have agreed. Bobreski v. U.S. Environmental Protection Agency, No. 02-0732(RMU) (D.D.C. Sept. 30, 2003); Immanuel v. Dept. of Labor, 1998 WL 129932 (4th Cir. 3/24/98)(per curiam)(unpublished). In such collateral matters, the Courts provide the enforcement authority and the applicable precedents.

<sup>3</sup> 42 U.S.C. §300j-9(i)(2)(A).

her she was fired as he handed her what he described as a termination letter. WASA contends that the letter provided sufficient notice of the adverse action to trigger commencement of the 30-day limitation period under Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1981); and Nunn v. Duke Power Company, 84-ERA-27 (Dep. Sec. July 30, 1987). Yet, Bhat waited until March 5, 2003, to file her complaint, and WASA argues that she thereby exceeded the statutory 30-day time limit. Alternatively, WASA contends, citing Jenkins v. U.S. Environmental Protection Agency, 1988-SWD-2 (ARB Feb. 28, 2003), that Bhat's termination was based upon prior unsatisfactory performance reviews and, accordingly, the limitations period began when those reviews became known to her and not when the resulting discipline was administered.

Bhat, of course, rejects WASA's arguments. She denies any recollection of receiving the January 30 letter at the January 30 meeting with Marcotte, but acknowledges that he did give her a number of documents which she did not read. She argues further, however, that the January 30 letter was not a final, unequivocal notice of termination. Her performance appraisal was then pending appeal with Marcotte, and he denied it at their meeting on January 30. Bhat claims, however, that she sought a further appeal, timely pursued, seeking review of Marcotte's decision by WASA's general manager with whom she met on February 28, 2003. Shortly after she met with the general manager, she was advised by WASA's Human Resources (hereinafter HR) director that her termination would be effective on March 5, 2003. The denial of her appeal by the general manager, Bhat argues, constituted notice of the final and unequivocal adverse decision, and she contends she clearly filed a timely complaint once her internal appeals were exhausted.

According to Respondent, however, Bhat initially inquired about the possibility of an appeal on January 30, 2002, but quickly accepted her fate and abandoned the idea of an appeal in favor of negotiating a more lucrative severance deal. Marcotte and Grier testified that Bhat requested severance enhancements which only the general manager was authorized to grant; and it was for that reason, not to appeal Marcotte's ruling on her performance evaluation, that Bhat requested a meeting with Johnson. She remained on paid administrative leave between January 30, 2003, and March 4, 2003, WASA explained, pending Johnson's severance decision.

Having considered that record viewed in its entirety, I conclude that Bhat's complaint was timely filed. While the credibility of every witness who addressed this issue, and virtually every other contested fact in this proceeding, was

challenged by one party or the other, I have based my conclusion on the totality of the circumstances. I have thus assessed the credibility of the various witnesses in light of their specific testimony on discrete issues considered in the context of the record viewed as a whole in accordance with the guidance provided by the Administrative Review Board in its comprehensive consideration of credibility issues discussed in Hall v. U.S. Army, 1997 SWD 05 (ARB, December 30, 2004). For the reasons which follow, I conclude that Marcotte's January 30, 2003 letter was not unequivocal; nor did it provide final, definitive notice of the adverse action. I further conclude that the unsatisfactory performance evaluations triggered a limitation period to the extent that Bhat wished to challenge them as independent adverse actions, but they did not trigger commencement of the 30-day limitation period for challenging the termination; the adverse action disputed in this proceeding.

### Communication of Termination Decision

The record shows that WASA's defense is predicated on three prongs (1), it argues that Marcotte handed Bhat a termination letter at their meeting on January 30, 2003; (2) he told her that, as far as he was concerned she was terminated; and (3) he advised her that WASA policy dictated her removal based on her two successive Level 1 performance appraisals. His communications on that date, WASA contends, provided the definitive, unequivocal notice of termination that started the 30-day clock running on her right to claim the protections afforded by the SDWA. WASA's contentions are without merit. Turning first to the letter Bhat allegedly received on January 30, 2003, we may assume she received it.

The first paragraph of the January 30 letter states:

The purpose of this letter is to confirm the terms and conditions of your separation from employment by the D.C. Water and Sewer Authority. As an At-Will employee, you serve at the pleasure of the General Manager, and may be terminated with or without cause. However, your termination is based on unsatisfactory job performance. The following terms and conditions pertain to your termination. RX 95.

The letter then outlined the terms of a severance package and advised Bhat if she failed to accept the severance offered, the termination would be effective "21 days after the date of this letter...."

On February 10, 2003, Marcotte sent Bhat another letter. This letter, like the January 30 letter, stated:

The purpose of this letter is to confirm the terms and conditions of your separation from employment by the D.C. Water and Sewer Authority. As an At-Will employee, you serve at the pleasure of the General Manager, and may be terminated with or without cause. However, your termination is based on unsatisfactory job performance. The following terms and conditions pertain to your termination.

Like the January 30 letter, this letter also outlined the terms of a severance package and again advised Bhat if she failed to accept the severance offer, her termination would be effective “21 days after the date of this letter...,” which, of course, ended on a date different from the date identified in the January 30 letter.

At the hearing, WASA’s general manager was shown a copy of the February 10 letter and denied it was a letter of termination. Sensing that a crucial element of her limitations theory might be in jeopardy, WASA’s counsel followed up with the general manager:

Q. You just testified that you had not seen a termination letter. What assumption, if any, are you making with respect to the purpose of this letter?

A. That’s a letter that outlines severance, the severance package as I read it. The purpose of this letter is [to] confirm the terms and conditions of your separation from employment with the Authority.

Q. Uh-huh. Are you assuming that there was another letter that says you were terminated?

A. I assume that there is.

Q. Have you seen such a letter?

A. No. Tr. 1784.

On March 10, 2003, following her meeting with Johnson, Bhat received a letter notifying her:

The purpose of this letter is to formally advise you that your employment with the D.C. Water and Sewer Authority was terminated effective Wednesday, March 5, 2003, due to unsatisfactory job performance as the manager of the Water Quality Program. As an At-Will employee, this action cannot be grieved or appealed. RX 113.

### Equivocal Notice

The case law confirms that one element of an employment decision prerequisite to the commencement of the Statute of Limitations is the unequivocal notification of the adverse action. Swenk v. Exelon Generation Co., 2003-ERA-30 (ARB April 28, 2005); *See also*, Larry v. The Detroit Edison Co., 1986-ERA-32 (Sec'y June 28, 1991). Considering the fact that the general manager of WASA did not recognize the language of the February 10, 2003 letter as a termination letter, but construed it instead as a severance offer, it would be difficult to conclude that virtually the identical language in the January 30, 2003 letter, whether or not it was delivered to Bhat, constituted a termination notice with unequivocal clarity.

Beyond that, Grier testified that WASA's HR Division customarily places termination letters in the employee's personnel file. Grier confirmed that Bhat's personnel file includes the revised severance letter dated February 10, 2003, and the termination letter dated March 10, 2003, but it does not contain the January 30, 2003 letter. By way of explanation, Grier testified that the January 30, 2003 letter was the actual termination letter, but it was not in Bhat's file because WASA, at Bhat's request, agreed to several changes in the severance package which were included in the February 10, 2003 letter. Yet this explanation is not persuasive. As the foregoing testimony by Johnson confirms, severance issues were separate from the termination issues, and neither the January 30 nor February 10 letters were termination letters according to WASA's general manager. Further, if at the time HR considered the January 30 letter the termination letter, it would have, according to Grier, included it in Bhat's personnel file even though severance issues remained unresolved. Yet the letter was not in the file.

### Lack of Finality

Assuming the January 30 letter were deemed an unequivocal notice of termination, it would still fail the test of finality. WASA asserts that Bhat did not appeal Marcotte's ruling upholding Boateng's performance evaluation; but

assuming she did appeal to Johnson, it would not toll the limitation period. Respondent's first contention is not supported by the record, and its second contention is not supported by the case law.

At the January 30, 2003 meeting, Marcotte told Bhat that WASA had a policy of termination for two consecutive Level 1 performance evaluations. Bhat was unaware of such a policy, and she inquired about her then-pending appeal of Boateng's performance review. Marcotte advised her that, although he had not previously mentioned it to her, he had actually denied her appeal about a week earlier; and he handed her a copy of his decision. Marcotte recalled Bhat asking whether she could obtain a positive performance evaluation if she submitted a resignation, but he was not inclined to change her performance evaluation because the unsatisfactory review was the reason for the termination. According to Bhat, Marcotte also told her at the January 30, 2003 meeting that she could appeal her performance reviews to Johnson. Marcotte, in contrast, denied making such a statement, insisting that he told her "there was no further appeal," and thus would he have affirmatively misled her regarding her appeal rights.<sup>4</sup>

Immediately after meeting with Marcotte, Bhat visited Grier. At the outset, Bhat, in a highly emotional state, inquired about the appeal process, and Grier confirmed that she could appeal the performance appraisal and take her request for increased severance to the general manager. According to Grier, the pursuit of an appeal was later abandoned when Bhat quipped through her tears that: "She didn't want to be there, if they didn't want her there." At that point, Grier testified Bhat's main concern was the severance deal.<sup>5</sup>

Bhat called Grier the next day to discuss a severance package, not an appeal; and WASA argues that this demonstrates that Bhat did not intend to appeal. Although WASA's interpretation of Bhat's intent based on the content of this call is not consistent with the record,<sup>6</sup> other evidence indicates that an appeal was discussed.

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<sup>4</sup> Complainant proposed a finding that "Marcotte was impeached with testimony during the OSHA proceeding in which he had attempted to claim, wrongly, that Bhat did not challenge the PIP process during her 2002 performance evaluation appeal. Tr. 1458." Marcotte testified that while he would have to look at additional material, but thought his connection of Bhat's calendar to an appeal of the PIP process may have been an oversight. Tr. 1458.

<sup>5</sup> Grier first testified about the severance discussion at her second deposition taken after WASA asserted its affirmative defense that Bhat failed to pursue her whistleblower complaint in a timely manner. Tr. 1632-1635, 1706. She did not mention any discussion about severance in her first deposition.

<sup>6</sup> For example, the same day Bhat spoke with Grier, she spoke with a co-worker about her meeting the previous day and her appeal. According to the co-worker:

The record shows that Bhat submitted her 2002 performance evaluation appeal form to Marcotte, and that was the only form needed to appeal to the general manager. According to Bhat, she asked Grier on January 31, 2003, to fax a form for her appeal to Johnson, but Grier told her she could simply submit the same package to Johnson that she submitted to Marcotte.<sup>7</sup> Grier testified that an employee is required to submit a written request for review, but the record reflects no WASA policy, procedure, or guideline that required an employee to file a separate petition initiating an appeal to the general manager. The same review packet submitted to the second-level supervisor could be submitted to the general manager on appeal, and Grier did understand Bhat wanted to meet with Johnson.

Although the purpose of the appeal is in dispute, the record shows that Johnson, in fact, entertained an appeal by Bhat. He met with her at WASA's Blue Plains facility on February 28, 2003. He recalled that the meeting lasted approximately 40 minutes, and he let her do most of the talking. While WASA officials testified that the actual appeal was limited to severance issues, Johnson confirmed that much of the discussion focused on Bhat's performance. Bhat, in fact, denied discussing severance with Johnson; and while he thought they discussed the subject, he recalled seeing no severance or sick leave documents in the materials Bhat asked him to review.

The record shows that Bhat took her appeal packets to the February 28, 2003 meeting with Johnson, and Johnson confirmed that she brought a "stack," a "whole bunch," and "lots and lots" of documents with her, organized in a folder or binder. She discussed the fact that she had been placed on a PIP which required, among other things, that her supervisor meet with her periodically to

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[Ms. Bhat said she] was called into a meeting with Mr. Marcotte and Kofi [Boateng], and I said, well, what happened, and she said, well, because I had two level [one performance evaluations,] they're talking about terminating me, and I said, what happens after that? And she said, well, I've asked, do I have any appeal rights and Mr. Marcotte said yes, she can appeal to Mr. Johnson. But she had to do it through the human resource director, Ms. Grier. Tr. 748-751.

<sup>7</sup> Although Grier allegedly told Bhat she did not need to submit a new form for her appeal to Johnson, Grier FAX'ed Bhat the form in case Bhat felt she wished to submit it. In her deposition, Grier testified she FAX'ed the form to Bhat, but testified at hearing: "I [do] not recall being requested to FAX any copies – to FAX a copy of a form to Bhat and no such document [was] FAX'ed." Tr. 1615, 1642. Grier questioned the accuracy of the deposition transcript; however, evidence is otherwise lacking that the deposition transcript was in error or that any errata was attached to it to correct any alleged error.

discuss her progress. She gave Johnson a color-coded calendar showing that Boateng canceled most of the meetings. Johnson confirmed she also showed him a time line of her communications regarding the lead monitoring program. Johnson made a copy of the calendar and confirmed that he told Bhat that the calendar was interesting and that Boateng had a responsibility to meet with her. He later discussed the calendar with Marcotte, expressing concern that if Bhat's explanations were true, "then perhaps Marcotte needed to spend some time working with that supervisor to ensure that these kinds...of things didn't happen in the future...." Johnson wanted WASA managers to keep their commitments to meet with employees they placed on PIPs.

### Purpose of Appeal

Now WASA asserts that Bhat's meeting with Johnson was arranged not for the purpose of hearing her appeal of Marcotte's decision to uphold Boateng's Level 1 performance evaluation, but solely to hear her request for additional severance pay and a buy-out of accrued sick leave. According to WASA, there is no evidence, other than her own testimony, that she even requested that Johnson hear her appeal. To the contrary, however, substantial evidence persuades me that Bhat did seek a substantive review of Marcotte's decision regarding her performance.

WASA places heavy emphasis on Bhat's comment that if WASA did not want her, she did not want to be there; but that off-hand comment hardly supports that notion that she abandoned any intent to appeal. Bhat was essentially blindsided during the January 30 meeting with Marcotte. Although he had ruled on her appeal the previous week, he failed to communicate his decision to her. At the meeting, he informed her, for the first time, not only that he upheld Boateng's evaluation, but that the result dictated her termination based upon two successive Level 1 evaluations. WASA concedes that the surprises which awaited Bhat at this meeting greatly upset her. Viewed in context, her comments, uttered spontaneously in reaction to Marcotte's decision, and the information he imparted to her cannot fairly be viewed in isolation. Indeed, when she met with Grier immediately following her visit with Marcotte, still very upset, grasping for dignity, she blurted out that if "they didn't want her, she didn't want to be there." But the record shows that she also asked both Marcotte and Grier about her right to appeal to the general manager. Bhat may have been upset and may have commented impulsively, but she clearly indicated she did not accept Marcotte's

decision on her performance evaluation as final, and she manifested an intent to appeal to Johnson in a manner consistent with WASA procedures.<sup>8</sup>

The record further shows that Bhat was given conflicting information about her appeal rights and whether she needed a separate form. While Marcotte suggested that he was the final level of review, Grier advised Bhat that she could appeal to Johnson, and she needed no special form to initiate the review. According to Grier, however, Bhat's comment about "not wanting to be there" signaled to her that Bhat abandoned the notion of appealing Marcotte's decision to Johnson, as confirmed by her contemporaneous notes of a telephone conversation with Bhat the next day. Yet Grier specifically advised Bhat how to appeal and lulled her into the belief that no special forms were needed to initiate the appeal process, and actually arranged for Bhat to meet with Johnson. Thus, accepting the contention that Bhat, on January 31, was exploring with Grier her severance options does not contradict Bhat's contention that she appealed the severance issue and the merits of the performance review to Johnson.

WASA also emphasizes that when Bhat met with Johnson, she told him she was not pleading for her job. He construed this to mean that Bhat was not appealing Marcotte's decision, while she meant that her performance justified her retention and she was not going to beg for her job. According to WASA, however, Bhat wanted Johnson to "change her performance review to fully satisfactory to enhance her chances for finding replacement employment in her field." Yet, to acknowledge this is also to acknowledge that Bhat was, in fact, appealing Marcotte's decision which upheld Boateng's second Level 1 review. Marcotte himself recognized this when he declined her request to change the rating to fully satisfactory because, as he noted, that was the basis he used to terminate her. Johnson, moreover, confirmed that Bhat did most of talking during their meeting and she spent most of the time discussing her performance and Boateng's failure to comply with the terms of the PIP he had placed her on; and I doubt Johnson would have allowed her to take up his time rambling on about a subject which was not germane to the purpose of their meeting. Indeed, the communication WASA conveyed to Bhat several days after the meeting with Johnson resolved pending

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<sup>8</sup> The Secretary has afforded whistleblowers considerable leeway when manifesting emotional or impulsive behavior in the charged environment of a personnel dispute. See, Lajoie v. Environmental Management Sys., Inc., 90-STA-31 (Sec'y Oct. 27, 1992), slip op. at 10-11, and cases cited therein, appeal dismissed, No. 92-2472 (1st Cir. Feb. 23, 1993); Kenneway v. Matlack, Inc., 88-STA-20 (Sec'y June 15, 1989), slip op. at 6-7.

questions about her performance appeal, the severance package, and the termination.

Considering the record as a whole, I conclude that Bhat appealed a number of issues. She appealed the severance package offer as WASA contends, hoping for a better deal if her job appraisal appeal proved unsuccessful. She also appealed Boateng's actions during her PIP and the Level 1 performance review Marcotte upheld; and Johnson entertained her appeal, which included a review of the performance-related materials Bhat had with her. At the close of their meeting, Johnson assured her that he would consider their discussion and get back to her with a decision; and consistent with his assurance, Grier later advised Bhat that Johnson had considered her appeal and decided to move forward with her dismissal. Thereafter, the termination letter issued. In view of the foregoing, I conclude not only that Bhat appealed Marcotte's decision, but that Johnson considered and decided to uphold Marcotte's ruling on her performance appraisal.

#### Tolling Based on Performance Reviews

WASA argues further that an analysis of the timeliness of Bhat's complaint does not end with the notice of termination. In its view, when a termination decision is based upon unsatisfactory performance reviews, the limitations period begins to run from the date when those reviews became known to the complainant, and not when the resulting discipline is affected. WASA cites Jenkins v. U.S. Environmental Protection Agency, 1988-SWD-2 (ARB Feb. 28, 2003), in support of this contention. The Board's decision in Jenkins is consistent with federal court decisions involving the effects of negative performance reviews, *See*, Woolery v. Brady, 741 F.Supp. at 669-70; Johnson v. Department of Health and Human Services, 1992 WL 675943, \*9 (N.D. Ohio Sep 17, 1992); Womack v. Shell Chemical Co., 514 F. Supp. 1062, 1104-05 (S.D. Ala. 1981); Ka Nam Kuan v. City of Chicago, 563 F. Supp. 255 (N.D. Ill. 1983). The circumstances here, however, are not the same as Jenkins.

Bhat received her 2002 unsatisfactory performance review no later than December 6, 2002. In Jenkins, the employee received an unsatisfactory rating on November 12, 1987, which led to an individual development plan (IDP) for a period from December 2, 1987, to January 31, 1988. Jenkins filed a complaint on April 11, 1988, and the Board ruled that the latest date upon which the limitations period commenced for purposes of these actions was November 12, 1987, the date complainant received the unsatisfactory rating. Consequently, in Jenkins, the triggering adverse action was the unsatisfactory performance appraisal. Here the

adverse action is the termination following an internal appeal. Beyond that, however, there is considerable conflict in the case law with respect to whether an adverse performance appraisal is, alone, sufficient to support a whistleblower complaint, let alone commence the running of a statute of limitations.

In Daniel v. Timco Aviation, it was noted that:

... a growing tangent in the administrative case law which suggests that certain types of discriminatory treatment of protected employees are not actionable under AIR 21 or other whistleblower statutes administered by the U.S. Department of Labor. Recently, for example, in Robichaux v. American Airlines, 2002 AIR 27 (ALJ, May 2, 2003), it was observed that, absent a showing of ‘tangible consequences’ such as a demotion, neither discriminatory oral criticism nor negative written evaluations can be considered actionable adverse actions. Robichaux's reasoning was predicated upon decisions of the Administrative Review Board in Shelton v. Oak Ridge National Laboratories, 1995-CAA-19 (ARB March 30, 2001)(an oral reminder only), and Ilgenfritz, Jr. v. U.S. Coast Guard Academy, 1999-WPC-3 (ARB August 28, 2001). *See also*, Jenkins v. EPA, 1988-SWD- 2 (ARB Feb. 28, 2003). Ilgenfritz, in turn, relied upon Davis v. Town of Lake Park, 245 F.3d 1232, 1242 (11th Cir. 2001) in which the Eleventh Circuit observed in a Title VII race discrimination case that: ‘Employer criticism, like employer praise, is an ordinary and appropriate feature of the workplace. Expanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance.’

To a degree of detail I need not here repeat, Timco Aviation explored the distinctions between adverse performance appraisals in Title VII cases and whistleblower proceedings, and explained fully how such adverse actions, when retaliatory, were tangibly designed to discourage whistleblowers from engaging in

precisely the type of behavior Congress sought to encourage. While several decisions have held otherwise, Timco Aviation concluded that discriminatory adverse performance evaluations are, alone, sufficiently tangible to sustain a whistleblower cause of action.

Nevertheless, cases like Robichaux and Ilgenfritz clearly would not give rise to a cause of action let alone trigger commencement of the limitations period. To the contrary, in both Robichaux and Ilgenfritz, whistleblower cases were dismissed for lack of “tangible consequences.” Yet, to dismiss on the ground that adverse performance appraisals lack tangible consequences, and then conclude that the adverse performance appraisal nevertheless triggers commencement of the limitation period, would quickly lead to the end of these types of actions. If WASA’s theory were accepted, a strategically minded violator could issue an adverse performance appraisal, which Robichaux and Ilgenfritz deem unchallengeable under whistleblower jurisprudence, then wait 30 days until the statute tolled and fire the whistleblower.

Nevertheless, while Timco Aviation rejects Robichaux and Ilgenfritz, it would not require a different result here. Bhat had no notice, and indeed WASA has failed to establish, that two successive Level 1 reviews required her termination. As a result, unlike the IDP which followed the unsatisfactory performance review in Jenkins, it has not been established here that the second unsatisfactory performance review inexorably triggered the termination. Furthermore, WASA does not dispute that Bhat appealed the second Level 1 review to Marcotte and had no notice of his action until January 30, 2003. Thereafter, she appealed Marcotte’s ruling to Johnson. Under these circumstances, WASA’s alternative theory that notice of the adverse performance appraisals triggered commencement of the limitation period for challenging her dismissal is without merit.<sup>9</sup>

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<sup>9</sup> Both the case law and the statute make clear that a complainant has 30 days from the “date of the violation” to file his or her complaint. In this instance, it was the termination, and although there are exceptions not here pertinent, Bhat generally would not now be free to charge additional violations involving her Level 1 performance appraisals. After 30 days, new violations generally may not be raised, but the statute and the implementing regulations contemplate both discovery and a *de novo* hearing of the facts relating to both the protected activities and the reasons for the adverse action. Unlike the situation in Sasse v. U.S. Attorney, 1998 CAA 07 (ARB, January 30, 2004), in which a complaint was amended *sua sponte*, to allege a new violation, it involves no “new violation” to adjudicate fully the fact circumstances of a timely filed complaint. Consequently, while any claim of violation based upon the adverse performance evaluations would be untimely, the circumstances leading to the performance evaluations and the evaluations themselves are appropriately considered in the context, not as separate violations, but as relevant fact circumstances which led to the termination which was timely challenged as a retaliatory adverse action.

## Internal Appeals

WASA argues further that whether or not Bhat appealed “is not material to WASA’s limitations defense,” because, as it reads the governing precedents, the existence of a grievance procedure does not render an adverse employment decision either “tentative” or “non-final” for purposes of applying the statute of limitations. International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc., 429 U.S. 229, 234-239 (1976); Rezac v. Roadway Express, Inc., 1985 WL 286195, Case No. 85-STAA-4 (OAA. June 5, 1985); *See* Ackison v. Detroit Edison Company, 1990 WL 656113, Case No. 90-ERA-38 (DOL Off.Adm.App. Aug. 2, 1990); Prybys v. Seminole Tribe of Florida, ARB No. 96-064, ALJ No. 95-CAA-15, slip op. at 5-6 (ARB Nov. 27, 1996); and Jenkins v. U.S. Environmental Protection Agency, ARB 98-146, ALJ Case No. 1988-SWD-2 (ARB Feb. 28, 2003). The cases WASA cites are not applicable here.

The statute begins to run when the decision of management is final. Thus, in a company that adopts no internal appeal mechanism or procedure for reviewing a supervisor’s decision, finality occurs when the supervisor communicates the adverse action to the employee. In a firm that promulgates guidelines and procedures for reviewing a supervisor’s determination, the adverse action is final, internally, when the appeal process is exhausted, and neither Robbins & Myers nor Rezac hold to the contrary. These cases merely stand for the principle that procedures external to the internal management decision do not toll the statute. *See*, Ackison v. Detroit Edison Company, 1990-ERA-38 (OAA Aug. 2, 1990); Prybys v. Seminole Tribe of Florida, 1995-CAA-15 (ARB Nov. 27, 1996); and Jenkins v. U.S. Environmental Protection Agency, 1988-SWD-2 (ARB Feb. 28, 2003).

Indeed, the Supreme Court held in Delaware State College v. Ricks, 449 U.S. 250 (1980), that a pending grievance or other method of collateral review of an employment decision does not toll the running of the limitations periods; but neither do non-final, preliminary rulings commence the running of the statute. In Ricks, the District Court determined that the limitations period commenced on June 26, 1974, when the President of the Board notified Ricks that he would be offered a "terminal" contract for the 1974-1975 school year. By then, the college’s tenure committee had twice recommended that Ricks not receive tenure; the Faculty Senate had voted to support the tenure committee's recommendation; and the Board of Trustees had voted to deny Ricks’ tenure. The Court observed that in light of this unbroken array of negative decisions, the District Court was justified

in concluding that the College had established its official position and advised Ricks no later than the president's decision on June 26, 1974. Thus, Ricks teaches that intermediate, internal reviews of adverse personnel decisions do not trigger the start of the limitation period; and accordingly, Ricks supports, not WASA's argument, but Bhat's position.

Nor does Chardon v. Fernandez, 454 U.S. 6 (1981), hold otherwise. In Chardon, the Court held that the limitations period began on the date plaintiffs received notice letters announcing an intent to terminate them at the end of their appointment periods, rather than the date their employment ended. WASA correctly reports that the Court noted: "[T]he proper focus is on the time of the discriminatory act, not the point at which the consequences of the act become painful." 449 U.S. at 258. Yet, it is also true that the Chardon plaintiffs received letters that advised: "a final decision had been made to terminate their appointments." *See also*, Nunn v. Duke Power Company, Case No. 84-ERA-27 (Dep. Sec., July 30, 1987).

The authorities all consistently start the limitations period on the date a complainant receives final, definitive and unequivocal notice of an adverse employment action. Swenk v. Exelon Generation Co. 2003-ERA-30 (ARB April 28, 2005); *See also*, Larry v. The Detroit Edison Co., 1986-ERA-32, (Sec'y June 28, 1991). *See, e.g.*, Albright v. Virtue, 273 F.3d 564, 575 FN10 (3rd Cir. 2001); Volkman v. United Transp. Union, 73 F.3d 1047, 1055 (10<sup>th</sup> Cir. 1996); Lewis v. Intern. Broth. of Teamsters, 826 F.2d 1310, 1318 (3d Cir.1987); Galindo v. Stoodly Co., 793 F.2d 1502, 1509-10 (9th Cir.1986); Adkins v. Intern. Union of Elec., Radio & Mach., 769 F.2d 330, 336 (6th Cir.1985); Walker v. Teamsters Local 71, 714 F.Supp. 178, 188 (W.D.N.C.1989), *aff'd in part and rev'd in part on other grounds*, 930 F.2d 376 (4th Cir.), *cert. denied*, 502 U.S. 1004, 112 S.Ct. 636, 116 L.Ed.2d 654 (1991); Balsavage v. Ryder Truck Rental, 712 F.Supp. 461, 471 (D.N.J. 1989). In this instance, that final, definitive, unequivocal notice occurred under WASA procedures, not when Marcotte denied Bhat's appeal of Boateng's decision, but when Johnson denied her appeal of Marcotte's decision.

For all of the foregoing reasons, I conclude that Bhat's complaint was timely filed under the SDWA. Delaware State College v. Ricks, *supra*; Chardon v. Fernandez, *supra*; Nunn v. Duke Power Company, *supra*; Jenkins, *supra*.

Protected Activities

As previously discussed, the statutory provisions set forth in the SDWA establish a whistleblower protection regime which prohibits a public water system, like WASA, from discriminating "against an employee with respect to compensation, terms, conditions, or privileges of employment" for engaging in protected activity. A protected activity occurs when the employee, *inter alia*, assists or participates in any action to carry out the purposes of the Act. 42 U.S.C. §300j-9(i)(C).

Bhat alleges that WASA supervisors eventually fired her as a consequence of her protected activity. Although WASA devoted considerable time and resources in discovery and at the hearing vigorously disputing that Bhat engaged in any protected activity, it now agrees that:

The good faith filing of environmental reports with the EPA in the course of one's regular duties is protected activity under environmental statutes. Japson v. Omega Nuclear Diagnostics, 93-ERA-54 (Sec'y Aug. 21, 1995); White v. The Osage Tribal Council, 95-SDW-1 (ARB Aug. 8, 1997). WASA concedes that Bhat was engaged in protected activity when she transmitted the July 30, 2002 email to George Rizzo of the EPA notifying him that the preliminary results of the June, 2002 sampling, when coupled with the earlier reported Fall, 2001, results, would cause WASA to exceed the EPA lead action level for the 2001-2002 monitoring period. *See, Resp. Concl. of Law* at 12.

At this stage of the proceedings then, WASA does not dispute that Bhat engaged in protected activities when she assisted and participated in actions, activities, and communications to carry out SDWA purposes; but it otherwise denies her charges of discrimination.<sup>10</sup>

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<sup>10</sup> While the SDWA specifically mandates that "...No employer may discharge...or discriminate against any employee..." who participates in an action to carry out the purposes of the Act, an exception has been carved out of this straightforward statutory language to exclude certain employees of the federal government. In Sasse v. U.S. Dept. of Labor, --F.3d--, Nos. 02-077; 02-078; 03-044 (6<sup>th</sup> Cir. May 31, 2005), for example, the Court, relying upon interpretations of the federal Whistleblower Protection Act (WPA), 5 U.S.C. §2302(b)(8), held that the investigation and prosecution of environmental crimes by an Assistant U.S. Attorney were not protected activities under the SDWA because he had a fiduciary duty to carry out those investigations and prosecutions. The Sasse decision embraces Willis v. Department of Agriculture, 141 F.3d 1139, 1145 (Fed. Cir. 1998), in which the Federal Circuit denied WPA coverage to a Department of Agriculture employee whose job it was to review farms for compliance with USDA regulations, because: "In reporting some of [the farms] as being out of compliance, [he] did no more

It is thus clear that Bhat's protected activities involved both internal and external communications, including, *inter alia*, her communications to EPA regarding water quality issues including lead and copper monitoring data; communications with EPA about the deficiencies in WASA's EPA-mandated public brochure; her seminar with EPA officials about adding polyphosphates to enable WASA to reduce lead levels; communications with D.C. City Counsel about the high lead levels; communications with EPA regarding the Smithsonian backflow incident; communications with the EPA regarding public notification about the chlorine/chloramines switch; and communications with the DOH regarding lead line replacement policies. Furthermore, her views regarding lead line replacement expressed at a meeting with WASA managers and EPA officials constituted protected activities, and were known to her WASA supervisors. In addition, many of Bhat's internal communications were protected, including emails and discussions involving high internal lead results; resuming water service to the Smithsonian after a cross-connection incident; internal emails regarding compliance with the LAL; emails and conversations regarding the use of phosphates and changing water pH to control lead leaching; discussions regarding her objections to WASA's public education campaign after the LAL; discussions regarding her objections to WASA's lead line replacement policy; and communications opposing exclusion of high lead volunteers from regulatory monitoring.

### Linking Protected Activity to Adverse Action

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than carry out his required everyday job responsibilities... the fiduciary obligation which every employee owes to his employer." *Compare*, Huffman v. Office of Personnel Management, 263 F.3d 1341, 1352 (Fed. Cir. 2001), (A law enforcement officer whose duties include the investigation and reporting of crime is not protected by the WPA), and Langer v. Department of the Treasury, 265 F.3d 1259, 1267 (Fed. Cir. 2001), (holding that an IRS employee whose duty it was to review actions taken by the IRS's Criminal Division, did not engage in activity protected), with Marano v. Department of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993), (disclosures of information closely related to the employee's day-to-day responsibilities" may be protected; *see also* Watson v. Department of Justice, 64 F.3d 1524, 1530 (Fed. Cir. 1995).

In contrast with the federal employees who lose whistleblower coverage for performing their job duties, other employees whose regular job duties involve protected activity are routinely covered by environmental, safety, and financial whistleblower protections. For example, the nuclear power plant safety inspector who reports safety violations is covered under the ERA; the airline captain who otherwise has a duty under FAA regulations not to fly an unsafe plane and the flight crew member who has a duty to report mechanical and other problems on board an aircraft are protected under Air 21; the CFO or CEO who, otherwise, has a duty to report financial chicanery is protected under Sarbanes-Oxley; and the trucker who, otherwise, has a duty to inspect and report safety defects in his vehicle is protected under the STAA. Here, unlike Sasse, Bhat was not a federal employee. In addition, while her duties included interacting with EPA and other agencies, unlike Sasse, it appears that the actual duty to report WASA's exceedance of the LCR rested with Marcotte, not Bhat, who merely helped draft the exceedance letter which Marcotte signed. *See*, CX 60.

The merits of Bhat's complaint have been fully litigated, and it is no longer disputed that she engaged in protected activity with the knowledge of her supervisors. As such, it would not, under applicable decisions of the Administrative Review Board, be particularly useful to analyze whether she has established a *prima facie* case. As the Supreme Court observed in United States Postal Serv. v. Aikens, 460 U.S. 709 (1983):

Because this case was fully tried on the merits, it is surprising to find the parties and the [court] still addressing the question whether [the plaintiff] made out a *prima facie* case. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The [court] has before it all the evidence it needs to decide the [ultimate question of discrimination]. 460 U.S. at 713-14, 715.

The ARB and the Secretary of Labor have consistently invoked the Aiken principle in a variety of whistleblower adjudications. *See, e.g., Adornetto v. Perry Nuclear Power Plant*, 1997-ERA-16 (ARB Mar. 31, 1999); Jones v. Consolidated Personnel Corp., 1996-STA-1 (ARB Jan. 13, 1997); Etchason v. Carry Cos., Case No. 1992-STA-12 (Sec. Mar. 20, 1995); Carroll v. Bechtel Power Corp., 1991-ERA-0046 (Sec. Feb. 15, 1995), *aff'd*, Carroll v. U.S. Dept. of Labor, 78 F.3d 352 (8th Cir. 1996). Accordingly, it should suffice here simply to observe that WASA management was aware of Bhat's protected activities when it fired her in temporal proximity sufficiently close to her protected activity to give rise to an inference of causation. Ertel v. Giroux Brothers Transportation, Inc., 88 STA 24 (Sec. Feb. 15, 1989), at 15; Stone & Webster Engineering, Inc. v. Herman, 115 F.3d 1568 (11th Cir. 1997); Mandreger v. Detroit Edison Co., 88 ERA 17 (Sec. March 30, 1994); Crosier v. Portland General Electric Co., 91 ERA 2 (Sec. 1994); Samodov v. General Physics Corp., 89 ERA 20 (Sec. 1993).

Unsatisfactory Performance  
Pre-dating Protected Activity

Yet an inference of causation is not proof of causation; and Respondent asserts that the record as a whole severs the temporal link and refutes any inference of a nexus between the protected activity and the adverse actions. WASA contends that the performance characteristics that eventually led to Bhat's

discharge pre-dated her protected activity and, therefore, sever any inference of a connection to her protected activity that a temporal nexus might suggest.

Arguing vigorously, but incorrectly, WASA postulates that “it is axiomatic that in order to establish a causal relationship between protected activity and a subsequent adverse employment decision, a complainant must negate the existence of prior bad conduct which might independently explain the contested disciplinary action.” Drawing authoritative support allegedly from the ARB, WASA articulates its rationale in its post-hearing brief, which I quote below to avoid contextual misconception:

For example, in *Clarence O. Reynolds v. Northeast Nuclear Energy Company*, 1997 WL 163646, ARB Case No. 96-034, ALJ Case No. 94-ERA-47 (DOL Adm. Rev. Bd. March 31, 1997), the Board recognized the existence of a continuum of undependability and poor communications on the part of the complainant as the cause for his discharge rather than any intervening protected activity. Because “[t]hese performance and character deficiencies ... were neither new nor recently recognized” and appeared “long before any signs of protected activity arose,” respondent’s decision to terminate him for unsatisfactory performance after alleged acts of protected activity was not susceptible to a claim of pretext. *Clarence O. Reynolds v. Northeast Nuclear Energy Company*, 1997 WL 163646, at \*6. The Board concluded: “To the contrary, the evidence reveals an unmistakable weakness in Complainant’s performance, which, despite Respondent’s repeated rehabilitative efforts, he never corrected.” *Id.*

Yet, a review of the Board’s brief decision in Northeast Nuclear reveals it wrote none of the language quoted above by WASA.<sup>11</sup> In Northeast Nuclear, the Board merely affirmed the ALJ’s findings in a fact specific context. It established no “axiomatic” principle that a complainant “must negate” the existence of prior bad conduct. To the contrary, it appears the language Respondent quotes was taken from the ALJ’s summary of Respondent Northeast Nuclear’s argument in the

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<sup>11</sup>See, Reynolds v. Northeast Nuclear Energy Company, ARB Case No. 96-034, 94-ERA-47 (ARB, March 31, 1997), <http://www.oalj.dol.gov/public/wblower/decsn/94era47b.htm>.

case. Thus, Judge DeNardi wrote in Northeast Nuclear under the heading “Respondent’s Version”:

Respondent further submits that Complainant's undependability and poor communication skills played central roles in the disciplinary events from 1992 rough 1994 that culminated in Complainant's discharge. **These performance and character deficiencies, however, were neither new nor recently recognized.** Indeed, in the early years of Complainant's employment -- **long before any signs of protected activity arose** - - Respondent identified these same flaws in Complainant's performance. This historical fact refutes any suggestion that Respondent used the discipline that ultimately followed as a pretext for retaliation. **To the contrary, the evidence reveals an unmistakable weakness in Complainant's performance, which, despite Respondent's repeated rehabilitative efforts, he never corrected.**” ALJ D&O (Dec. 1, 1995) at 6-7. (emphasis added).

Moreover, it is a well-settled principle in whistleblower adjudications that the protections afforded by these statutes are not reserved exclusively for the model employee. Dale v. Step 1 Stairworks, 2002-STA-00030 (ALJ April 11, 2003), aff’d, in part, and rev’d in part, on other grounds (ARB March 31, 2005).<sup>12</sup> Consequently, the polemic that performance difficulties preceding protected activity “axiomatically” severs the causal link ignores the fact that legitimate reasons pre-dating the protected activity, alone, are not sufficient to end the inquiry if, despite the reasons alleged, the whistleblower would not have been terminated “but for” the protected activity. See, Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982); Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); Passaic Valley, *supra*. The record shows that performance issues surfaced early in Bhat’s tenure, but the protected communications occurred sporadically during the entire time she worked there;

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<sup>12</sup> In Dale, the ARB upheld a whistleblower complaint notwithstanding the fact that the employee, as found by the ALJ, “was not a model employee. He griped a lot, used coarse language, on occasion denigrated the company and its management, and was generally regarded as exhibiting a bad attitude.” As upheld by the Board, Dale and other similar cases indicate that instances of “prior bad conduct” are factors which must be evaluated in the context of the totality of the circumstances revealed in each record viewed in its entirety.

and, of course, the adverse action challenged by Bhat itself post-dated her protected activities.

WASA also relies on Pike v. Public Storage Companies, Inc., 1998-STA-0035 (ALJ, May 10, 1999),<sup>13</sup> in which evidence of a complainant's disputes with co-workers and managers was deemed "sufficient to support respondent's decision to terminate his employment as being legitimate and non-pretextual, notwithstanding the existence of intervening protected activity." Resp Br. at 16. Yet WASA oversimplifies Pike.

Public Storage fired Pike for a specific incident that occurred on March 16, 1998, in combination with his prior history of poor performance and insubordination. It appears that Pike worked overtime without permission on March 16, 1998, then attended a dental appointment without permission, used the company truck to get to the dental appointment, and had over one hour of unaccounted time. The ALJ in Pike noted that this incident followed others in which he failed to follow company procedures, and his last written warning dated February 25, 1998, indicated that if he continued to fail to follow company procedures, he would be subject to further disciplinary action including termination. As such, the ALJ concluded that Pike, unlike Complainant Bhat, was on specific notice that he risked termination unless he followed company procedures. Eschewing these admonitions, he was terminated two days after the last incident under circumstances which demonstrated that the termination was neither discriminatory nor retaliatory. Analogous to Pike, Reemsnyder v. Mayflower Transit, Inc., ARB 93-STA-4 (Sec'y Feb. 25, 1994), is similarly a fact-dependant case which lacked the element of discrimination.

WASA next cites Wiley v. Coastal Corporation and Coastal States Management Corporation, Case No. 85-CAA-1 (Sec'y June 1, 1994), and represents that the Secretary held: "that a complainant's failure to keep colleagues informed about significant information related to their responsibilities justified adverse action notwithstanding existence of an interrelated communication that was protected." The Secretary did not, however, conclude that the adverse action was "justified," as WASA contends. He simply observed that:

The first reason for Mr. Dunker's reaction, failure to keep colleagues informed about significant information related to their responsibilities, would not be protected activity,

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<sup>13</sup> The ARB issued a brief decision on August 10, 1999, affirming the ALJ's decision. See, <http://www.oalj.dol.gov/public/wblower/decsn/98sta35b.htm>

but the second reason, the call to the state agency by itself, would. On this record, I cannot find whether the protected aspects of Complainant's phone call motivated Respondent. Therefore, coverage must be based on the internal Belcher report. *Id* at 8. (Emphasis added).

The propriety of a justification for an adverse action requires more than a mere reference to an unprotected activity as a rationale for the discipline. As the Supreme Court held in Aikens, the ultimate question is whether the discipline is discriminatory.

WASA argues further that:

Ms. Bhat's protected and non-protected activity were discovered jointly. Under such circumstances, she cannot satisfy her preponderance burden -- she cannot prove that WASA's motivation for rating her unsatisfactory and ultimately terminating her was unlawful because her egregious conduct was coterminous with her protected activity. Resp. Br. at 21.

Here again, however, WASA misunderstands the applicable precedents.

It is not Complainant's obligation to separate Respondent's motivations. Respondent must do that. Indeed, it is well established in the rulings of several Appellate Courts, and by the Board as well, that WASA incurs the risk if legal and illegal motives for its termination action merge and become inseparable. Passaic Valley Sewerage Commissioners v. United States Dept. of Labor, *supra* at 476, 478. If they are intertwined inextricably, WASA cannot prevail. Passaic Valley, *supra*; Dale v. Step 1 Stairworks, Inc., 2002-STA-30 (ARB March 31, 2005) at 3; Mandregger v. The Detroit Edison Co., 88 ERA 17 (Sec. 1994); Hoch, *supra* at 31; *Cf. Pogue v. United States Dept. of Labor*, 940 F.2d 1287, 1289-90 (9th Cir. 1991); Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159, 1164 (9th Cir. 1984). In such cases, a respondent "bears the risk that 'the influence of legal and illegal motives cannot be separated . . . ." Mackowiak, 735 F.2d at 1164, *quoting NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983); Sprague v. American Nuclear Resources, Inc., 92-ERA-37 (Sec'y Dec. 1, 1994).

Seeing itself as uniquely victimized by Bhat's charges, WASA insists: "that in a standard whistleblower case, the respondent takes adverse action against the complainant in order to silence the complainant's protected whistleblower

activities, [and] the evidence in this case establishes that WASA had no such motivation.” Yet a review of whistleblower litigation over the past two decades will confirm that WASA is oversimplifying the scope of the decided whistleblower cases. It is true that adverse actions, in some instances, are motivated by a desire to silence future whistleblowing activity, but it is also true that many protected employees are punished not simply to silence them in the future, but to punish them for blowing the whistle in the first place. Others are punished as examples to deter coworkers from similar activity. In this instance, whether the intent was to punish, silence or both, the record shows that WASA was motivated to terminate Bhat, in part, as a consequence of her protected activities. It could hardly be made more clear: Boateng, on August 26, 2002, recommended that she be fired, and he specifically cited her July 30, 2002 email to the EPA notifying it that WASA had exceeded that LAL as a justification for his recommendation.

Nor does Hasan v. System Energy Resources, Inc., 89 ERA-36 (Aug. 2, 1989), aff’d., (Sec. Sept. 23, 1992), aff’d., 1 F.3d 1236 (5<sup>th</sup> Cir. 1993), help Respondent. Hasan is a case Respondent embraces that involved similar, but distinguishable circumstances, and it actually supports Bhat’s position. In Hasan, a complainant’s supervisors assigned him to assist in preparing for a Nuclear Regulatory Commission audit notwithstanding their knowledge he previously had blown the whistle about piping structures that were the subject of the NRC’s visit. Later, complainant’s supervisors invited him to participate in meetings with NRC inspectors and to review pipe support packages in response to the auditor’s findings. Unlike Bhat, however, Hasan’s regular duties did not involve contact with NRC personnel, and unlike Bhat, Hasan was not his employer’s “agent and spokesperson in dealings with” the employer’s chief regulatory agency, political leaders, or the affected community. His normal responsibilities did not require him to meet with NRC investigators. Given Bhat’s job duties and her personal relationship with Rizzo, WASA, unlike Hasan’s employer, could not prevent her from expressing her views to regulators without immediately reassigning or firing her. Indeed, Boateng was motivated to fire her shortly after he read her July 30, 2002 email to EPA, and probably would have terminated her then had Marcotte not urged him to act in a more “orderly” fashion. This slowed the termination process and allowed her to continue performing her regular job duties, but hostility linked to the protected activity is no less evident.

Finally, attacking Complainant’s testimony and citing Jenkins v. United States Environmental Protection Agency, 1988-SWD-2 (ARB Feb. 28, 2003), WASA believes Bhat’s credibility should play the same key role here that it did in Hasan; however, I do not concur. Complainant’s credibility is important but not

“contraindicative of a finding that whistleblower activity motivated WASA to terminate” her. In contrast with Jenkins and Hasan, direct evidence unrelated to Complainant’s testimony or her perception of events establishes WASA’s motives for the adverse action it imposed. Indeed, evidence provided by Boateng and Marcotte was far more important in that analysis than any testimony provided by Bhat.<sup>14</sup>

### Further Evidence of a Causal Link

In this instance, Complainant need not rely merely upon inference predicated on circumstance to provide the causal nexus required by the Act. The record shows that by the end of July, 2002, Bhat’s career prospects at WASA were declining even as her performance was improving. She was no longer a scornful employee who rudely challenged her supervisor, but she had become an unwelcome whistleblower. Thus, on July 30, 2002, Bhat advised EPA about the lead levels in the D.C. water supply and necessitated an increase in the level of operational attention WASA management accorded the problem. Without Bhat’s “untimely” communication with the EPA to jar things loose, her internal calls and emails likely would have received little attention. By reaching out to EPA, Bhat forced the lead issue to the forefront of her supervisor’s agenda, and, shortly thereafter, he recommended that she be fired.

The record shows that information Complainant imparted to EPA triggered a series of corrective actions, and unlike the situation in Rivers v. Midas Muffler Center, 94 CAA 5 (Sec. 1995), which deemed retaliation unlikely because the employer anticipated no adverse ramifications from Rivers’ disclosures, Bhat’s disclosures shed unwelcome and, according to WASA, premature press, political, and regulatory attention on its performance.

Accordingly, I conclude that Complainant has demonstrated by a preponderance of the evidence that she engaged in protected activities and that her termination was sufficiently connected to her protected conduct, by direct and circumstantial evidence, to establish a causal link between the two. *See*, Trimmer v. U.S. Dep’t of Labor, 174 F.3d 1098, 1101-02 (10th Cir. 1999); *see also*, Dysert v. Sec’y of Labor, 105 F.3d 607, 609-10 (11th Cir. 1997). She is, therefore,

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<sup>14</sup> WASA, relying on after-acquired evidence, argues that Bhat deliberately misled her superiors about her record of communication with Boateng regarding the 2001-2002 lead results and created a fraudulent email to corroborate her story, mislead OSHA investigators by providing them with the same fraudulent email, and perjured herself in these proceedings by lying extensively under oath regarding the circumstances under which two March, 2002 emails were created. Those allegations will be considered in detail *infra*. It should suffice here simply to note that WASA’s charges are not established on this record.

entitled to relief unless Respondent can demonstrate that it did not discriminate against her for engaging in protected activity, but would have imposed the same adverse personnel action in the absence of any protected behavior. Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); Trimmer, 174 F.3d at 1102; Martin v. Department of the Army, 93-SDW-1 (Sec'y July 13, 1995); Landers v. Commonwealth-Lord Joint Venture, 83-ERA-5 (Sec'y Sept. 9, 1983); Dartey v. Zack Co. of Chicago, 82-ERA-2 (Sec'y Apr. 25, 1983).

### Justification for Termination

#### Respondent's Burden

WASA argues with vigorous conviction that its reasons for terminating Bhat were entirely appropriate and nondiscriminatory. She had, it contends, a longstanding history of unsatisfactory performance in the areas of communication and teamwork which predated her protected activity. WASA describes her as resistant to constructive criticism and unable or unwilling to improve her performance despite repeated opportunities to do so, and it blames her for failing effectively to manage and timely communicate the results of the LAL monitoring program even after she was warned to be more open and forthcoming with programmatic information. In WASA's view, it had ample and legitimate, nondiscriminatory reasons to discharge her. Zinn v. Univ. of Missouri, 93-ERA-34, 93-ERA-36 (Sec. 1996); Yellow Freight System, Inc. v. Reich, 27 F.3d 1133, 1139-1140 (6<sup>th</sup> Cir. 1994); St. Mary's Honor Center, *supra* 113 S.Ct. at 2749. Bhat disagrees.

Rebuffing WASA's assertions, Bhat contends that WASA's stated reasons are not really why she was dismissed. She asserts that WASA acted vindictively in response to her passion for water quality which led her to engage in protected activities by turning to EPA when her supervisors were unresponsive. In her view, to the extent WASA states reasons that are superficially legitimate, they have shifted so dramatically over time that they are now irreconcilably inconsistent; and she insists that WASA's reasons for terminating her are merely pretexts motivated by retaliatory animus. Upon careful consideration of the evidence, I find the record supports neither party's scenario.

## Analytical Framework

### Pretext or Dual Motive

When a complainant contends that the employer's motives were wholly retaliatory and the employer counters that its motives were wholly legitimate, neither party is relying on a "dual motive" theory, and use of the "pretext" legal discrimination model may be appropriate. Thus, WASA relies on Shusterman v. Ebasco Servs., Inc., 87-ERA-27 (Sec. Jan. 6, 1992), which held that the employer may prevail if it shows by a preponderance of the evidence that its reasons for terminating complainant were legitimate and nondiscriminatory, and these reasons were not shown by complainant to be pretexts or unworthy of belief. Complainant, in contrast, cites Hoch v. Clark County Nevada Health Dept., 1998-CAA-12 (ALJ Jan. 18, 2000), Final Order Approving Settlement & Dismissing Appeals with Prejudice (ARB Jan. 31, 2001). Yet these cases are inapposite. The record supports neither party's contention that this is a pretext case.

In Mitchell v. Link Trucking Co. Inc., 2000-STA-39, aff'd (ARB Sept. 28, 2001), the Board noted that: "...when a **fact finder** affirmatively concludes that an adverse action is not motivated in any way by an unlawful motive, it is appropriate to find simply that the complainant has not proven his claim of discrimination and it is unnecessary to rely on a 'dual motive' analysis." (emphasis added). *See, e.g.*, Schulman v. Clean Harbors Env'tl. Servs., Inc., 1998-STA-24 (ARB Oct. 18, 1999); Carroll v. Dept. of Labor, 1991-ERA-46 (8th Cir. Mar. 5, 1996); Zinn v. University of Missouri, 1993-ERA-34 and 36 (Sec'y Jan. 18, 1996); Bausemer v. TU Electric, 1991-ERA-20 (Sec'y Oct. 31, 1995). In contrast, the dual motive test comes into play if the Complainant engaged in protected activity and there is evidence of both legitimate and improper motives for the adverse action. *See*, Henry v. Pullman Power, 1986-ERA-13 (Sec. June 3, 1987); Lopez v. West Texas Utilities, 86-ERA-25 (Sec. July 26, 1988). This record contains irrefutable confirmation of Respondent's dual motives.

### Dual Motives

Now contrary to arguments advanced by both parties in their post-hearing briefs, the record they developed at the hearing neither supports Respondent's argument that its motives were wholly legitimate nor Complainant's contention that Respondent's reasons were mere pretexts designed to mask the adverse

personnel action it imposed in retaliation for her protected activities. As in most instances involving complex personnel matters, the events and interactions of the actors are not nearly as crystal clear as the advocates would have us believe.

Turning first to WASA's contention that its motives were benignly pure when it was compelled to fire Bhat for flunking two successive performance evaluations, the record demonstrates otherwise. Bhat's protected activities and the manner in which she engaged in them was, indeed, a factor in the decision to discharge her. WASA's argument to the contrary requires it to contradict the very documents and testimony it relies upon in support of its defense.

The record shows that protected activities, in fact, motivated the discharge. Bhat received her first unsatisfactory performance evaluation in December, 2001. In it, Boateng was critical of Bhat's teamwork and communication skills and in the category of "Observation of WASA Policies, Regulations, Rules," he commented that "Seema must learn to observe other organizational protocols: follow proper chain of command in her routine work activities...." The PIP which followed this evaluation was issued to Bhat on May 12, 2002. It included two "Action Items" which addressed the chain-of-command issue: Action Item 3 required Bhat to "Inform and discuss major initiatives with her department director prior to formerly engaging others, particularly other agencies outside of WASA..., and Action Item 4 directed that "Seema will always follow the proper chain of command in conducting business within the organization."

On July 11, 2002, Bhat received the June, 2002 lead monitoring results from the Washington Aqueduct. On July 30, 2002, she communicated with Rizzo at the EPA by phone and by an email which she copied to Boateng. Her email advised that she had received the preliminary results of the June, 2002 lead sampling data, and although she still had to review the validity of the data, it appeared that WASA "did not meet the Lead Action Level both for the first and second draw." Unquestionably, the email to Rizzo was a protected communication.

Boateng testified, however, that this email to EPA infuriated him and left him feeling betrayed, embarrassed, shocked and "blindsided," because he was receiving the information "second-handedly." Shortly after he read it, he urged Marcotte to fire Bhat. Marcotte recalled that Boateng expressed a number of concerns about Bhat's insufficient communications, but the only specific example he could recall Boateng mentioning involved the lead data Bhat compiled in "the middle of 2002." In a follow-up draft memorandum to Marcotte on August 26,

2002, Boateng proposed moving “quickly forward” with Bhat’s termination. The first reason he cited was Bhat’s July 30, 2002, EPA communication:

On July 30, 2002, you sent an email to an EPA personnel [sic] regarding lead and cooper monitoring program. [sic] In your email you affirmed that you had not closely reviewed the lead data, yet you reported, prematurely, that WASA did not meet the established [LAL] for the specified period. At a minimum, you should have completed your review and analyses before passing preliminary information on a regulatory matter. Moreover, while you briefly mentioned to me the possibility of WASA’s non-conformance, you failed to discuss with me the completed status of the lead results and its implications, prior to engaging the EPA. Such an action would have been necessary to involve the department director and, subsequently, other WASA stakeholders in devising plans to preempt any regulatory requirements and public concerns. RX 72 at R786.

#### Direct Evidence of Improper Motive

WASA argues that Boateng’s angry reaction to Bhat’s July 30, 2002 email to Rizzo fails to provide direct evidence of unlawful animus for engaging in protected activity, because: “The term direct evidence means evidence which, if believed, ‘proves the existence’ of a disputed fact ‘without inference or presumption.’ Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11<sup>th</sup> Cir. 1997),” Resp Br. at 19. As WASA reads the authorities: “only the most blatant remarks, whose intent could be nothing other than to discriminate ... will constitute direct evidence of discrimination. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358-59 (11<sup>th</sup> Cir. 1999), *citing* Early v. Champion Int’l Corp., 907 F.2d 1077, 1081-82 (11th Cir. 1990). *See also*, Haddon v. Executive Residence at White House, 313 F.3d 1352, 1358-59 (Fed. Cir. 2002).”

While Title VII discrimination cases like those cited by Respondent, at times, provide guiding precedent in whistleblower discrimination proceedings, the cases WASA cites here are not on point. As discussed in considerable detail in Daniel v. TIMCO Aviation Services, Inc. 2002-AIR-26 ALJ, June 11, 2003), crucial distinctions exist at times which render Title VII jurisprudence inapplicable

in whistleblower situations, and the direct evidence rule as WASA construes it in this proceeding is one such misapplication. Direct evidence in a whistleblower context means evidence showing a specific link between an improper motive and the challenged employment decision, Parton v. GTE, 971 F.2d 150, 153 (8th Cir. 1992), and direct evidence of an improper motive here is present in abundance. At this stage, we isolate the direct evidence which demonstrates not that Bhat was subjected to a discriminatory termination as in Haddon, but that Bhat's protected activity was a factor in Boateng's decision to terminate her.

To be sure, the existence of dual motives does not end the inquiry in a whistleblower proceeding. As the applicable case law teaches, dual motive situations can lead to the proper discharge of a protected worker in some instances and unlawful, discriminatory terminations in other cases. At this point, we examine Boateng's motivation, not whether the termination itself was discriminatory which will be addressed later. Thus, Respondent argues that: "Boateng's writings demonstrate that he was motivated by multiple performance deficiencies that he had observed first hand," Resp Br. at 20, but, as the record shows, his writings also demonstrate that Bhat's protected activities were a factor he specifically cited to justify the adverse action he sought; and these writings constitute direct evidence of Boateng's dual motives.

Boateng's August 26 memo continued:

Any drinking water-related issues that could possibly have any negative impact on the public health and cause public concern must be brought to the attention of the WASA executive team. You spoke prematurely and acted exclusively on this very important and sensitive matter.

While the admonition that she should alert WASA's executive team to any drinking water issues is, of course, entirely appropriate, Boateng was also motivated by the fact that Bhat "prematurely" notified EPA without consulting him, which was, of course, a protected communication, as WASA conceded.

In 2002, Boateng again rated Bhat "Level 1," because she "Rarely Meets Expectations" in teamwork and communication. On this occasion, Boateng

deleted the criticism of Bhat's "premature" disclosure to EPA, but it is clear he was referring to the same incident. Later, on December 3, 2002, in a termination recommendation, Boateng wrote that Bhat had failed to show improvement in three particular instances, the first of which included Bhat's handling of the LAL monitoring data.

Again, Boateng was not specifically critical of Bhat's "premature" disclosure to EPA which prevented WASA from "preempting" regulatory action, but he acknowledged that nothing occurred after he first recommended discharging her on August 26, 2002, that caused him to recommend her discharge again; he was simply "following up on administrative matters." Indeed, Boateng conceded that the factors that motivated his August 26, 2002 recommendation also motivated his November 25, 2002, recommendation; and Bhat's disclosure to EPA clearly influenced his action in August of 2002.

Moreover, Boateng acknowledged that nothing happened after November 25, 2002, that changed the circumstances leading to Bhat's discharge. Marcotte agreed that Boateng made substantially the same set of observations and described the same incidents, employing the same examples to justify Bhat's termination on November 25, 2002; and the only specific performance deficiency Marcotte knew about, firsthand, was the way Bhat reported the LAL to Rizzo. Although Marcotte indicated he never contemplated "removing Ms. Bhat from her position as manager of water quality services as a result of the email that she sent to Mr. Rizzo on July 30, 2002," that was the first instance mentioned in Boateng's November 25, 2002, discharge proposal. Indeed, Grier confirmed that Bhat's LAL communication with the EPA was an example illustrating communications or chain-of-command deficiencies by Bhat; and it was her opinion, when she concurred with the discharge recommendation, that Bhat's July 30, 2002 communication with the EPA about the LAL demonstrated a failure to adhere to the chain of command directive.<sup>15</sup>

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<sup>15</sup> In [Saporito v. Florida Power & Light Co.](#), 89-ERA-7 and 17 (Sec'y Feb. 16, 1995), the Secretary considered an employee who, unlike Bhat, refused to reveal his or her safety concerns to management and asserted the right to bypass the "chain of command" to speak directly with the Nuclear Regulatory Commission was protected under the ERA. The Respondent characterized this holding as providing an employee with an "absolute right" to refuse to report safety concerns to the plant operator if he plans to inform the NRC of the safety concerns. The Secretary explained that this was not an accurate interpretation of his holding; rather the right of an employee to protection for "bring[ing] information directly to the NRC," and his duty to inform management of safety concerns are independent and do not conflict. The Secretary stated that such a factual situation should be reviewed pursuant to a dual motive analysis, and that the respondent would have an opportunity to show it would have discharged complainant for other legitimate reasons even if he had not insisted on his right to speak first to the NRC. In this proceeding, Respondent, WASA, was afforded the same opportunity.

On January 7, 2003, Boateng rejected Bhat's 2002 performance evaluation appeal. In a January 7, 2003 Memorandum, Boateng justified his rating, saying:

I expected you, as a Water Quality Division manager, to have fully engaged me much earlier in the June 2001/June 2002 lead monitoring and reporting period....As it turned out the first report you provided me, rather late in the reporting period, July 30, 2002, was a copy of an email that was addressed to an EPA personnel [sic], discussing a serious potential for WASA not meeting the EPA's LAL. At a minimum, you should have discussed your preliminary results, analyses, and implications with me and/or other WASA stakeholders prior to engaging others outside the organization. CX94.

Boateng faulted Bhat for not informing him of preliminary results until July 30, 2002, in an email which he did not open until August 12, 2002, and concluded "at a minimum" she should have advised him and other WASA managers of preliminary results and analyses and their implications prior to engaging others outside the organization. We will examine in greater depth later the merits of Boateng's criticism that Bhat untimely reported the exceedance to him. His clearly articulated sentiments about her "premature" report to the EPA, however, constitute direct evidence of his motivation, Chapman v. T.O. Haas Tire Co., 94-STA-2 (Sec'y Aug. 3, 1994), and I conclude that Boateng's writings constitute direct evidence that his anger and frustration over Bhat's notification to EPA of WASA's LAL exceedance, in part at least, unlawfully motivated his decision to fire her.

#### Legitimate Factors

##### Teamwork and Communications:

March 29, 1999, to April 29, 2002 (the date of the PIP)

Once the employee shows that illegal motive played some part in the discharge, the employer must prove that it would have discharged the employee even if he or she had not engaged in protected conduct. Mt. Healthy City Sch. Dist.

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v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). As noted above, Complainant argues that WASA's reasons for discharging her were all pretexts, and she, too, hopes to avoid a dual-motive analysis. However, unlike the situation in Hoch v. Clark County, Nevada Health District, *supra*, in which the employer's justifications were deemed pretexts for the adverse actions, several of Boateng's criticisms of Bhat's performance were not unjustified.

The record shows that Bhat performed well on technical matters, and Boateng praised her dependability and productivity in achieving her substantive goals. He was not as sanguine, however, about her communication and teamwork skills. Moreover, her difficulties in these areas did, as WASA argued, predate both her protected activities and Boateng's tenure.

In the spring of 2000, before Boateng arrived at WASA, Bhat was seeking to fill a clerical support position in the Water Quality Division. She and WASA Compensation Manager, Linda Brown, exchanged email correspondence in which Brown disagreed with Bhat's proposal to require a bachelor's degree in chemistry and 5 years' experience in water quality programs as minimum qualifications for a position in the Water Quality division. Bhat responded to Brown, copying the general manager in her response. This caught the attention of WASA HR Director Grier, who was miffed that Bhat sent a copy of her criticism of Grier's operation to the general manager.

About the same time, Marcotte, while still Bhat's supervisor, received complaints from Grier and Pumping Station Manager, George Papadopolis, regarding Bhat's tone of communication. Marcotte testified that he asked Bhat to be a bit more sensitive in dealing with people, but she became defensive and tended to blame others for failing to understand her needs and expectations. Marcotte formed the opinion that Bhat's teamwork skills were limited, but he took no specific personnel action to address his concerns. He did, however, comment to Boateng, when Boateng was hired in August, 2000, that Bhat was "one of the most challenging employees to manage that Marcotte had ever come across." Boateng would soon learn what Marcotte meant.

Not long after he assumed the position as Bhat's supervisor, Boateng found himself in the middle of the dispute between Bhat and HR. Boateng claims Bhat accused him of incompetence during a senior staff meeting because he failed to gain HR's approval to hire individuals Bhat deemed qualified. Bhat denied calling Boateng incompetent, but acknowledged that she did tell him in front of colleagues that she wanted him to pressure HR to act on her requests.

At Bhat's urging, Boateng approached Grier only to learn that Grier had complaints of her own about Bhat. According to Grier, Bhat had been rude and abusive toward her staff and uncooperative in dealing with Grier's people. After conferring with Grier, Boateng counseled Bhat to tone it down a notch when requesting program support.

The record shows that within a few months of becoming Water Services Director, Boateng expressed concerns to Marcotte regarding Bhat's lack of teamwork and communication skills, and the impact that was having on his team-building efforts. According to Marcotte, Boateng, over time, became less and less optimistic about his ability to make Bhat a part of his team. By the summer of 2001, the developing friction between them which had simmered at a low level was about to heat up.

In June, 2001, WASA staged a simulated water quality emergency to test WASA's emergency preparedness procedures. During a retrospective meeting to discuss the exercise, Bhat irritated Boateng by announcing that she had been in charge of the operation. In fact, Boateng was in charge, and, after the meeting, he chastised Bhat who responded that her remarks were "just something to say." Boateng construed Bhat's conduct as an attempt to undermine his authority.<sup>16</sup> With their interactions deteriorating, Boateng claims he first raised with Marcotte in the summer of 2001, the possibility of terminating Bhat.<sup>17</sup>

Thereafter, Bhat fired one of her technical assistants who later sought new employment at WA. Boateng initially supported Bhat's decision to terminate the technician because she and the technician did not get along, and the technician was a probationary employee. Boateng did not, however, oppose the technician's

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<sup>16</sup> Bhat again angered Boateng by allegedly failing to provide him with a report he requested about a back-flow incident at the Smithsonian. The incident involved the presence of nitrates/nitrites in the water which are dangerous to infants, and the Smithsonian had a daycare center on the premises. On June 22, 2001, Bhat emailed Marcotte, with a copy to Boateng, complaining about the resumption of water services at the facility before installing a back-flow preventer and before adequately testing for harmful chemicals.

Since the Smithsonian incident involved protected activity, it ordinarily would be necessary to differentiate the protected from the unprotected manifestations of abrasive behavior it reflected, Mackowiak v. University Nuclear Sys., Inc., 735 F.2d 1159 (9th Cir. 1984); however, in this instance, the incident occurred nearly two years before the adverse action, and it is not mentioned as a reason Bhat failed the PIP or as a justification in Boateng's termination memorandum. The incident is mentioned here as reflective of the interactions between Bhat and Boateng over time.

<sup>17</sup> Complainant proposed a finding that "Marcotte denied that Boateng proposed Bhat's discharge in 2001. Tr. 1447." In contrast, Marcotte testified that he recalled several discussions with Boateng about his dissatisfaction with Bhat, but he did not recall a specific recommendation to terminate her in the summer of 2001. Tr. 1447. Marcotte's failure to recall Boateng's proposal is not a denial that Boateng made the proposal.

application for employment with WA, and this angered Bhat, who, according to Boateng, confronted him in a rude and disrespectful manner at a meeting.

Adamant in her opposition to the technician's effort to secure employment at WA, Bhat emailed Boateng and Marcotte on October 26, 2001, because she "strongly felt that the...public safety of over a million people was at stake, and that time was a critical time of September 11.... [T]he previous day in our workshop, Marcotte had said that we had...to be absolutely diligent about such matters." In her opinion, the technician demonstrated a "very violent, unpredictable nature and posed a danger to the public." Marcotte, in contrast, testified that he considered the technician "a pretty good guy," and he recommended him to WA.

On October 30, 2001, Bhat sent Boateng another memorandum via email revisiting the topic of the technician's employment at WA. She terminated the technician, she explained, because he:

...thrived in spending long periods of time giving unnecessary and misleading information to the public informing them as to how the contaminants in DC water could cause various health problems further stating if it was him he would not drink that WASA water.

Bhat wrote that she considered it: "unimaginable that [Boateng] should take such a dangerous risk jeopardizing the safety and security of drinking water quality supplied to over a million people." Turning her attention to Boateng, Bhat berated him for allegedly failing to recognize her achievements and failing to provide her with guidance and support. She continued:

I have a few very basic expectations of my supervisor. Chief among them is at least to recognize my work and support an appropriate action taken by me as a management staff. However, instead of understanding, supporting and appreciating my work and the actions taken per WASA policy what I am experiencing is that you are taking advantage of a situation nullifying actions whether it is the case of [the technician] or otherwise.

She concluded her comments by suggesting that Boateng "consider the facts [she had] mentioned above as a positive suggestion" and asked him to not: "let

them reflect negatively on [her] annual performance rating.” She then sent a copy of the email to Marcotte, Boateng’s supervisor.

Offended by the lack of tact it reflected and seething over the accusations which she communicated directly to his supervisor, Boateng destroyed his copy of Bhat’s email. When Bhat visited him a week later and inquired about her email, Boateng reprimanded her for the accusations she leveled at him without factual support, noting he found her tone very insulting. Acknowledging that her emails angered him, Boateng was not about to overlook Bhat’s scorn when he addressed her performance evaluation.

### 2001 Performance Evaluation

Bhat received her FY ‘01 performance review in December, 2001. Boateng commended Bhat for her excellent technical abilities, for being “safety and security conscious,” and for keeping her assigned personnel “on task while maintaining a very credible water quality program.” According to Boateng, Bhat was a supervisor who held “employees accountable for completing assigned work,” was “fair and consistent in assigning work to employees,” was “quick in identifying problems,” and “commendably [took] initiatives to address them.” She achieved all of her “performance goals,” including implementing a direct main flushing program, developing a consumer confidence report, enforcing and implementing the installation of ten back-flow preventers, obtaining a chloramine grant, and starting inter-agency ventures.

Turning to attributes he found less impressive, Boateng was critical of Bhat’s performance in the categories of teamwork and communication. He found that Bhat “occasionally did not meet expectations” with respect to observing WASA policies, regulations and rules. He commented that Bhat did “not take instruction well,” often appeared “unreceptive to others opinions and views,” was “apt to question/challenge needlessly,” and often displayed “overly aggressive tendencies in asserting her views – usually seemingly oblivious to other issues and views.” Boateng remarked that Bhat should learn to observe other organizational protocols, “follow proper chain of command in her routine work activities, be more receptive to instructions, organizational dictates/directions, and be more open to the opinions, views and responsibilities of others.”<sup>18</sup>

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<sup>18</sup> The chain-of command element has attributes of both protected and unprotected activity. For example, complaints Bhat voiced about personnel matters in Grier’s shop which she sent to Johnson reflect a chain of command issue that created organizational friction which does not appear to involve protected activity. Bhat’s

The performance evaluation noted further that Bhat “occasionally did not meet expectations” in the area of customer service, observing that her “approach to interfacing with both internal and external customers is often construed as rude, disrespectful, and argumentative.” Boateng counseled that to be an effective professional, Bhat must make an effort to improve her interactions with others. He thus rated her as “occasionally not meeting expectations” in the area of dependability and responsiveness. Boateng commented that Bhat had a “‘strong’ proclivity for independent work and recognition,” but noted that “these tendencies usually overshadow her alignment with departmental, team, and other group goals and objectives.” He observed that these traits could have “a potential to mar her overall responsiveness and dependability on [an] organizational level.” Accordingly, he recommended that Bhat “sensitize herself to these tendencies and avail herself of managerial training opportunities to improve her performance in this area.” Boateng further observed that while Bhat held subordinates accountable, “employees construe her style as being disrespectful of them,” and she should address that perception.

Boateng rated Bhat as “rarely meeting expectations” in the area of teamwork. While he praised her for being highly focused on water quality issues, he was critical of her approach and manner, which he concluded “often antagonizes needed cooperation by others.” In his opinion, she needed to improve her skills “to fully recognize and respect the shared ownership needs and responsibilities of others” above and below her in the chain of command, as well as managers and employees outside the Water Services Department. Boateng reported that he had previously discussed this deficiency with Bhat without success.

He also rated her as “rarely meeting expectations” in the area of communication. Boateng observed that while Bhat possessed fairly strong writing and verbal skills, “her medium or style of communication often tends to undermine projected goals.” He wrote that “[t]o be more effective, [Bhat] must consider the needs of her intended audience, perhaps on their particular communication needs and concerns; anticipations, and even sensibilities.”

As a consequence of the rating, “rarely meets expectations” in both teamwork and communication, Boateng rated Bhat overall, Level 1 or unsatisfactory on her 2001 performance evaluation, and he met with her on

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complaints to Marcotte about the resumption of water service at the Smithsonian after the back-flow incident, and later her notifications to the EPA involve, chain-of-command issues that did involve protected activities.

December 26, 2001, to discuss it. He used this session as an occasion to counsel her regarding her deficiencies in the teamwork and communications area, but according to Boateng, she was not receptive. He described her as “impervious” to his counseling and “very defiant.”

### 2001 Performance Appeal

Dissatisfied with Boateng’s evaluation, Bhat appealed her 2001 performance rating to Marcotte. Addressing the performance evaluation and Boateng’s comments during their December 26, 2001 meeting, Bhat disagreed that her teamwork or communications skills were deficient and denied Boateng’s criticism that she was unreceptive to instruction and the opinions and views of others. She characterized Boateng’s comments as “inappropriate,” asserting that “there were no instances when [she] did not take instructions well.” She claimed that she was “always receptive and respected others’ opinions and views in vertical and lateral communication.” She described her communication skills as “the basis of her success as an excellent manager.” She thought Boateng’s comment that she was “apt to question/challenge needlessly” had no basis, and she denied that she had ever “challenged needlessly on any issues.”

Responding to Boateng’s criticism that she failed to observe WASA’s chain of command when she had copied Marcotte on the October 30, 2001 email criticizing Boateng for permitting WA to hire the technician she had fired, Bhat chided Boateng for taking her comments personally and using them as a basis for penalizing her in her performance review. Repeating her criticisms about the technician situation, Bhat described Boateng’s action as “ridiculous,” even as she denied that she had ever been rude, disrespectful or argumentative. She expressed her resentment at Boateng’s comments during her performance review that her interactions and opinions had aggravated HR staff, and she defended her conduct in connection with the personnel matters that had arisen during the rating period. In her opinion, the problems resided with the HR staff.

Commenting on an incident involving the development of a preventive maintenance plan with Martin Wallace, identified by Boateng as an example of her undependable and unresponsive behavior, Bhat noted that Boateng and Wallace never commented on her plan, and she concluded: “The invalid incidence Mr. Boateng refers to shows not my alignment but exposes Mr. Boateng’s handling of the situation and unjustifiably penalizing me on my performance evaluation.”

In the teamwork area, Bhat emphasized that she played an important role as a team player contributing to the success of WASA's inter-agency and intra-agency goals and projects, and she provided specific examples. Refocusing from her perceived positive contributions to her perceptions of Boateng as a manager, she observed:

At no time did Mr. Boateng have any suggestions as to how things might be done differently or better or even appreciation of my efforts. This kind of teamwork goes unrecognized! By his baseless remarks Mr. Boateng is suppressing individuality and hindering personal growth. Synergy or togetherness is not about blocking free speech and personal growth. He asks for suggestions and turns around and crucifies the messenger instead of understanding the underlying message. My managerial and teamwork skills instead of being used positively are used as a tool to affect my performance negatively. RX 25 (R000641) (emphasis in original).

Bhat continued:

Mr. Boateng and other staff members not understanding the gains and the benefits that can be achieved by healthy suggestions, is not my fault. They have to have an open mind and be receptive and courageous to accept and implement the healthy suggestions.... Mr. Boateng is trying to block individuality, free speech and participation by a staff member. Other co-managers... respected my opinion.... However, Mr. Boateng implies that they were offended and is penalizing me for my assertive opinion/suggestions on issues which has nothing to do with teamwork. RX 25 (R000643)

She carped that Boateng raised a:

...baseless issue to undermine my achievements and accomplishments. His comments are nothing but biased and prejudicial based on his resentment and anger on the

memo referenced in PF-1 and Mr. Boateng's repeated comment during the evaluation discussion 'You send me a strong memo and c.c to Mr. Marcotte.'

Bhat also complained about Boateng's criticism of her supervisory style and his impression that employees perceived her as disrespectful of them. She suggested that Boateng "has to look at the facts," and noted, among other issues, that some employees felt they should be paid for doing nothing. "This is," she wrote, "the mentality I have to discipline to be an effective supervisor," and she concluded that she deserved an outstanding rating in all categories addressed in the performance review. As Marcotte pondered these and other arguments she addressed in her appeal, more dissension was brewing.

### The Security Guard Incident Report

On February 20, 2002, while her performance appeal was pending before Marcotte, Bhat was on her way to meet with Boateng when a security guard at the east gate of WASA's facility denied her entry onto the property, sending her to the west gate. At the west gate, the guard there also denied her entry and walked away. According to Bhat, she commented: "How stupid can this get," and the guard started shouting at her. Bhat returned to the east gate where the guard discovered that she was on an approved entry list and, this time, let her pass. According to the incident report filed by the guard, Bhat resisted the instruction to use the west gate rather than the main gate and stated that the officer at the west gate was "stupid." The guard reported that she challenged Bhat for making such a statement, and Bhat just shrugged her shoulders.<sup>19</sup>

Bhat wrote two emails to Boateng regarding the guard's report. In the second email, sent on February 26, 2002, Bhat claimed she was deprived of her "right as a WASA management employee to park in WASA facilities by security personnel...." She then turned her attention to Boateng. Bhat scolded Boateng for coming to a meeting on February 22, "prepared to snub [her] without any basis." She accused him of "instigating" the guard's incident report. She chastised him because he "did not even bother to show the courtesy" of listening to her side of the story, and she reproached him for prejudging the incident and then using it

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<sup>19</sup> The guard who filed the report worked for a WASA contractor and was scheduled by WASA to testify in this proceeding. The guard did not, however, appear when she was called to testify, and I accept, as credible, Bhat's testimony regarding her encounter with the guard.

against her: “You tied this incidence (sic) to support your biased perception and unfair rating on my performance evaluation in December 2001.” She described the encounter as a minor misunderstanding, but revealing of Boateng’s “behavior and treatment of [his] managerial staff even in the insignificant matters like this.” Not quite done, she brusquely attacked Boateng for a perceived insult to her integrity, upbraiding him for his handling of the incident which, to Bhat, demonstrated his “biased behavior and intent to capitalize on (sic) trivial situation to support [his] comments in [her] December, 2001 evaluation.” Finally, while Bhat denied the allegations contained in the guard’s incident report, and I have accepted her denial in this proceeding, she argued that even if she did call the guard “stupid,” it would not be an “abusive remark,” because the dictionary meaning is simply “given to unintelligent decisions or acts.”

While the incident itself was not a factor in Bhat’s 2001 performance review or her appeal, her remarks do tend to confirm Boateng’s observations about her communication style and vindicate his displeasure with her attitude toward him. On March 1, 2002, Marcotte reached a similar conclusion about Bhat’s appeal papers. He found that the tone and content of her appeal “appear to validate Mr. Boateng’s concerns.” Agreeing with Boateng’s overall rating, he denied Bhat’s appeal except for the category dealing with observance of WASA policies, which he raised from “occasionally does not meet...” to “consistently [met] expectations.”<sup>20</sup> Bhat, thereafter, requested reconsideration, and Marcotte subsequently denied it.

### Performance Improvement Plan (PIP)

As a consequence of the Level 1 evaluation, Bhat was placed on a Performance Improvement Plan (PIP) on May 12, 2002, effective as of April 29, 2002. The PIP identified communication and teamwork as the areas needing improvement. With respect to performance changes he expected to see from Bhat in the future, Boateng wrote:

[Bhat] will strive to communicate better with others, including subordinates, peers and superiors. She will do

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<sup>20</sup> Complainant proposed a finding that “Boateng was impeached about his memory of the results of Bhat’s 2001 performance evaluation appeal. Tr. 1118-1119.” Boateng was not impeached. He testified that Marcotte denied Bhat’s appeal of his overall rating even though he overturned Boateng’s rating in one category. Tr. 119. Marcotte otherwise affirmed Boateng’s ratings with respect to the remaining performance factors, leaving unchanged the overall Level 1 (Unsatisfactory) rating for 2001. RX 32.

this by avoiding overly aggressive language and respecting others' opinions and communication needs. [Bhat] will learn to recognize the equal sense of value and interdependence that must be attributable to all WASA programs. She will learn to recognize the shared ownership needs that others must have of the Water Quality Program. She will present program support requests in a way that will garner cooperation from others, and not antagonize needed support. [Bhat] will also work better with others as a team player, the key being embodied in the concept of 'synergy.'

Boateng listed six action items in the PIP. Bhat was required to complete two training courses by July 31, 2002: one on communication for a technical professional in a managerial role and one on organizational management in team building. Item three required her to inform and discuss major initiatives with her supervisor before engaging others and tentatively required Bhat and Boateng to meet informally twice a week. Item four directed Bhat to follow the proper chain of command; item five directed her "to avoid the overly aggressive approach to her program support requests within the Department of Water Services and elsewhere in the WASA organization;" and item six required her "to pay closer attention to her interactions with others (subordinates, superiors, etc) in understanding their particular communication needs," making "an effort to understand and respect others' shared ownership needs and responsibilities for the Water Quality Program and, on a broader organizational level, for programs within the Department of Water Services and WASA."

#### August 26, 2002 Termination Recommendation

On August 26, 2002, Boateng prepared a draft of a memorandum addressed to Bhat which would inform her that she had failed to comply with stated requirements of the PIP and that she continued "to be challenged with the basic concepts of communication and teamwork." Boateng reported that he remained concerned with her "speculative and dictatorial communication approach; non-inclusive decisions and actions on sensitive and priority matters; and inability to follow directions and chain of command." Boateng stated that he had conducted an interim evaluation and had determined that she repeatedly failed to meet Action Items 3, 4 and 5 of her PIP. He identified three specific examples that justified his assessment: he criticized Bhat for contacting the Procurement Department about a personnel procurement contract without consulting him, which to Boateng again

demonstrated her disregard for the needs of the Department as a whole; he criticized her for communicating prematurely and acting exclusively in reporting the LAL exceedance on July 30, 2002; and he again criticized her for being overly aggressive in requesting program support.

Boateng presented his termination recommendation to Marcotte, who urged him to wait until the end of the 2002 performance evaluation period before moving against Bhat. It would, Marcotte reasoned, be more “orderly.”

### 2002 Performance Evaluation

Boateng signed Bhat’s 2002 performance evaluation on November 15, 2002. Again he commented positively that Bhat: “consistently observed WASA policies and regulations ... continued to provide quality service to [WASA’s] customers ... consistently responded to water quality complaints in a timely manner and provided technically accurate information to the public ... improved her interactions with other WASA departments;” was “a dependable and responsive professional, rarely needing any supervision [sic] in her work ... diligent [sic] and perform[ed] assignments timely ... reliably perform[ed] her part of an assigned work [sic] and work[ed] well independently ... was “well organized, detailed and a very productive professional;” was “a good problem solver;” “possess[ed] strong analytical skills and use[d] them capably in addressing problems;” was “conscious and observant about safety and security matters;” was “well organized and an effective project manager;” was “fair and consistent in supervising her assigned staff ... respond[ed] to personnel issues quickly and firmly;” and “delegate[d] well and [held] employees accountable.” Bhat met or exceeded all of her performance goals. Boateng summarized, “Ms. Bhat is a productive professional when working independently. She has handled multiple water quality responsibilities during this reporting period.” Thus, Bhat performed well in all but two categories; but again in 2002, Boateng rated her “Rarely Meets Expectations” in teamwork and communication and rated her overall “Level 1.”

On December 3, 2002, Boateng submitted a memorandum to Grier, through Marcotte, requesting Grier’s office to take appropriate steps to terminate Bhat from the position of Manager of the Water Quality Program. Boateng advised that Bhat had received unsatisfactory “Level One” performance ratings for two consecutive rating periods based mainly “on her lack of performance, after repeated counseling, in the two-performance factor categories of Communication and Teamwork.” He claimed she failed a PIP designed to assist her in addressing her communication

and teamwork deficiencies by not fully informing him about the lead exceedance or involving him before she contacted EPA. He charged that she “prematurely” requested the termination of a personnel services contract with NAI without “first consulting him or others who might be impacted, or even considering how her actions would affect others,” and she failed to address her overly aggressive communication style.

According to Boateng, Bhat continued to “groundlessly and overtly denigrate other personnel, units and departments within the organization, including unjustly questioning their capability, performance and productivity,” and he represented that he counseled her about her behavior over the telephone on at least one occasion. Boateng concluded that Bhat’s approach caused “further disruption of an already tenuous working environment” and threatened his department’s “fragile efforts towards team building and performance improvements,” and he blamed her for “the failure of WASA’s upper management to address the lead exceedance issue in a timely manner.” Based upon this second Level 1 performance review, Boateng recommended that Bhat be fired and Marcotte concurred. Marcotte, and later Johnson, denied Bhat’s appeal, and she was terminated effective March 5, 2003.

#### A Whistleblower is Not a Privileged Employee

Now it is not a function of these proceedings to second-guess the established rules a business or governmental agency may adopt to govern its workforce. *See O’Brien v. Stone and Webster Engineering*, 84 ERA 31 (ALJ Feb. 28, 1985 at pgs 19-20). As the tribunal in *Stewart v. Henderson*, 207 F.3d 374, 378 (7th Cir. 2000), observed, the courts do not “sit as a superpersonnel department that reexamines an entity’s business decision and reviews the propriety of the decision,” but are only concerned with “whether the legitimate reason provided by the employer is in fact the true one.”

The protected employee is thus accorded no special treatment and is accorded no immunity from discipline. To the contrary, the rational set forth in *Daniel v. Timco Aviation*, 2002 AIR 26 (ALJ June 11, 2003), is equally applicable here:

Air 21 thus renders whistleblowers no less accountable than others for their infractions or oversights. It ensures only that they are held to no greater accountability and

disciplined evenhandedly. Consequently, no personnel policies or standards need be watered-down in the interest of shielding otherwise protected activity or accommodating the policies promoted by the Act. Timco Aviation at 17-18.

The protected worker's performance and behavior must satisfy the same standards both before and after the whistle is blown. *See, LaTorre v. Coriell Institute for Medical Research*, 97 ERA 46 (ALJ Dec. 3, 1997) at 30-31.

Conversely, the employer must apply its rules, standards and procedures consistently against the whistleblower in the same nondiscriminatory manner that it applies them to all of its workers. No matter how tough the standard or how drastic the discipline, an employer who applies its rules in an even-handed, consistent way and demonstrates that the protected worker was treated as a non-whistleblower would be or has been treated in the same or similar situations can take the adverse action warranted in the circumstances. *Compare, Daniel, supra, with LaTorre and O'Brien, supra.*

#### Discrimination

Since Bhat has established that a discriminatory intent played a role in her removal, WASA may avoid liability for the adverse action by demonstrating that it would have terminated her anyway solely for legitimate reasons. Mt. Healthy Sch. Dist. v. Doyle, 429 U.S. 274 (1977); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Zinn v. Univ. of Missouri, 93 ERA 34, 36 (Sec. 1996). Especially persuasive in this regard is evidence demonstrating the employer's compliance with its own personnel policies and the treatment received by similarly situated employees who did not engage in protected activity. O'Brien, supra; Pogue v. U.S. Dept. of Labor, 940 F.2d 1287, 1291 (9th Cir. 1991); *See also, Pensyl v. Catalytic Inc.*, 83 ERA 2 (Sec. 1984) at 9; Mackowiak, supra, at 1162. Unusually harsh or disparate treatment of a protected worker, in contrast, is crucial evidence that an employer's legitimate reasons, alone, would not otherwise support the adverse action imposed.

#### Performance-Related Deficiencies

Considering the evidence demonstrating Bhat's blunt, abrasive, at times rude and disrespectful written and oral communications that angered and insulted Boateng and irritated others, particularly in the HR office, WASA has adduced

ample, legitimate justification to warrant the first Level 1 performance evaluation Bhat received in 2001 and the PIP which followed. In many respects, her communications with Boateng were stridently tactless, abrasively aggressive, and affirmatively disrespectful. She did not merely disagree with his opinions or correct what she perceived as factual errors, but sought to impugn otherwise legitimate criticisms of her personal interactions which tended to rub many, including Boateng, the wrong way. Her aggressive and, at times, churlish communications not merely lacked tact, but were overtly offensive and insulting to many members of WASA's staff who had to deal with her. Her propensity to elevate factual disputes or policy differences into *ad hominem* attacks tended not only to impact her relationship with Boateng adversely, but it diminished her effectiveness as a manager, especially in dealing with Boateng and personnel in WASA's HR offices. The 2001 performance evaluation, and the PIP which followed, constitute responses to her actions which were strikingly similar to the discipline for teamwork and communications deficiencies approved by the Board in Smalls v. Carolina Electric & Gas, 2000-ERA-27 (ARB Feb. 24, 2004). *But see*, Timmons v. Franklin Electric Coop., 1997-SWD-2 (ARB Dec. 1, 1998).

Indeed, Smalls demonstrates that zealous, well-meaning whistleblowers can, at times, overstep bounds of civility in ways that trigger justifiable anger in those they offend, cause unnecessary disruptions within an organization, and prompt a legitimate personnel response. *See also* Mitchell v. Link Trucking, Inc., 2000-STA-39 (ALJ May 9, 2001), *aff'd* (ARB Sept. 28, 2001). While Smalls is distinguishable in other respects, it teaches that a whistleblower may be disciplined for teamwork and communications deficiencies when these skills are essential requirements of a job, and the whistleblower fails to meet management's expectations in these areas. Like Bhat, Smalls was dedicated and committed to his program, but was disciplined for the over-zealous manner in which he pursued his goals, his lack of respect for the opinions of others, and the "disruptive manner in which he pursued his concerns," causing a significant delay in a major project and a large expenditure of resources.

In this instance, even Bhat anticipated that her performance evaluation might be impacted by her confrontational pursuit of vindication. After a particularly provocative memorandum which chastised Boateng for disagreeing with her assessment of the technician she had fired, Bhat wrote that she hoped Boateng would not let her comments reflect negatively on her annual performance evaluation. Yet this and other instances admittedly angered Boateng; and having carefully reviewed her communications with him and others, the record provides no basis for rejecting Boateng's decision to rate her as unacceptable in teamwork

and communications in her 2001 performance evaluation. Her blunt and caustic manner of communication justified the criticism mentioned in the unsatisfactory 2001 performance evaluation and the PIP, and I find neither personnel action unwarranted or discriminatory.

Whether protected communications or unprotected personnel interactions, the manner in which Bhat expressed her concerns was the subject of Boateng's 2001 criticisms, not the fact that she engaged in protected activities; and his observations are not without merit. *See Smalls, supra*, at 8. I conclude that the first Level 1 performance appraisal and the PIP were justifiable manifestations of Boateng's displeasure with Bhat's confrontational tone. Consequently, while there are elements in the categories of teamwork and performance that involve protected activity, I conclude that, in the absence of Bhat's protected activities, Boateng likely would have done nothing differently in rating Bhat Level 1 in these categories in 2001, and placing her on a PIP. Complainant's initial performance deficiencies, however, must be placed in perspective both in terms of her 2002 performance review and as grounds for termination.<sup>21</sup>

#### WASA's Personnel Practices

As noted above, Smalls supports the unsatisfactory 2001 performance evaluation and the PIP, but the adverse action here is the termination, and unlike Smalls, the ultimate question here is whether WASA would have terminated Bhat notwithstanding her protected activity, and Smalls provides us limited guidance in addressing that issue.<sup>22</sup>

We turn instead to WASA's policy and personnel practices. If its policies dictate the termination of employees who legitimately receive two Level 1 performance reviews, it is free to apply that policy to its workforce, generally, and to employees who engage in protected activity as well. (*See Daniel, supra*.) Our role is simply to determine whether WASA applied its policies and procedures in a way that demonstrates by a preponderance of the evidence that it did not discriminate against the employee because she engaged in protected activity.

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<sup>21</sup> I should here emphasize again that Bhat's 2001 performance evaluation and the PIP are addressed in the context of her overall performance. They were not challenged, and are not here considered, as a basis for an SDWA violation.

<sup>22</sup> While the Board, in Smalls, reviewed a worker's record of abrasive, insulting conduct and found "overwhelming evidence" supporting the employer's decision to rate the employee as unsatisfactory notwithstanding his protected activity, the Board specifically noted that a termination action "was not in issue...." *See, Smalls* at Fn. 6.

Aikens, supra; Mt. Healthy, supra; Price Waterhouse, supra; Frechin v. Yellow Freight, 96 STA 34 (ARB Jan.13, 1998); *See also*, Mitchell v. Link Trucking, Inc., 2001 STA 39 (ALJ, May 9, 2001). Upon review of the record, several aspects of WASA's defense persuade me that Bhat was not accorded even-handed treatment.

The record shows that WASA had in place specific procedures for dealing with types of problems addressed in Bhat's 2001 performance evaluation. Consequently, in determining whether she would have been terminated in the absence of the protected conduct, we examine whether WASA followed its procedures in dealing with her shortcomings and whether Bhat's communication and teamwork skills actually failed to improve in 2002, as WASA alleges. Upon careful review of the record evidence, I conclude not only that Respondent failed to follow its own personnel procedures in dealing with this Complainant, but that the behavior which led Boateng to rate her as unsatisfactory in 2001 did not continue unabated in 2002. In summary, Respondent has failed to demonstrate that Bhat would have been terminated in the absence of her protected activities. The treatment she received was indeed discriminatory.

#### WASA's PIP Policies

WASA's HR Director, Barbara Grier, testified that WASA's personnel policies guide Respondent's employment practices. From these policies, we learn that WASA uses PIP's to assist workers with perceived performance shortcomings to strengthen their weaknesses and increase their value to the organization. A WASA employee generally is not eligible for termination on performance grounds at the beginning of a PIP. The PIP affords the employee an opportunity to improve and, according to Grier, if the employee improves sufficiently, the employee will not be fired based on performance. Boateng understood this and described the PIP as a means of helping employees "remedy the areas that they will need some help in." Boateng confirmed that PIP's are a "tool to help employees improve." They are not a disciplinary tool. To the contrary, according to Boateng, the purpose of a PIP is for "coaching and counseling an employee," and Grier agreed. She testified that the intent of a PIP is to elevate the employee's performance to a satisfactory level. While there may be "incidents of such magnitude" that an employee can be terminated without the benefit of an interim evaluation, Grier knew of no such incident involved in Bhat's case.

To achieve its remedial objective, WASA's PIP policy also contemplates the active support of an employee's supervisor. In addition to providing the employee with relevant examples of deficient behavior, the supervisor is expected to meet regularly with the employee during the PIP period and

document their discussions. Grier testified further that, during the PIP process, the supervisor must communicate with the employee if the employee has a performance problem and must suggest ways to address it. An employee should not be terminated under WASA policy without an interim performance evaluation.

As mentioned previously, we look only to WASA's employment practices to guide us in evaluating its treatment of Bhat and, thus, we examine first whether WASA followed its personnel policies in administering the PIP Bhat allegedly failed. *See Daniel, supra*. As a protected worker, she is entitled to no special dispensation, but an inference of unlawful discrimination may arise under circumstances in which a departure from customary personnel policies adversely impacts an acknowledged whistleblower. *DeFord v. Secretary of Labor*, 700 F.2d 281, 287 (6th Cir. 1983); [Van Der Meer v. Western Kentucky University](#), 95-ERA-38 (ARB Apr. 20, 1998); *See also LaTorre*, 97-ERA-46, at 23.

#### Execution of the PIP

Thus, WASA's PIP policies are designed to provide for the clear and equal treatment of employees who exhibit performance deficiencies, and Bhat was not afforded the benefit that a PIP was intended to provide. In recommending her dismissal on August 26, 2002, Boateng reported that he engaged in "unrelenting efforts" to counsel her during the PIP. The record shows, however, that he could not recall "any counseling" of Bhat during the PIP; and contrary to the policy of documenting PIP counseling activities, Boateng failed to record any counseling in writing.

The record shows that Action Item 3 of the PIP required Boateng and Bhat to meet informally "twice a week, tentatively," and HR expected Boateng to meet this schedule. Boateng claimed he and Bhat "had this supplemental meeting...as part of the PIP ... even though I couldn't make all of them. We met on some occasions," and he advised in his OSHA affidavit that: "I held regular meetings, at least once a week, with [Ms.] Bhat subsequent to her PIP.... I think I documented some of these meeting [sic] in a notebook...." He testified, however, that he did not have informal meetings with Bhat twice a week regarding Action Item 3 or specifically regarding the PIP.

Moreover, if Boateng remained dissatisfied with Bhat's performance during the PIP, WASA policy required him to advise her, discuss ways to correct the problem, attach a note of the discussions to her performance plan,

coach her regularly, and give her feedback. He met none of these PIP requirements. To be sure, Grier expected Bhat to seek feedback on her own, but Grier had no knowledge of Bhat's efforts to meet with and discuss her PIP with Boateng, and Bhat did, on several occasions, seek unsuccessfully to meet or communicate with him about her PIP and other matters.<sup>23</sup>

The record shows that Bhat and Boateng met twice during the PIP: on May 13, 2002, and on July 26, 2002.<sup>24</sup> Boateng canceled or otherwise missed all of the other one-on-one meetings. He explained that he supervised four division managers, including Bhat, and testified that he "literally [works] 24 hours a day, 7 days a week." Typically, he attended five to ten meetings a day, received as many as 100 emails a day, and typically fielded 15-20 phone calls. He admitted that these factors prevented him from keeping to a schedule, attending meetings with Bhat, or returning her phone calls and emails promptly, if at all.

The record further shows, however, that while Boateng was very busy, Marcotte and Johnson were not pleased with the way he handled Bhat's "performance management progress," and Marcotte acknowledged that Boateng's failure to meet with Bhat merited mention in Boateng's own performance review. As Boateng's supervisor, Marcotte counseled him "that there needs to

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<sup>23</sup> On May 6, 2002, Bhat wrote to Boateng, "You had informed me on Friday May 3, 02 that you will meet with me today May 6, 2002. However you did not come. Please let me know whether you will be here tomorrow." Id. Boateng responded saying that the two could meet the following afternoon. Id. Yet, on May 7, 2002, Boateng again did not show up, prompting Bhat to send an email asking, "Well Kofi what happened?" CX43. At 5:25 p.m. On May 8, 2002, Boateng responded, saying only, "Sorry I have not been able to make it up there yet." CX36 at R713. On June 5, 2002, Bhat hand-wrote Boateng a brief note about his unavailability to discuss her PIP, in which she said, "It is becoming difficult to meet with you in person." CX41. She elaborated at the hearing, saying, "I was not being able to meet with him in person [and] he did not return my e-mails or ...my phone calls." Tr. 250. Bhat sent Boateng an email in part regarding compliance with her PIP on June 24, 2002, in which she observed, "I left you several messages and also sen[t] you emails however have not heard from you." CX42. On July 26, 2002, Boateng formally invited Bhat to a one-on-one meeting at Bhat's Fort Reno facility (CX52), which he subsequently canceled. Nevertheless, Bhat then traveled to Boateng's facility and met briefly with him there. Tr. 275. On August 19, 2002, Bhat called Boateng's attention to his failure to respond to her inquiry of August 2, 2002 regarding lead line replacement in the aftermath of the LAL exceedance. CX58.

<sup>24</sup> Bhat compiled a color-coded calendar documenting Boateng's failures to meet with her one-on-one during the PIP between May and July, and thereafter throughout 2002. Bhat compiled the calendar retrospectively, in December, 2002, when she was challenging her 2002 performance evaluation. It was a compilation of "one-on-one meetings" to discuss Bhat's priorities and performance, and shows a total of six one-on-one meetings in 2002, five between January and March, before the PIP started, and one in December, with one meeting rescheduled by Bhat. It erred in failing to reflect that they did meet on May 13, 2002, and on July 26, 2002.

be an emphasis on holding meetings that were scheduled despite other competing priorities within the group.”<sup>25</sup>

The failure to meet regularly regarding the PIP was not, however, the only departure from standard personnel procedures. Contrary to WASA’s PIP policy, Bhat was never told she was failing the PIP or that she remained deficient in any element of the PIP. She was never told that any of the performance problems occurring prior to the PIP continued during the PIP. Indeed, even when they met on July 26, 2002, Boateng made no comment critical of Bhat’s performance. To the contrary, and perhaps most revealing, is Boateng’s admission that he did not think “Ms. Bhat realized that [he] was dissatisfied with her progress” on the PIP. Tr. 1131. A properly executed PIP, administered consistent with WASA policy, would leave no doubt in this respect.

Although it is abundantly obvious that Bhat’s PIP failed to comply with WASA personnel procedure, the record also shows the treatment she received was

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<sup>25</sup> Tr. 1535. During the discovery phase of this proceeding, Complainant sought to compel the production of personnel records of Boateng and Marcotte on grounds that they “could reveal a pattern of retaliation” or improper motivation or intent on the part of Bhat’s supervisors. Following a hearing on then-pending motions convened on January 20, 2004, and subsequent *in camera* review of the requested records, an Order Denying Motion to Compel issued on January 29, 2004. The order noted that the requested personnel records contained nothing to indicate retaliatory animus or improper intent regarding Complainant and did not mention Bhat or her protected activity.

At a subsequent deposition on February 17, 2004, (*see* Tr. 1998), Marcotte testified that during Boateng’s performance evaluation, he counseled him because Boateng canceled so many scheduled meetings with Bhat, and Marcotte confirmed that counseling in testimony at the hearing. Tr. 1534. He explained that he mentioned during Boateng’s performance evaluation that, despite competing priorities, Boateng needed to place an emphasis on holding scheduled meetings. Tr. 1535. Marcotte could not, however, recall if he included this general comment in Boateng’s written performance review which was reviewed *in camera*. Tr. 1535-36.

Since the *in camera* review of the performance evaluation revealed no indication that any reference or comment in it referred to Boateng’s dealing’s with Bhat, at the hearing, Complainant’s counsel, Mr. Schwartz, referring back to Order Denying the Motion to Compel, Tr. 1535-37, asked Marcotte: “Well, the Administrative Law Judge ... reviewed these evaluations earlier in this proceeding and said there was nothing relevant addressed in that performance evaluation of Mr. Boateng. Surely you’re not disputing the Judge on this that you didn’t mention it in his written performance evaluation?” Tr. 1535-36. These comments by counsel mischaracterize the Order.

The Order did not conclude that “there was nothing relevant addressed in the performance evaluation,” as counsel alleges. It concluded that Boateng’s performance review contained no indication of improper intent, motivation, or retaliation as alleged by Complainant as grounds for discovering Boateng’s personnel file. Thereafter, if Mr. Schwartz discovered, at a subsequent deposition, new information that justified the discovery of Boateng’s personnel file on different grounds or otherwise indicated that the Order may have issued in error, he had ample opportunity to seek reconsideration or renew his discovery request. He did neither; and in light of his cross-examination of Marcotte in reference to the Order, he was asked at the hearing about his failure to seek reconsideration of the discovery ruling when he learned that a general reference in Boateng’s performance evaluation did refer to Bhat. He responded:

Mr. Schwartz: If you’re cross-examining me --

Judge Levin: No, I’m not. I’m asking you a question. I said you didn’t seek--

Mr. Schwartz: At that point, I certainly did not file any brief or request reconsideration.

Judge Levin: Okay. But you did know. At that point you learned for the first time it was a performance issue for Mr. Boateng, didn’t you?

Mr. Schwartz: I did. Tr. 1998-99.

I do not delve into counsel’s litigation strategy for avoiding such a motion when I observe that his failure to move for reconsolidation or renew his motion in light of the information he discovered at Marcotte’s deposition, and which he could have, but declined to pursue during the discovery process, does not appear to be an oversight.

different from the PIP experience of others at WASA. The record provides a contrast with another employee, David Thornhill, who received a PIP which, like Bhat's, required "open communications with manager on progress of projects." Unlike Bhat, however, Thornhill, at least, received an evaluation of his performance on the PIP, and his supervisor documented multiple, formal meetings throughout the PIP prior to his termination. Once Bhat's PIP was in place, however, Boateng failed to follow up on any of the responsibilities he had to see it through. The manner in which her supervisor carried out the PIP, in comparison with others who were placed on PIP's, demonstrates she received disparate, discriminatory treatment which deprived her of the benefits PIPs were designed to provide before a WASA worker was eligible for termination.

### Alleged Continuing Performance Deficiencies

Respondent contends that regardless of what Bhat had done before, new and valid reasons to get rid of her emerged during the PIP. Boateng mentioned three, not to Bhat during the PIP, but subsequently to justify her termination. He expressed displeasure that Bhat failed to inform him timely about the LAL exceedance, that Bhat terminated the NAI contract without consulting him, and that she continued to cause staff friction as a result of her abrasive style of communication. We examine these contentions below.

### Termination Memorandum

After completing Bhat's second Level 1 review, Boateng contacted Grier to discuss the termination procedure. Grier advised him to prepare a letter setting forth the grounds for his recommendation, and he complied on December 3, 2002. In a memorandum to Grier, submitted through Marcotte, he noted that Bhat had received unsatisfactory, Level 1, performance ratings for two consecutive rating periods based mainly "on her lack of performance, after repeated counseling, in the two-performance factor categories of Communication and Teamwork." Boateng explained that Bhat had been placed on a PIP designed to assist her in addressing her performance deficiencies, which he recounted, and advised that she failed to fully inform and engage him regarding the LAL exceedance; she prematurely requested the termination of a personnel services contract with NAI without first consulting him and, thus, failed to exhibit team spirit and ignored the proper chain of command; and she continued her overly aggressive communication style, "groundlessly and overtly denigrat[ing] other personnel, units and departments within the organization, including unjustly questioning their capability, performance and productivity."

In Boateng's view, Bhat's deficiencies in the communication and teamwork areas prevented her from bringing others along in meeting WASA's regulatory

challenges, initiating public outreach programs, extending the reach of the Department's new water conservation program for the District of Columbia, and caused the failure of WASA's upper management to address the lead exceedance issue in a timely manner. The three reasons Boateng cited for failing Bhat on the PIP and rating her Level 1 on the 2002 performance evaluation are considered below.

#### NAI Contract

Prior to implementation of the PIP, in an effort to meet the needs of his department for clerical support, Boateng encouraged WASA's Procurement Department to negotiate a temporary services contract with National Associates, Inc. (NAI). Pursuant to the contract, NAI sent Bhat four administrative employees. According to Bhat, one was acceptable, but the other three, for various reasons, were unsatisfactory; and she expressed her dissatisfaction to Trisdale Berhanu, the contact in Boateng's shop who dealt with the NAI contract.

On June 20, 2002, Berhanu sent an email to Bhat, copied to Christine Lasiter, a procurement official, advising that Bhat should alert WASA's procurement office "that the issue is in [hers] area only and that [WASA] intend[ed] to keep" the NAI contract active elsewhere in DWS. After receiving Berhanu's email, Bhat sent a June 20, 2002 email to Lasiter, copied to Berhanu and Boateng, notifying Lasiter of her dissatisfaction with three NAI temporary placements and with the NAI representative responsible for the WASA contract. Bhat asked Lasiter to provide her division "an alternative Vendor so that the Water Quality division can get the required services."

When Boateng read Bhat's email to Lasiter, he was livid. He testified that he "worked very hard" to "get a temporary staffing program in place...to give Bhat the ultimate of flexibility to hire and fire employees," and she terminated it without consulting him. It was, in addition, a department-wide contract that impacted other areas in DWS, and it was his understanding that Bhat terminated or attempted to terminate the NAI contract without considering the effect on others. This, WASA insists, demonstrated her irremediable pattern of obstructionism, selfishness, and disregard for the needs of the organization as a whole. Boateng, however, did not confront or overrule Bhat, or express his displeasure with her in any way at the time, but he mentioned the incident in her 2002 performance evaluation as an example of her continuing unsatisfactory communication skills, and he cited it as a justification for her discharge.

Yet, Boateng acknowledged at the hearing that Berhanu was the appropriate person to contact in his organization about the NAI contract, and he conceded that he had no idea how many times Bhat spoke with Berhanu before she sent the June 20, 2002 email to Lasiter at Berhanu's suggestion. Moreover, Bhat had neither the authority nor the ability to terminate the NAI contract, and Grier knew of no way Bhat could have terminated the contract without such authority. Thus, the record shows that the contract remained in effect until the end of its term.

Beyond that, Boateng never counseled or reprimanded Bhat in any way concerning this incident during her PIP. Instead, he waited nearly seven months, until their December 6, 2002 meeting regarding the 2002 performance evaluation, before mentioning it as an example of her continued unsatisfactory communications, and later cited it as a contemporaneous example, along with the lead exceedance, to justify her discharge.

It is clear, however, that Bhat complied not only with the chain-of-command requirements of her PIP when she advised Berhanu about the problems she encountered with the NAI contract, but she followed Berhanu's advice in contacting Lasiter. Indeed, Boateng acknowledged that Bhat's complaints about NAI personnel may have been legitimate. Moreover, her email, as Berhanu suggested, asked for an alternative vendor for the water quality division, not DWS as Boateng alleged; and, in fact, the NAI contract was not terminated in response to Bhat's communication. Furthermore, as one of the very few incidents that occurred during the PIP that reflected on an Action Item Boateng imposed, WASA policy required him to bring it to Bhat's attention timely and counsel her about the aspects of what she had done that were inconsistent with his expectations. Had he addressed that incident in a timely way, his appreciation for Bhat's actual compliance with terms of the PIP when she consulted Berhanu and followed her advice would have been heightened and his anger potentially tempered. Indeed, upon reflection, both Boateng and Marcotte agreed that the NAI email incident was not sufficient justification to fire Bhat.

#### Notification of Lead Exceedance

On July 30, 2002, Bhat communicated by phone and by email with George Rizzo at EPA. Her email, which she copied to Boateng, advised that preliminary results of the June, 2002 lead sampling data "did not meet the Lead Action level both for the first and second draw." As previously discussed, this communication

constituted protected activity which ordinarily would not be a proper ground for discipline; however, in Smalls *supra*, the Board noted a distinction between the manner in which a protected communication is delivered and the communication itself. In this instance, the information imparted to EPA was delivered at virtually the same time to WASA management; and this, according to WASA, justified Bhat's termination.

Boateng testified that he opened his copy of the email to EPA on August 12, 2002, and it infuriated him. He felt betrayed, embarrassed, shocked and "blindsided," because he received the information "second-handedly." WASA argued that Bhat's delay in notifying Boateng of the exceedance was clearly a dereliction of duty justifying disciplinary action. A few weeks later, on August 19, 2002, Boateng urged Marcotte to fire her. Marcotte recalled that Boateng expressed a number of concerns about Bhat's insufficient communications, but the only specific example he could recall Boateng mentioning was the lead data she compiled in "the middle of 2002." In a follow-up draft memorandum to Marcotte on August 26, 2002, Boateng urged moving "quickly forward" with Bhat's termination. The first reason he cited was Bhat's "premature" July 30, 2002 EPA communication which allegedly impeded WASA's ability to "preempt" regulatory action.

Marcotte agreed that Bhat's notification to the EPA "was premature," but he also considered her notification in the same email to him and Boateng "extremely late." Boateng viewed Bhat's July 30, 2002 protected communication to the EPA as an example of a "non-inclusive decision" and indicative of her "inability to follow directions."

The record shows, however, Boateng and Marcotte had previously instructed Bhat not to send them any of the raw data she received from WA, and it further shows they were not especially responsive to her emails or phone calls. Boateng often did not return her phone calls for days or weeks and, at times, not at all, and he did not open his copy of the July 30 EPA email for nearly two weeks. Although Boateng alleged that Bhat failed to notify him adequately of the 2001-2002 results, he could not recall what efforts Bhat had made to meet with him and discuss the LAL prior to July 30, 2002, and he acknowledged that she may have tried to contact him and received no response. Moreover, Marcotte acknowledged that PIP Action Item 4 regarding the chain-of-command instruction could be read as

directing Bhat not to inform anyone but Boateng about water quality issues, and she did undertake to inform Boateng prior to emailing the EPA.<sup>26</sup>

At this point, a brief reflection upon the timeline of events helps clarify the record. Before she contacted Rizzo on July 30, 2002, the record shows Bhat tried to engage Boateng, but he was not responsive. Mindful that she was instructed not to send management raw data from the lead monitoring program, she informed her WASA supervisors in a manner consistent with their instructions.<sup>27</sup> On June 5, 2002, for example, Boateng spoke with Bhat about the lead program and EPA regulations after discussing lead line replacement and budgeting with Jerusalem Bekele. He testified that he did not speak to Bhat about the LAL, but he had “latent knowledge” that WASA was very close to exceeding the LAL in 2001 and that LAL exceedance required lead line replacement. He testified that neither the LAL nor the EPA were his “preoccupation. That was Ms. Bhat’s job.”

On June 24, 2002, Bhat sent Boateng an email stating, among other things, “The lead and copper monitoring has to be completed in June for 2002, and the new monitoring for 2003 started in July. Thus I am using some of my flushing employees on O.T.” Bhat testified that her email was confirmation of a conversation she had with Boateng regarding the lead and copper monitoring program during a managerial training workshop. During the seminar on June 24, 2002, Boateng and Bhat were on the same team, and Bhat chose the lead and copper regulatory monitoring program as a training model. She testified that their team discussed the impact of exceeding the lead action level at that meeting, and that WASA was likely to exceed the lead action level in the 2001-

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<sup>26</sup> On August 7, 2001, Bhat began receiving lead and copper test results from the WA for the 2001-2002 monitoring period, which had begun July 1, 2001. The initial results indicated that six properties tested in excess of the lead action level. On August 24, 2001, Bhat received additional results that seven additional properties tested in excess of the lead action level. On September 5, 2001, she received a report that four additional properties tested in excess of the lead action level. Bhat testified that she did not view these results as final, and that she continued to investigate the data. WASA now argues that Bhat should have included the likelihood of exceedance of the LAL in the fall of 2001 in her monthly report to WASA’s General Manager, which she submitted through Boateng. Bhat considered the results significant, but consistent with instruction she received, she did not convey these preliminary results to Boateng or Marcotte.

<sup>27</sup> WASA proposed a finding that Bhat testified that “during the first week of March, 2002, she provided Boateng with a list of homes that had already exceeded the LAL. Tr. 199-202; 570. Boateng denied that Bhat provided him with the list. Tr. 1057-58.” WASA Proposed Finding 110. The cited testimony at Tr. 199-202 relates to in-house, WASA drinking fountains, not homes. The testimony at Tr. 570, though linked to Tr. 199-202 by WASA in its finding, and by counsel in her question at Tr. 570, involves a different set of data. Bhat testified that she gave Boateng a **print out** of the status of volunteers based on a preliminary analysis. Tr. 571. Contrary to WASA’s proposed finding, Boateng never denied, at Tr. 1057-58, that Bhat “provided him with a list.” He denied receiving emails with a list, and denied any recollection of a meeting in which a list was mentioned. Counsel never asked him if he received a **print-out** list, and he did not deny receiving a print-out list.

2002 monitoring period which “was basically the reason for prioritizing” lead and copper monitoring in that training scenario.<sup>28</sup>

On July 12, 2002, the administrative coordinator for WASA’s Department of Water Services requested that Bhat provide additional detail to support her FY ‘03-‘04 budget request. Bhat responded on July 17, 2002, with a copy to Boateng. Attached to her response was a four-page spreadsheet, the last item of which referred to the replacement of lead service lines in the water distribution system. Bhat described the project as follows:

The corrosion control program is implemented for the DC drinking water and the pH is maintained so that there is no leaching of lead. DC is in compliance with the Lead Copper rule however in year 2001-2002 there are large number of homes exceeding the lead action level and DC may not meet the lead action level for 2002. Also there is increasing public request to replace lead service lines. The customers are willing to replace their portion of the service line if WASA replaces its portion. There are large number of homes with elevated levels and these homes also have lead service lines. RX 60/CX 46.

Boateng testified that Bhat had proposed a \$10,000 appropriation for voluntary lead line replacement, which was only a fraction of the amount needed in the event of a regulatory event requiring a system-wide 7% annual replacement rate. In the latter situation, the cost would rise into the millions of dollars, and Bhat had not included it in her budget projections. Accordingly, he saw no cause for alarm.<sup>29</sup> Marcotte also criticized the content of Bhat’s July, 2002 budget submission as “incomplete” and indicative of her failure appropriately to advise WASA of the true situation regarding the lead monitoring program. Yet the training seminar and the notification in the budget submission were not Bhat’s only communication on the subject of lead exceedance.

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<sup>28</sup> Bhat also claims to have indicated that lead concentrations would exceed that LAL at a seminar involving her fellow managers conducted on June 24, 2002. Tr. 252-253. WASA proposed a finding that “Boateng denied her assertion, and there is no written evidence to corroborate Bhat’s testimony. Tr. 1058.” At Tr. 1058, Boateng denied he received emails advising him that WASA exceeded the LAL; however, contrary to WASA’s proposed finding, he testified: “...but obviously she, she had mentioned it during our staff meetings.”

<sup>29</sup> While it appears the cost of voluntary lead line replacement was a line item in the Water Quality Division’s budget, the record does not show that the 7% system-wide regulatory replacement cost was an item which would have been or has since been allocated to the Water Quality Division budget.

On July 19, 2002, Bhat attended a senior staff meeting of Water Service managers chaired by Boateng. Minutes of the meeting were prepared by Boateng's administrative assistant, Jill McClanahan. The minutes reflect that Bhat's water quality report was discussed, and that she told her colleagues that WASA "may not meet levels." Boateng did not pay careful attention to Bhat's report, because, he contends, she failed to provide a definitive warning that WASA would fail the lead action rule. Boateng's Executive Assistant, Jill McClanahan, recalled Bhat's announcement of the LAL exceedance in July, 2002, and Martin Wallace also remembered Bhat's announcement that if the high lead level trend continued, WASA would probably exceed the LAL.

Boateng testified that after the July 19, 2002 staff meeting, he did not initiate any follow-up communications with Bhat regarding her announcement of the likely LAL exceedance. He knew that the annual lead monitoring results arrived in July, and Bhat did inform him in her June 24, 2002 email that the 2001-2002 monitoring period was concluding. According to Boateng, Bhat should have given him "the courtesy of a sit-down meeting" about the LAL; but he acknowledged that he did not request such a meeting after July 19, 2002, and he was not aware of what, if any, efforts Bhat made to meet and discuss the LAL with him.

The record contains no evidence of any written communication between Bhat and Boateng from July 19, 2002 to July 30, 2002, but it does show that Bhat did attempt to meet with him during this period. Indeed, she had every reason to expect that they would meet because the PIP contemplated such meetings twice weekly. In fact, Bhat was scheduled for a one-on-one meeting with Boateng on July 26, 2002, but that meeting was cancelled. Later that day, she visited Boateng at his Bryant Street office with a summer intern, and she claims she told Boateng on that occasion that the lead results were high.<sup>30</sup> Bhat was also scheduled to meet with him on July 28, 2002, but Boateng did not attend the meeting.

Nevertheless, despite its protestations to the contrary, the record indicates that WASA management was, in fact, aware of the lead exceedance even before Bhat's July 30 email was opened by Marcotte or Boateng. Boateng, for example, did not open Bhat's July 30, 2002, email to Rizzo, "Subject: Lead and Copper monitoring for the period July 2001 to June 2002," until August 12, 2002, and

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<sup>30</sup> Boateng denied any recollection of any discussion about lead results on that occasion, but, as discussed in detail above *infra*, he did learn about the exceedance before reading about in Bhat's July 30 email.

he testified that was the first time the LAL exceedance “really hit” him, and the first time he was “actually engaged” and paid attention to the LAL. He then sent a copy of the email to Marcotte; but Marcotte, of course, already had a copy.

Although Boateng may not have known it, Bhat forwarded the July 30, 2002 email to Marcotte on August 2, 2002. She sent it to him because she had received no response from Boateng either to her July 30 email or an earlier inquiry she sent him regarding an inquiry from the D.C. Department of Health about WASA’s lead line replacement policy. In fact, neither Marcotte nor Boateng had any immediate response to Bhat about her July 30 message.

On August 2, 2002, Marcotte read Bhat’s email advising EPA that WASA had exceeded the LAL, and it “caused [his] heart to skip a couple of beats.” Yet, Marcotte already knew about the about the LAL exceedance by the time he read Bhat’s email. He learned about it, he testified, a day earlier during a phone conversation with Boateng. Thus, it was not Bhat’s information about the exceedance itself that surprised or alarmed Marcotte. Apparently, what really jolted him was the fact that Bhat had informed EPA. Moreover, according to Marcotte, Boateng did not mention how he learned about the LAL exceedance, but the conversation Marcotte described indicates that Boateng knew about it at least 10 or 11 days before August 12, 2002, when he opened Bhat’s email to the EPA.

Although Bhat is faulted for not adequately informing WASA “stakeholders” before she notified the EPA, the evidence indicates they somehow knew about the exceedance before they acknowledged opening their copies of Bhat’s July 30 email. While the record does not reveal the source of Boateng’s knowledge, either Bhat’s communications regarding LAL exceedance in her budget submission and at meetings which Boateng did attend provided him sufficient notice of the exceedance, despite his protestations to the contrary, or Boateng had an independent source who provided the information, and he did not actually need or rely upon Bhat to alert him to the lead exceedance. If one accepts Marcotte’s testimony that Boateng advised him of the exceedance before August 2, 2002, Boateng actually knew about the exceedance weeks before he was willing to acknowledge learning about it from Bhat’s email.

Conversely, Marcotte admittedly knew about the exceedance on August 2; yet Boateng claims he knew nothing about it until he opened Bhat’s email on August 12. Thus, despite the alleged adverse, costly impact on WASA caused by Bhat’s delay of about two weeks in notifying WASA “stakeholders” about the

exceedance, if Boateng is believed, Marcotte displayed no sense of urgency after he found out about the exceedance on August 2. To the contrary, according to Boateng, Marcotte never mentioned the exceedance to him between August 2 and August 12, 2002; Marcotte never requested a follow-up report from Boateng or Bhat during that period; and he asked for no status report, plan of action, or recommendations. Indeed, it seems a bit incongruous to blame Bhat for WASA's delays and costs and fire her for failing to communicate when neither Marcotte, who admittedly knew about the exceedance on August 2, 2002, nor Boateng, who also knew if Marcotte is believed, displayed any sense of urgency in dealing with the matter, and neither responded to her communications for nearly two weeks even to acknowledge they received them.

Yet, Boateng chastised Bhat for prematurely advising EPA of the LAL exceedance, while depriving WASA of an opportunity to devise "plans to preempt any regulatory requirements and public concerns." The record, however, fails to document how Bhat's alleged "premature" disclosure to the EPA on July 30, 2002, in any way limited or impeded WASA's compliance options. To be sure, once WASA exceeded the LAL, it was expected to comply with EPA regulatory requirements; not attempt to preempt regulatory requirements via additional monitoring samples or otherwise.

Under these circumstances, to place full blame on Bhat because WASA felt unprepared to deal with the LAL exceedance seems unjustified. Her dedication to WASA's water quality commitment seems no less diligent than others involved in the process. Nor was WASA's budget significantly impacted by the two-week delay between the time Bhat received the data from WA and reported it to EPA, Boateng, and Marcotte. WASA management knew about the exceedance within a few weeks of the date Bhat received the monitoring data from WA, yet WASA did not act on her budget for several months after it admittedly knew about the exceedance. In summary, the record shows that, contrary to WASA's assertions, Bhat actually communicated with Boateng in several instances, and attempted unsuccessfully to communicate with him on other occasions, before she sent the July 30, 2002 email to Rizzo; but equally significant, upper echelons of WASA management were not dependent upon Bhat's email for their LAL exceedance information. Consequently, it appears Bhat's July 30 email alerted EPA to the exceedance and, in so doing, ensured, rather than delayed, WASA's response to the problem.

## Failure to Communicate Alleged Performance Deficiencies or Report Performance Improvements

Boateng testified that he decided to fire Bhat because she failed the PIP and showed no improvement in her teamwork or communications skills. Before turning to WASA's stated justifications, however, a further observation regarding the PIP seems appropriate. It was Boateng's responsibility under WASA's PIP policy to meet with her frequently to make constructive suggestions, and to alert her when aspects of her teamwork or communications style were causing friction or disruption. Yet, no one in management ever communicated to Bhat during the PIP that she needed to adjust her personal interactions or offered her any constructive advice regarding her performance during the PIP. Despite WASA's clear personnel policies that encourage managers to communicate their concerns and suggestions to subordinates, Boateng seemed content to allow the very problems he identified as reasons for the PIP to fester without imparting any of his valuable observations to Bhat.

Thus, Bhat was not afforded the benefits of the PIP that WASA policy dictates she should have been accorded. Nevertheless, the record shows that she did modify and tone down her rhetoric and did avoid the abrasive, confrontational, insulting style of communications that previously impeded her effectiveness as a member of the organizational team. She worked within Boateng's chain of command, consulting with Berhanu, before contacting the Procurement Office about the NAI contract; and she attempted to engage Boateng, to the extent he permitted himself to be engaged, about the lead exceedance. In the communications category, she accepted Berhanu's suggestion about how she should communicate her dissatisfaction about NAI personnel to the Procurement Office, and she communicated with Boateng and Marcotte about the LAL exceedance in the manner and form they directed.

Finally, even Boateng admitted that following the 2001 performance review and during the PIP, Bhat's conduct evolved from abrasive and confrontational to "docile." During the PIP, Bhat softened her chaffing demeanor, retreating from the abrasive, combative behavior that got her into trouble, to a meekness that Boateng readily observed. Thus, the record shows that although Boateng essentially failed to participate in the PIP, the PIP did have a positive impact on the way Bhat interacted with others. Despite WASA's arguments to the contrary, the record shows that Bhat was apparently chastened by the PIP and her conduct demonstrably improved during the PIP.

## Two Level 1 Evaluations

Nevertheless, WASA now suggests that termination was the automatic consequence of two successive Level 1 reviews and, therefore, Bhat was on notice that she would be terminated on December 6, 2002, when she received her second consecutive unsatisfactory appraisal. The record, however, fails to document any WASA policy, guideline, training manual or personnel procedure which supports the contention that two successive Level 1 reviews required termination, and it is devoid of evidence that WASA employees, like Bhat, were ever advised of such a policy in training or otherwise. Bhat testified that she was unaware of any such policy before Marcotte mentioned it on January 30, 2003, and indeed her testimony is not inconsistent with the views of the woman who designed WASA's performance management program. She, too, knew nothing about it.

Indeed, it seems that Boateng himself was unaware of the policy. After issuing Bhat's second Level 1 performance evaluation, Boateng wrote: "During the coming performance year, I encourage [Ms. Bhat] to fully and more cooperatively engage her supervisor and other WASA personnel earlier in addressing program related issues and challenges." He also wrote that "Bhat will be a much greater asset to DWS/WASA by striving early to engage her supervisor and/or other WASA professionals of potential problems of technical origin." Thus, the record fails to demonstrate that WASA had a policy that required Bhat's termination after the second Level 1 rating.

## Disparate Treatment

As discussed above, Respondent is free to fire a manager who performs poorly after being placed on a PIP, but the record lacks evidence that WASA ever fired any employee on performance grounds without counseling or guiding the employee during the PIP. Contrary to WASA's personnel policies that foster disclosure of the supervisor's performance-related observations to identify areas of weakness and promote improvement, Bhat was provided little during the PIP to guide her to become a better worker; and WASA adduced no other instance of a low-level or management-level employee anywhere in its organization who was terminated on performance grounds in similar fashion, without the benefit of an effective PIP or notice that they were failing the PIP. Consequently, it is difficult to bridge the gap from the PIP to the termination.

Under these circumstances, the notion that Respondent's failure to apply its own personnel procedures in dealing with Bhat's performance problems validates

its use of an automatic termination based on two successive unsatisfactory performance appraisals seems a bit fanciful. The record shows that Boateng's assertions that Bhat interfered with the NAI contract, unreasonably delayed her communication to him advising of the lead exceedance while "prematurely" advising the EPA, and the notion that she continued during the PIP to communicate in a brash, disdainful way lack merit or foundation.<sup>31</sup> Further, by ignoring its customary practices in dealing with the performance issues, Respondent undermined its rationale for failing Bhat on her 2002 performance appraisal and then terminating her under some automatic discharge policy that it cannot substantiate; and it takes on increased significance that, based on her extensive experience at WASA, Grier was unaware of any employee other than Bhat who was terminated following a discriminatory PIP which was executed in a manner inconsistent with WASA policy.

Reduced to its essence, the evidence is clear that Respondent did indeed discriminate against Bhat not only in the way it handled the PIP, but for issuing a second Level 1 performance evaluation predicated on a discriminatory PIP and stale accusations, and then terminating her based on two Level 1 evaluations, the second of which was discriminatory. Johnson v. Old Dominion Security, 86-CAA-3, 4 and 5 (Sec. 1991); DeFord v. Secretary of Labor, *supra*.

In dual motive situations, a respondent ordinarily incurs the risk if legal and illegal motives for its actions merge and become inseparable, Passaic Valley, *supra* at 476, 478; however, in this proceeding, there is no merger. WASA has simply failed to demonstrate that, absent her protected activity, Bhat would have been fired under the circumstances demonstrated in this record.

Based upon the findings in Appendix A, annexed hereto, and the foregoing discussion, I find and conclude that Complainant established that she engaged in protected activity and that Respondent has failed to demonstrate that it would have fired her in the absence of protected activity. Accordingly, a violation of the SDWA has been established.

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<sup>31</sup> The "premature" disclosure issue again raises the dual motive question presented in Saporito v. Florida Power & Light Co., *supra*, and discussed herein in detail.

After-Acquired Evidence  
of Alleged  
Fraud, Perjury, and Dereliction of Duty.

Invoking McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, (1995), and its progeny, WASA claims that during pre-trial discovery, it learned about several serious infractions and fraud committed by Bhat which limits her right to any relief she might be granted in this proceeding. WASA claims it discovered that Bhat falsified her employment application and created fraudulent emails purporting to show that she had informed Boateng of the LAL exceedance results as early as March 21, 2002. It further claims it discovered that Bhat received lead testing results in August, September, and October, 2001, indicating high lead concentrations in more than half of the properties which had been sampled in the first cycle of the 2001-2002 monitoring period which rendered WASA out of compliance with the lead action rule, and WASA asserts that “Bhat was aware of the significance of these test results,” but failed timely to inform WASA management.

Thereafter, according to WASA, Bhat’s “deliberate failure” to inform her management of the complex issues that awaited the agency at the end of the 2001-2002 monitoring period had longstanding consequences for WASA and its top officials. It blames her for the public’s loss of confidence in the integrity and safety of the Washington, D.C., water supply and for the numerous investigations and a class action lawsuit filed against WASA that it claims might have been avoided had Bhat stepped forward in time to permit an adequate response to the situation. Bhat’s alleged intentional misdeeds, WASA argues, rule out any right to reinstatement or back pay after December 1, 2003, when WASA contends it discovered the existence of her serious misconduct. McKennon; Castle v. Rubin, 78 F.3d 654, 657 (D.C. Cir. 1996). *Accord*, Smith v. General Scanning, 876 F.2d at 1319 n. 2. Alternatively, WASA accuses Bhat of perjury and argues that she “should not be rewarded with a judgment--even a judgment otherwise deserved...,” in light of her fraudulent and unlawful conduct. Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); *But see*, Willy v. The Coastal Corp., 85-CAA-1 (Sec’y June 1, 1994).

Bhat accepts none of this. She dismisses WASA’s assertion that she deliberately failed to inform anyone about WASA’s LAL exceedance. Further, as she sees it, WASA’s only accusation based on “after-acquired” evidence of wrongdoing involves its contention, which she denies, that she drafted fraudulent emails. Thus, in McKennon, the Court held that:

Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish [by the preponderance of the evidence] ... that the employee in fact would have been terminated on those grounds alone had the employer known of it at the time of the discharge. 513 U.S. at 353; *see also*, Francis v. Bogan, 86-ERA-8 (Sec. 1988); Frazier Indus. Co., Inc. v. N.L.R.B., 213 F.3d 750, 760 (D.C. Cir. 2000). *See also* Mohave Elec. Co-op., Inc. v. N.L.R.B., 206 F.3d 1183, 1192 (D.C. Cir. 2000).

Considering the Court's rationale in McKennon, Bhat believes WASA's reliance on the after-acquired evidence doctrine is misplaced; but beyond that, she emphasizes that the doctrine has its own inherent limits. Attorney's fees and compensatory, punitive and other damages may still be available even under circumstances in which the after-acquired evidence doctrine is appropriately invoked. McKennon at 362; *See* Capp v. City of Miami Beach, 242 F.3d 1017, 1021 (11<sup>th</sup> Cir. 2001); Miller v. Beneficial Mgmt. Corp., 855 F. Supp. 691, 716 (D.NJ 1994). Pursuant to McKennon, we consider first the circumstances WASA contends came to its attention after Bhat was terminated.

#### Violations of the LCR

More than a year after Bhat's discharge, EPA, on June 16, 2004, issued an Administrative Order and Consent Decree which alleged that WASA engaged in numerous violations of the Lead and Copper Rule between the July-December, 1998 monitoring period and January 26, 2004, when WASA failed to file its tap water monitoring report timely. Several of the violations addressed in the Consent Decree occurred while Bhat was WASA's water quality manager; many, however, involved the activities and responsibilities of other WASA managers. WASA contends, however, had it known Bhat improperly "invalidated" lead monitoring samples in 2000-2001, it would have discharged her at that time.

In its Consent Decree, EPA found that, for the monitoring period July, 2000/ June, 2001, WASA failed to comply with 40 C.F.R. §141.90(g) which required the results of all samples taken during the monitoring period be reported to EPA, and 40 C.F.R. §141.86(e) which required the results of all samples collected during the monitoring period to be included in the calculation of the 90<sup>th</sup> percentile lead level.

EPA found that of the 50 samples submitted by WASA, two samples were repeated within the same monitoring period, and five others were taken outside the June–September period required by 40 C.F.R. §141.86(d)(4)(iv). EPA also cited WASA for failing to report the results of six samples in violation of 40 C.F.R. §141.90, and found that had WASA’s report included results for the July, 2000/June, 2001 monitoring period, WASA would have exceeded the lead action level a year earlier than reported.

### Bhat’s Role

The LCR mandates that water service providers report the results of all samples tested in the monitoring program, even those subject to invalidation. 40 C.F.R. §141.86(f)(2). According to the LCR, any decision to invalidate a sample must be in writing, describing both the decision and the underlying rationale, and must provide all documentation supporting invalidation. 40 C.F.R. §141.86(f)(3). On August 6, 2001, WASA provided its official LCR results to the EPA for the 2000-2001 monitoring period,<sup>32</sup> and reported its compliance with the lead standard for the 2000-2001 monitoring cycle. The results of 50 samples were attached to the letter, only 4 of which exceeded the LAL of 15 ppb; however, WASA’s letter failed to inform EPA that any samples had been invalidated or left out of its report. As such, it did not comply with the requirements of the LCR. Bhat helped prepare the letter for Marcotte’s signature.

The record shows that in the spring of 2001, Bhat noticed that she did not have data for four volunteers from her original EPA-approved 2000-2001 list, and she checked with Turner at WA to find out if the results were available. When Turner reported that the several volunteers failed to report, Bhat consulted her EPA contact, George Rizzo, and she testified that he advised her to obtain samples from the original EPA-approved volunteers, but if data from the original volunteers were unavailable, equivalent sampling sites for the originally listed sites should be substituted.

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<sup>32</sup> WASA’s August 6, 2001 notice letter to EPA was also untimely. The LCR provides that such reports be filed within ten days after the end of each applicable monitoring period. CX 4, §141.86(f)(4). Since the monitoring period ended on June 30, 2001, WASA should have finalized the report no later than July 10, 2001.

On August 3, 2001, Bhat received the final monitoring results. After all the data were examined, WASA had 50 sites from the original list of volunteers and proper substitutions. Based on her consultations with EPA, Bhat understood that WASA was on reduced monitoring and needed to report 50 lead results from the 2000-2001 monitoring period. Consequently, because WASA had 50 valid samples, Bhat thought she needed to report only the results received from the pre-approved lead samples sites for the 2000-2001 monitoring year, not the results from the back-up sites. According to Bhat, Rizzo told her to investigate the five back-up samples with high lead, but not to include them in her 2000-2001 lead monitoring report.

### Reporting Errors

Thus, the record confirms that mistakes were made, but it does not clearly reveal who made them. Bhat testified credibly that she handled and reported the data in a manner she, in good faith, believed was consistent with the advice she received from her contact at EPA, but the record does not demonstrate whether Bhat's EPA contact gave her erroneous advice or she simply misunderstood his advice; and no one from EPA helped clarify matters in this proceeding. Marcotte testified that he contacted EPA and was advised that no one at EPA authorized Bhat to invalidate any results; but again, no one from EPA refuted Bhat's testimony in this proceeding that EPA advised her to report 50 samples from WASA's original list, not data from the back-up sites.

Nevertheless, WASA argues in its post-hearing brief that EPA's Order demonstrates that Bhat's handling and reporting of the 2000/2001 monitoring data involved serious misconduct or gross incompetence sufficient to justify her termination. The record shows, however, that Bhat was in regular contact with George Rizzo, her EPA contact. She met with him in late July, 2001, routinely consulted with him, candidly disclosed and discussed the lead monitoring data with him, and relied on his advice as she understood it. Moreover, she kept her WASA managers fully informed about her discussions with Rizzo. There is, moreover, no evidence in this record that Bhat ever misrepresented the data to Rizzo or Boateng or purposely misrepresented Rizzo's advice which she, in good faith, understood as allowing WASA to exclude back-up samples from the 2000-2001 monitoring report.

Whether Bhat received erroneous advice from EPA or simply misunderstood the advice she received in 2001 about the reporting of back-up samples cannot be resolved on this record. In either eventuality, however,

WASA's argument in this proceeding that Bhat's conduct would justify her termination on grounds of incompetence or misconduct is a bit disingenuous.

While WASA urged me to find that Bhat acted improperly and incompetently, WASA argued the exact opposite to EPA. On June 17, 2004, WASA advised EPA that Bhat acted prudently with respect to the 2000/2001 monitoring data. In its submission to EPA, WASA cited, adopted, and relied upon testimony that it vigorously urged me to reject as unreliable, devoid of credibility, and emanating from a perjurer. Indeed, WASA confirmed to EPA that Bhat, after consulting with Rizzo, took what she believed "was the most prudent course of action" and investigated the data, and, thereafter, reported the results in compliance with Rizzo's instructions. In contrast with the position it takes in this proceeding, WASA advised EPA:

In short, based upon the information we have located and reviewed to date, there is no evidence that Ms. Bhat, or anyone else at WASA, sought to manipulate the testing performed during the July 2000-June 2001 monitoring period in order to prevent WASA from exceeding the Lead Action Level. Instead, the decisions that Ms. Bhat made regarding which test to include, and exclude, from WASA's final report for this period appears to have reflected a good-faith effort to conduct the testing appropriately, and in accordance with EPA instructions. CX 168 at 7.

WASA contends that after-acquired evidence demonstrates willful misconduct in reporting the monitoring data, but considering its representations to EPA, WASA's argument here may, most generously, be described as inconsistent, if not inexplicable.<sup>33</sup>

Moreover, while an employer is generally free to fire managers who make mistakes in good faith, if its personnel policies so dictate, it may not mete out especially harsh discipline against a protected employee for mistakes that it would otherwise overlook in its general workforce. The record shows that Bhat's mistakes resulted, not because she deliberately took actions or withheld actions which she knew were contrary to established methods of administering the

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<sup>33</sup> Before EPA, WASA denied that Bhat or any other WASA staff member willfully engaged in any misconduct, and EPA entered no finding to the contrary.

LCR monitoring program, but from a misinterpretation, conceivably originating from within EPA, of a complex set of water quality regulations. Under these circumstances, the argument that Bhat would have been fired for a good-faith mistake is refuted by a record barren of evidence indicating that anyone at WASA actually was fired as a consequence of any finding in the EPA Order; and many violations did not involve Bhat. Nor has WASA offered any evidence of a policy, a practice, or a single instance in which it terminated any employee for a mistake made in good faith. As a result, the notion that Bhat should be denied relief under the SDWA, under these circumstances, is not sustainable.

### Allegedly Fraudulent Emails

WASA alleges that it discovered after her termination that, in December of 2002, Bhat fraudulently created two emails which she dated March 12, 2002, and March 21, 2002, respectively, to convey the false impression that she kept Boateng informed about the monitoring data long before her July 30, 2002 email to EPA. WASA's computer forensics expert, Stevens Miller, testified that the emails were fabrications that were never sent to Boateng. In WASA's view, this after-acquired evidence demonstrates the commission of fraud and later perjury as Bhat testified that these emails reflected her communications with Boateng.

Bhat testified that she sent Boateng an email, CX 26, dated and time stamped 3/12/02; 12:29 PM, with the subject heading: "2001-2002 Lead Results." The email references a prior communication between Bhat and Boateng about lead results and Bhat's intention to investigate the use of water softeners by volunteers whose samples tested high for lead. Bhat concluded this message with a reference to potential invalidation of the high results if there was evidence of water softener usage. This email was embedded in an email that Bhat first forwarded to her email address on the WASA server on 12/18/2002 at 4:57 PM, and then to her home email address on 1/31/2003 at 11:13:31 EST. Bhat testified that a March 12, 2002 email message embedded within CX 32 was a draft of the email message she allegedly sent to Boateng on 3/21/2002 at 12:34 PM. In the draft version contained in CX 32, Bhat reported in connection with the 2001-2002 regulatory lead monitoring that 37 samples had been analyzed to date, and that there were high lead results in 20 samples.

Bhat testified that she sent the monitoring information to Boateng and Rizzo on March 21, 2002. The email to Boateng, however, referenced 37 samples, in comparison with the email sent to Rizzo which stated that 39 had been tested. Bhat addressed this inconsistency in the various versions of the March 21, 2002

email by explaining that one of them was an early draft she had forwarded to her home computer, and she simply made a mistake in the number of the samples that had been tested and reported high in lead.

According to Miller, Bhat's August 8, 2002 email back-up files contained an unrelated draft email to a fellow Water Services manager, Jackie Oliver, created on March 12, 2002 at 12:29 PM, and in his opinion, the email Bhat allegedly sent to Boateng was fabricated at a later date by erasing the stored contents of the email to Oliver and substituting the current contents. He reached this conclusion after studying emails contained in Bhat's December 28, 2002, back-up files. Miller found that RX 86 contained an exact copy of the March 12, 2002 email message embedded in CX 32. He concluded that Bhat created RX 86 on December 18, 2002, and twice forwarded the embedded message contained in CX 32 to herself on December 23, 2002, in back-to-back succession, creating the email messages entered into evidence as RX87 (R000820) and (R0004958). According to Miller, Bhat then created a third email message to herself on December 23, 2002, at 11:00 AM., RX 87 (R001170), wherein she modified the contents of R000820 and R0004958, *inter alia*, by placing the salutation "Kofi" above the text of the message; changing the number of samples analyzed from "thirty-seven (37)" to "thirty-nine (39)"; changing the number of samples remaining to be analyzed from "13+" to "11"; and by changing the number of samples that had tested above the lead action level from "[20]" to "[17]."

Miller testified that he compared the contents of RX 87 (R001170) with the contents of RX 92/CX 99 and found them to be the same except for the date and time listed in RX 87 (R001170). RX 92/CX 99 is the email that Bhat forwarded to Marcotte on January 15, 2003, as evidence of communications with Boateng.<sup>34</sup> Miller concluded that Bhat created her March 21, 2002 email to Boateng from a draft created on March 12, 2002, which was never sent to Boateng.<sup>35</sup> Miller

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<sup>34</sup> WASA's Proposed Findings 130 represents that: "At hearing, Bhat denied that Rx 87 at 001170 and RX 92 are the same, Tr. 629, but there is no other credible explanation for the similarities in the two documents, both of which were created during the pendency of Bhat's appeal process." WASA's finding is misleading. Bhat denied that she attempted to "coordinate with the information" that she sent to Rizzo, and denied she sent this email to Marcotte on January 15, 2002. Bhat did not deny the similarities in the two documents; she denied counsel's speculation as to the cause of the similarities, and she truthfully and credibly denied that she forwarded the email to Marcotte on January 15, 2002. Tr. 629. The question posed to Bhat by counsel referenced the wrong year, 2002, rather than the correct year, 2003. When the mistake was pointed out to counsel, she requested to go off the record and did not correct her question to Bhat. Tr. 629.

<sup>35</sup> WASA cites in corroboration of its expert's opinion the fact that this email is not among the emails listed in the "Kofi Pb/Cu" folder that Bhat compiled in December, 2002, in connection with her 2002 performance review appeal. Bhat explained that she simply overlooked it when she was compiling the list.

concluded that Bhat's March 12, 2002 email to Boateng was "very unlikely" to have been created on the same date at the same time because it would "require some pretty speedy work." Bhat testified that she composed email text in Word, so all she needed to do was cut and paste the text into new emails, and she contends she could have easily created several within the same minute, e.g., RX86/87 and CX26.<sup>36</sup>

Miller further observed, however, that CX 26 and CX 33 are not in the folder which otherwise contained Bhat's other correspondence with Boateng regarding the lead issue; and it would, Miller testified, be highly unusual for all evidence of CX 26 and 33 to disappear from all three locations in which they would have been recorded: Boateng's email inbox, Bhat's email outbox and Bhat's email receipt file. A series of emails that Bhat forwarded to herself on December 4, 2002, included a forwarded email addressed to Boateng dated December 4, 2002, within which is copied the content of the email message Bhat sent to Rizzo on March 21, 2002, at 12:34 PM, except for changes in the opening and a new sentence at the end of the closing. The electronic file folder created in mid-December, 2002, to collect her communications with Boateng on the lead issue did not include any email message to Boateng dated December 4, 2002.

Bhat explained that she emailed the series to herself because she wanted to use them in the development of a water quality brochure for the George Washington University, and the lead data attached to the CX 84/R001154/RX 79 would assist her in identifying high lead properties in the vicinity of the University, and some were relevant to her task while some were not. Bhat was asked about another December 4, 2002 email which purports to contain an embedded copy of the email Bhat sent to Boateng on March 21, 2002, at 12:34 PM. RX 78 (R001155). The lead testing values contained in RX 78 are different from those contained in the email she sent to Rizzo on March 21, 2002 (RX 42a) and the email Bhat forwarded to Marcotte on January 15, 2002. (RX 92) (*i.e.*, RX 42a and RX 92 refer to 39 samples tested to date versus 37; 11 samples remaining to be tested versus 13+; and 17 high lead results versus 20). Bhat testified that the differences in lead testing values found in RX 78 and RX 79 represent mathematical errors which were corrected prior to transmittal to Rizzo.

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<sup>36</sup> WASA noted that Bhat asked WASA's technical support department how to cut and paste after she received her performance evaluation. The record shows that Bhat asked how to cut and paste a list of the contents of her folder. She testified that she did this to compile her table of lead communications for her evaluation appeal.

## Forensic Analysis

Predicated largely on inconclusive circumstantial evidence, WASA's allegations of fraud and perjury lack merit. The record shows that WASA's forensic analysis of its computer records was marred with significant flaws. Miller requested all of the back-up tapes from 2001 on; however, his opinions about Bhat's emails were based on back-up tapes made in August, 2002, and after, not the monthly back-up tapes for March, 2002, or the months before August, 2002. Miller acknowledged that there was a "cartridge missing" from the June, 2002 set of back-up tapes provided to him by WASA's legal office, and he neither participated in the creation of the tapes nor did he know anything about the custody of the back-up tapes prior to the time he received them. Miller decided to begin his analysis with the August, 2002 tape because he had limited time and a limited budget, but he acknowledged that the back-up tapes produced closer to March, 2002, would have been more likely to contain complete data from that month. Yet, the back-up tapes containing emails before June, 2002, were not reviewed.

Miller also did not review the Lotus Notes log files which existed on WASA's Lotus server and which would have contained a complete record of emails sent and received regardless of whether or not such emails were deleted later by employees. Nor did he look at records of service interruptions in March, 2002. In addition, Miller testified that although all of his opinions in this matter concerned Lotus Notes, he has never published any articles or attended any training regarding Lotus Notes, and he does not use Lotus Notes on a day-to-day basis.

The record shows that WASA creates daily, weekly and monthly back-up tapes of Lotus Notes; however, Miller did not know when the March 21, 2002 daily back-up tape was recycled, or if there were any errors in the compilation of weekly back-up tapes from dailies, or monthly back-up tapes from weeklies. WASA only maintains the monthly back-up tapes. The forensic analysis did not include a review of log files, Bhat's archived files on her local drive or any of Bhat's folders on the WASA server, and Miller acknowledged that Bhat could have saved relevant emails and later sent them to herself. For example, WASA's printout of Bhat's "Kofi Pb/Cu" folder came from the December 28, 2002 back-up tape, not directly from her folder on the server. Items would only appear in her folders if she placed them in the folders or if she created an automatic filing system. Further, although Miller deemed significant the fact that Bhat had no return receipt for the March 21, 2002 email; the record indicates that she

sporadically requested return receipts and did not obtain a return receipt for the email she sent to Rizzo on the same date.

Indeed, Miller acknowledged that the absence of an email in an in-box on a back-up tape does not, within a reasonable degree of scientific certainty, establish that an email was not sent. Bhat's response to comments on her 2001 performance review, RX 44, for example, is a memo which also is not on WASA's email system, although Bhat emailed it, and WASA does not dispute that Marcotte received and responded to it. Bhat's March 21, 2002 email to Boateng regarding regulatory lead sampling did not appear on back-up tapes WASA created of Bhat's and Boateng's email folders; however, back-up tapes would not show emails that were deleted by employees before the back-ups were made.

Miller testified further that when a document is merely opened, with no content changed by the user, the next time the document's dialogue box is inspected it may show that the document was modified. He examined a dialogue box for Bhat's December 23, 2002 email of the text of her March 21, 2002 email to Boateng, and admitted that "under some circumstances" the email could say that it was modified on a particular date, such as December 23, 2002, when in fact, it was only opened on that date.

Thus, the after-acquired forensic analysis does not establish that the challenged emails were not sent, and this is particularly significant because, despite WASA's after-acquired evidence arguments, Boateng did not initially deny receiving the March 21, 2002 email. In January, 2003, for example, he told Marcotte that he did not "grasp the significance" of the March 21, 2002 email which Marcotte construed as an acknowledgement that he received the email but did not take action on it. Later, Boateng suggested that he could have overlooked the email on March 21, 2002, and that it was possible he received it. More recently, he suggested he did not receive it.<sup>37</sup> Nevertheless, considering the changes in Boateng's recollections, and in light of the significant limitations and deficiencies in the forensic analysis of WASA's computer records, I conclude that

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<sup>37</sup> Bhat submitted a document that purports to be a contemporaneous record of her activities in the 2002 calendar year. CX 23. WASA submitted the report to a document expert with over 25 years of experience with the FBI. His report indicates that the entry Bhat made for March 21, 2002, regarding an email she had allegedly sent to Boateng on that date indicating that she had received high lead results was, in fact, made in a different color ink from the remainder of the entry for that day and was added at a later time. RX 109. The expert's conclusion was based upon an examination made with ultraviolet light. Bhat stipulated that certain entries were made in multiple color inks and may have been made at different times, Tr. 686-691, and the expert could not determine when Bhat had added the detail about the alleged email to Boateng.

WASA has failed to adduce substantial evidence supporting its allegations of fraud and perjury involving Bhat's March, 2002 emails to Boateng.

### Pre-Employment Matters

WASA further asserts that Bhat should be denied reinstatement and back pay because she allegedly lied on her resume and employment application. Bhat submitted her resume to WASA during an interview in January, 1999. Her resume indicated, *inter alia*, that she became WA's lead or chief chemist in February, 1997, in charge of the administrative and management functions of the chemistry division. The resume further indicated that from September, 1997, until December, 1998, she was the temporary Lab Chief for microbiology in the chemistry division. WASA does not dispute that she served in that capacity until January of 1998, but it believes she lied about her job title after that date. Thereafter, on her first day of work at WASA, she completed an employment application certifying that the information was true and complete to the best of her knowledge, subject to the condition that should any statement prove false, misleading or erroneous, she could be terminated. In her application, she stated that her employment with WA ended in December, 1998.

The record contains a letter from a physician to Bhat's former WA supervisor dated March 17, 1999, supporting Bhat's request for extended sick leave due to work-related stress. Bhat testified that she, in fact, had terminated her employment relationship with WA on or about March 19, 1999, and that she did not consider herself to be a WA employee as of March 29, 1999. The application also stated that Bhat was "Supervisory Chemist" from September, 1997, until December, 1998, and she described her job duties. She did not mention that she served as Lead Chemist at WA after that, and WASA contends that the application thus contained false and misleading information because Bhat was not the supervisory chemist during the entire period she claimed and because she omitted her employment as lead chemist from January to March of 1999. These misstatements on her application, WASA argues, would justify her termination.

While WASA has failed to demonstrate that any of the information it now describes as pre-employment evidence was unavailable or unknown to it before the termination, and thus after-acquired, *see DeVoe v. Medi Dyne, Inc.*, 782 F. Supp. 546 (D. Kan. 1992), it has otherwise adduced no evidence indicating that it would have terminated Bhat or anyone similarly situated based on the pre-employment factors it now cites. The record shows, for example, that while Bhat lost the title

Acting Chief and reverted to her title of lead chemist, she still performed the duties of the Acting Chief, including signing timecards and performance evaluations, hiring and disciplinary actions, organizational restructuring of the lab and dealing with other agencies on behalf of the lab, at an annual salary of \$55,000. Her resume may have been technically inaccurate, but WASA has not demonstrated that it was inaccurate in any substantive sense that made a difference to it. The employment application, similarly, though not identically, describes her title as “supervisory chemist,” not Acting Lab Chief, but again WASA does not seem to contest the description of the supervisory duties she described in her application or her salary level, only the technical title she provided. Thereafter, WASA claims pre-employment omissions in Bhat’s employment history from January, 1999, through March 1999, would justify her termination. Yet Bhat was no stranger to WASA management before it hired her.

WA managers and WASA managers worked together closely; and WA personnel, including Bhat at the time, worked with WASA management. Despite protestations to the contrary, WASA managers most likely knew what her job at WA entailed in early 1999 even if they did not know her technical title; and WASA did not refute Bhat’s testimony that, in fact, WASA managers met with her at WA during the last months of her active employment at WA. Thus, Bhat was offered a position with WASA after interviewing with WASA managers, Melvyn Lewis and George Popadopolous, in January, 1999; and Marcotte approved the job offer after he contacted Thomas Jacobus, the General Manager of WA, in February, 1999.

Still, Bhat’s resume and application were technically incorrect and WASA is free to insist upon whatever level of accuracy and completeness it chooses from those who seek to join its workforce. Nevertheless, assuming McKennon is properly invoked, WASA adduced no evidence that it ever initiated a disciplinary action against any employee arising out of inaccuracies or omissions of a technical, non-substantive nature in a resume or an employment application. Consequently, not only has Respondent failed to establish that its pre-employment justifications emanate from after-acquired evidence, it has not established that Bhat’s technical infractions would have justified termination.

Finally, WASA contends that Bhat improperly remained an employee of WA after she joined WASA’s workforce. The record shows that Bhat may have been on leave from WA after joining WASA, but it does not show that she actually performed any work for her former employer after the date she started

work at WASA. Apparently, she was posturing for a negotiated settlement of an EEO complaint at the time and worked out an arrangement with WA that left her on its employment roster, on leave status, after she joined WASA.

While WASA now says Bhat's lingering attachments to her former employer would have justified her removal, it does not contend, and it has not demonstrated, that whatever deal she worked out with WA at the time, in any way, impacted or detracted from her WASA work, created any conflict of interest, or allowed her to receive pay from WASA for any work performed at WA. Thus, WASA's HR Director confirmed that contemporaneous employment would justify further inquiry, but an employee can be hired at WASA while he or she is still receiving the benefit of leave accrued at a prior employer. Consequently, WASA failed to establish its ignorance of her employment status at WA after she joined WASA's staff; but assuming it did not know, it failed to demonstrate it would have terminated Bhat for the limited relationship she briefly maintained with WA after she went to work for WASA.

#### LAL Data

WASA also argued that it found after-acquired evidence of Bhat's improper withholding of critical LAL data from September, 2001, through July, 2002. Evidence addressing Bhat's disclosures relating to lead monitoring data prior to July 30, 2002, is not after-acquired. Evidence of EPA's findings relating to mistakes made by Bhat and others at WASA in the reporting of the regulatory data is after-acquired, but has been heretofore considered in detail and will not be repeated here.

#### Conclusion

For all of the foregoing reasons, I find and conclude that much of what WASA describes as after-acquired evidence is not after-acquired within the meaning of McKennon, and the evidence which is after-acquired fails to establish that Bhat committed fraud or perjury. Beyond that, I am mindful that Bhat, in good faith, made mistakes, but others did too. Yet, no one else was disciplined for their role in any of the regulatory violations found by EPA. Nor does the record reveal that anyone else has been terminated or disciplined for technical discrepancies in their resumes or applications. Significantly, the record fails to show that WASA meted out any discipline against any other employee or manager for the type of mistakes it now asserts would justify Bhat's termination. Under such circumstances, even if all of the evidence WASA deems after-acquired was, in

fact, acquired after Bhat's termination; the fraud allegations were not established, and WASA has failed to demonstrate that its other contentions would warrant curtailing this whistleblower's right to relief under McKennon.

## Relief

### Reinstatement and Back Pay

Under the SDWA, reinstatement is an automatic remedy designed to re-establish the employment relationship. Thus, Subsection 42 U.S.C. §300j-9(i)(2)(B)(ii) of the Act provides, in part:

If in response to a complaint filed under subparagraph (A) the Secretary determines that a violation of paragraph (1) has occurred, the Secretary shall order (I) the person who committed such violation to take affirmative action to abate the violation, (II) such person to reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment....

Considering similar statutory language in the Surface Transportation Assistance Act, 49 U.S.C.A §31105(b)(3)(A)(ii), the Board recently held that an employer may not be relieved of its obligation to make a *bona fide* offer of reinstatement even when an employee does not seek it. *See, Dale v. Step1Stairworks, Inc.*, 2002-STA-30 (ARB, March31, 2005). Consequently, Bhat must, absent extenuating circumstances, be restored to the same or a similar position that she would have occupied but for the discrimination. In addition, back pay, which begins when she was wrongfully discharged, ends when the employer makes the *bona fide* unconditional offer of reinstatement or when the complainant declines such an offer. *Step1Stairworks, supra*.<sup>38</sup> As a successful litigant, Bhat is,

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<sup>38</sup> Complainant has a duty to exercise reasonable diligence to attempt to mitigate damages awarded as back pay, but the employer bears the burden of proving that the employee failed to mitigate. The employer can satisfy its burden by establishing that "substantially equivalent positions were available [to the complainant] and he failed to use reasonable diligence in attempting to secure such a position." *Hobby*, at 19-20. The complainant has a duty to attempt to mitigate damages by seeking suitable employment. *See, e.g., West v. Systems Applications International*, 94-CAA-15 (Sec. 1995). The record shows that Bhat was in a senior position at WASA and has had difficulty finding alternate employment, despite applying for 40 positions in approximately one year; and WASA, which has the burden of establishing that the back-pay award should be reduced because complainant has not exercised reasonable diligence in seeking other substantially equivalent employment, has presented no evidence that Bhat failed diligently to attempt to mitigate her damages. *Doyle v. Hydro Nuclear Services*, 89 ERA 22 (ARB, 9/6/96); *West v. Systems Applications International, supra*.

therefore, entitled to an order requiring WASA to take affirmative action to abate the violation, to reinstate her to her former or substantially similar position with the same pay, pay increases, benefits, and terms, conditions, and privileges of employment she held before her termination. In summary, she is entitled to receive the wages and benefits she would have received but for the illegal discrimination, and an appropriate order will be entered. Crabtree v. Baptist Hosp. of Gadsden, Inc., 749 F.2d 1501 (11th Cir.1985) Pillow v. Bechtel Construction, Inc., 87-ERA-35 (Sec. July 19, 1993).

### Back Pay

With respect to her back pay, Bhat must establish the amount that Respondent owes. The record shows that Bhat earned a gross salary of \$73,187.14 in 2002 as the Water Quality Division manager, Salary Grade 18, and that WASA implemented a standard 4% per fiscal year salary increase each successive fiscal year thereafter. Complainant's back pay award must therefore reflect these 4% annual increases.

### Merit Increases

Bhat also argues that with average Level 2, performance ratings, she would likely have received merit increases. Yet, Bhat has failed to demonstrate that merit increases were awarded as a matter of right or that she likely would have received any merit increases granted as a matter of discretion. As previously discussed in detail, for example, WASA failed to show that it took disciplinary action against any employee involved in the violations found by EPA; however, the record also fails to establish that WASA granted merit increases to employees involved in the mistakes and , errors which led to the violations. In summary, Bhat has failed to establish her entitlement to merit increases.

### Lost Benefits

While at WASA, Bhat paid \$84.28 per pay period, \$168.56/month, for health care. After her discharge, she paid \$480.02 per month for COBRA for 18 months. As a result, her health care costs for the first 18 months after her discharge, through September, 2004, increased by \$5,606.28. WASA's plan also provided free dental and vision coverage. Bhat's monthly costs for dental care the first 18 months after her termination was \$837.18. Her out-of pocket expenses due

to lost benefits total \$6,443.46. WASA also contributed \$197.04/pay period (\$4,728.96/year) to Bhat's pension when she was earning \$73,187.09, based upon a 6.46% pension benefit. Thus, Bhat is entitled to back-pension benefits totaling 6.46% of her gross annual salary.

### Interest

Finally, Bhat is entitled to pre-judgment and post-judgment interest on the back pay award. See Step 1 Stairworks, *supra*; Murray v. Air Ride, Inc., 1999-STA-34 (ARB Dec. 29, 2000). In calculating the interest on back pay, the rate used is that charged for underpayment of federal taxes, See 26 U.S.C.A. §6621(a)(2) (West 2002); Drew v. Alpine, Inc., 2001-STA-47, (ARB June 30, 2003), and is compounded quarterly until the award is paid. Assistant Sec'y & Cotes v. Double R. Trucking, Inc., 1998-STA-34 (ARB Jan. 12, 2000); see Doyle v. Hydro Nuclear Services, 1989-ERA-22 (ARB May 17, 2000); Palmer v. Western Truck Manpower, Inc., 85 STA 16 (Sec. Jan. 26, 1990).

### Front Pay

Although reinstatement and restoration of benefits is the presumptive remedy in cases of this type, see McCuiston v. Tennessee Valley Authority, 89-ERA-6 (Sec. Nov. 13, 1991), and Bhat contends she is entitled to reinstatement. She also suggests, however, that front pay "is likely a better solution for all parties," and she claims total front pay of \$648,538.91, based on standard increases, from the date of the submission of her brief until the date she is eligible to retire.

Under some circumstances, alternative remedies are preferred. Front pay in lieu of reinstatement may be appropriate, for example, under circumstances in which a company no longer employs workers in the job classification the complainant occupied, or has no positions for which the complainant is qualified, or when a complainant suffers from depression, See, e.g., BSP Trans, Inc. v. United States Dept. of Labor, 160 F.3d 38 (1st Cir. 1998), or where the parties prove the impossibility of a productive and amicable working relationship. Moder v. Village of Jackson, Wisconsin, 2000-WPC-5 (ARB 2003); Blum v. Witco Chem. Corp., 829 F.2d 367, 374 (3d Cir. 1987); see EEOC v. Prudential Federal Sav. and Loan Ass'n, 763 F.2d 1166, 1172 (10th Cir.), cert. denied, 474 U.S. 946 (1985); United States v. Burke, 119 L.Ed. 2d 34, 45 n.9 (1992).

In this instance, Bhat suggests that front pay may be warranted because the working relationship between her and WASA had deteriorated beyond the point of reconciliation. She claims Boateng exhibited such extreme animus toward her that their working relationship could no longer be productive. In addition, Bhat believes her former job is unique and represents that WASA has filled it.

The record shows that her job was important but not unique in terms of WASA positions concerned with the quality of the D.C. water supply; and the case law teaches that reinstatement may not be denied merely because friction may continue to exist between the complainant and the agency or its employees. Nor should it be denied because the employer may find it inconvenient to reinstate the former employee. See Hobby v. Georgia Power Co., 1990-ERA-30, (ARB Feb. 9, 2001) at 8-13. In this instance, the parties have not demonstrated that reinstatement to the same or substantially similar position is impractical, impossible, or otherwise unwarranted, See Step 1 Stairworks, *supra*, and under these circumstances, front pay and future benefits seem unwarranted.

#### Compensatory Damages

Under the SDWA, compensatory damages are specifically authorized by Subsection 300j-9(i)(2)(B)(ii)(III). These damages may be awarded for pain and suffering, mental anguish, embarrassment, and humiliation, Thomas v. Arizona Public Service Co., 89- ERA-19 (Sec. Sept. 17, 1993), and for impairment of professional reputation caused by a respondent's wrongful treatment. Leveille v. New York Air National Guard, 1994-TSC-3 and 4 (ARB Oct. 25, 1999); See Blackburn v. Martin, 982 F.2d 125,132 (4<sup>th</sup> Cir. 1992). In DeFord v. Tennessee Valley Authority, 81-ERA-1 (Sec. Aug. 16, 1984), the Secretary found that there were three elements of the claim for compensatory damages: medical expenses; damages for emotional pain and suffering and mental anguish; and damages for injury to reputation.

To prove emotional distress, a complainant may demonstrate: "(1) objective manifestations of distress, e.g. sleeplessness, anxiety, embarrassment, depression, harassment over a protracted period, feelings of isolation, and (2) a causal connection between the violation and the distress." Moder v. Village of Jackson, Wisconsin, 2000-WPC-5 (ARB 2003), (*citing* Gutierrez v. Univ. of California, 98-ERA-19 (ARB 2002)). Evidence sufficient to establish the existence and magnitude of the injuries may include credible testimony by the complainant and her family and, though not required, the evaluation of medical experts. Moder,

*supra* at 9; Smith v. Esicorp, Inc., 93-ERA-16 (ARB 1998), *citing* Carey v. Piphus, 435 U.S. 247 (1978); Blackburn v. Metric Constructors, Inc., 86-ERA-4 (Sec. Oct. 30, 1991); Bigham, *supra* at p. 14; Lederhaus v. Paschen, 91-ERA-13 (Sec. Oct. 26, 1992), at p. 7.

Indeed, a complainant's credible testimony establishing his loss of self-esteem, alone, without any concomitant financial hardship is sufficient to support a compensatory damage award. Blackburn v. Reich, 982 F.2d 125 (4th Cir. 1992). The testimony of medical or psychiatric experts is not necessary, but it can strengthen a complainant's case. Thomas v. Arizona Public Service Co., 89-ERA-19 (Sec. Sept. 17, 1993); Busche v. Burkee, 649 F.2d 509, 519 n.12 (7th Cir. 1981), *cert. denied*, Burkee v. Busche, 454 U.S. 897 (1981); Busch v. Burke, 649 F.2d 509, 519 (7th Cir., 1981) *cert. denied*, 454 U.S. 817 (1981); DeFord, *supra*; Doyle v. Hydro Nuclear Services, *supra*; Mosbaugh v. Georgia Power Co., 91 ERA 1 (Sec. Nov. 20, 1995); Thomas v. Arizona Public Services Co., 89 ERA 19 (Sec. Sept. 17, 1993). Bhat has not only testified credibly about her loss of self esteem, but her emotional pain and suffering (DeFord, *supra*; Blackburn v. Metric Constructors, *supra*), embarrassment and humiliation, (Creekmore v. ABD Power Systems Energy Co., 93 ERA 24 (Sec. Feb. 14, 1996), Lederhaus v. Donald Paschen, 91 ERA 13 (Sec. Oct. 26, 1992), but she has adduced medical evidence which links her depression to her termination.

Although it does not appear that Bhat has requested a specific amount for compensatory damages, she does cite a number of cases in which compensatory damages in excess of \$100,000 were awarded, and she contends that her injuries are as severe and as well documented as the injuries in those cases. *See* Hall v. U.S. Army, Dugway Proving Ground, 1997-SDW-5 (ALJ 2002) (\$350,00); Hobby v. Georgia Power Co., 1990-ERA-30 (ARB Feb. 9, 2001), (\$250,000); *See also*, Peyton v. DiMario, 351 U.S. App. D.C. 118, 121 (D.C. Cir. 2002) (\$300,000); Dickerson v. HBO & Company, 1995 WL 767193 (D.D.C.) (\$100,000). Complainant argues further that assessing comparative compensatory damages awards is a reasonable way to evaluate the relief to which she is entitled so long as other factors such as inflation and case-specific injuries are considered. Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd., 91-ERA-13 (Sec. 1992). In summary, she contends that Respondent's retaliation induced severe stress, humiliation, and sleeplessness; triggered severe depression; caused her loss of self-esteem and her professional reputation; adversely impacted her family relationships; required counseling and medication; and caused other adverse physical health consequences, such as diabetes and high blood pressure due to

stress, resulting in the type of injuries and the severity of damages that have justified awards in excess of \$100,000.

WASA counters that Bhat has failed to establish by a preponderance of the evidence that she suffered cognizable emotional injuries caused by its conduct, noting that: "To recover for emotional distress . . . the complainant must show by a preponderance of the evidence that he or she experienced mental suffering or emotional anguish and that the unfavorable personnel action caused the harm." Gutierrez v. Univ. of California, 1998-ERA-19, (ARB Nov. 13, 2002). Bhat, WASA emphasizes, was treated for depression long before she was employed by WASA and was diagnosed as suffering from depression and stress allegedly caused by her prior employer. More than a year prior to her discharge, she was treated for depression and attention-deficit disorder; and according to WASA, her history of emotional disorder renders it particularly difficult for her to establish that the alleged distress she claims was due to her termination. While Complainant's history of depression is a factor we must consider in assessing WASA's contentions, we also need be mindful that WASA remains liable if its unlawful actions have aggravated Bhat's pre-existing psychiatric condition. *See Dindo v. Grand Union Co.*, 331 F.2d 138, 141 (2d Cir. 1964).

#### Mental Anguish, Emotional Distress, and Depression

As the Supreme Court noted in Carey v. Piphus, 435 U.S. at 264 n.20, "[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others." We thus turn first to the testimony provided by Bhat and her family.

Although Bhat previously experienced bouts of depression, she claims her depression since being terminated by WASA has been more severe. The record shows she suffered from episodes of depression when she lost a parent in 1988 and 1996, but she claims those instances did not affect her substantially or long term and did not interfere with her ability to work. Comparing her present condition with her depression over her parents' deaths, Bhat's husband testified: "[I]t was not to this extent. I can see it, feel it, but it just lasted maybe a couple of months or maybe less . . . and after consoling her, [her depression] slowly filtered away." Her son stated, "[T]he only time I remember her really being sad was after her parents' deaths . . . ." In early 1999, Bhat again felt depressed over her non-selection for the Lab Chief position at WA, but she claims the depression subsided when she began working at WASA in March, 1999.

As a result of the termination, Bhat claims she is incapable of engaging in the activities she loved prior to March, 2003, such as writing, reading, gardening, walking the dog, traveling, exercising on the treadmill, participating in social and religious activities, and calling and visiting friends, because she feels obsessed over her termination. Her family also noted personality changes after her termination and observed that she stopped participating in her hobbies, avoided friends, and appeared embarrassed. Before her termination, Bhat frequently went to the temple and participated in religious festivities with her husband, but no longer participated after the termination. Her husband, Sudhakar, testified that in November, 2003, Bhat “didn’t have any interest. Generally we go to temple, that specific day, and she [doesn’t] want to go there. Generally she dress[es] up with our customary costume which is sari and she [doesn’t] even do anything. She wanted to sit at home and do nothing actually.” Around family, Bhat is withdrawn. In May, 2003, Sudhakar arranged a trip to Chicago with Bhat and their son. Mr. Bhat testified that Ms. Bhat was hesitant to go because she did not want the family’s friends to ask her about her job at WASA, and once in Chicago, she did not want to interact with or talk to anyone. Sudhakar testified that she “was fearing that . . . they [were] going to ask her what you do now, how is your job doing. . . .”

Bhat’s husband and son confirmed that before her termination, she loved to cook, and both noticed changes after her termination. Sudhakar, in particular, complained that his wife’s cooking habits changed because she no longer prepared meals as often or as carefully as before. Prior to her termination, Sudhakar described his wife’s cooking as “meticulous.” After the termination, he noticed that she no longer paid attention “to any details.” He offered the following example, “a couple of times she added so much salt I couldn’t eat it the dish, and that’s not her nature. She was so . . . meticulous . . . .”

Bhat testified she feels depressed and guilty and reflected that her: “[D]espondent mood has just affected them deeply, especially my son, . . . I just no longer participate in his activities which as a motherly function . . . I used to do, and that affects him as well as I just, in daily activities I used to discuss my career and everything with him and I just felt that that has affected our relationship.” She gets easily agitated and is short tempered. Her son, Adityn, testified that “[s]he is very snappy now and she’ll cry very easily.” This has had a negative impact on her relationship with her son and husband. Adityn observed that his interactions with his mother changed after she was terminated because she was always “down” and “emotional.” He testified: “She cries very easily...and doesn’t like to interact

as much as she would before.” Sudhakar, too, feels that Bhat does not “pay any attention to him like before.”

### Severity of Emotional Distress

WASA argues that the testimony of Bhat, her husband and son, following her termination, fails to prove that she suffered serious or substantial depression as a result of her termination, because other evidence shows that she was not only able to look for new employment in February, 2003, and thereafter, but she was able to negotiate with WASA officials regarding the nature and duration of her severance package, communicate with former colleagues about business issues, participate in the investigation and prosecution of her OSHA complaint from the time of filing through the trial, and attend every deposition. In addition, WASA notes that she gave media interviews and testified before the District of Columbia Council concerning the lead monitoring program at WASA. In short, WASA believes the level of her activity and involvement in her own legal affairs demonstrates that she was not seriously impaired by the termination of her employment.

It is, of course, true, as Complainant contends, that emotional distress may be established in the absence of expert opinion evidence; but it is also true, as Respondent asserts, that symptoms indicative of emotional distress observed by laymen must be considered in the context of a complainant’s other activities in assessing the severity of the injury caused by the violation. The lay evidence in this instance indicates that Bhat’s symptoms are not totally debilitating, but damage has been done. For further analysis, we turn to the medical evidence.

### Expert Evaluations

Three physicians addressed Bhat’s post-termination physical and mental health. Dr. Irma Bensinger, an osteopath, treated Bhat from August 16, 2000, to November 17, 2003. She reviewed Complainant’s medical history, noted a bout of depression in July of 1999, evaluated an X-ray indicating premature diffuse atrophic degeneration of the brain, but deferred with respect to whether the atrophy could cause psychological problems. In a letter dated February 10, 2003, Dr. Bensinger commented that Bhat has a history of depression. On April 30, 2003, she observed: “[R]ecently, [Ms. Bhat’s] depression has worsened, and she has recently sought the care of a psychiatrist by the name of Dr. Elhole (*sic*). The patient just saw her recently, and Dr. Elhole (*sic*) increased her Prozac.” CX122 at 790. In a letter dated May 10, 2003, Dr. Bensinger explained, “Although, Ms.

Bhat had been on Prozac in 1988, after her mother's death, she had since stopped it. I had prescribed fluoxetine 20 mg. (Prozac) for the patient in January 2003, when she related increasing stress issues. The patient now informs me that her psychiatrist has doubled the dose of fluoxetine from 20 mg. to 40 mg. daily." Dr. Bensinger reported that Bhat "relates feeling very depressed due to the fact that her termination she feels has affected her integrity."

Dr. Bensinger referred Bhat to Dr. El-Kholy, a psychiatrist. Dr. El-Kholy first saw Bhat on April 29, 2003. She took a history which included Bhat's use of Prozac in 1987 when her mother passed away, and her 20 milligrams daily dose of Prozac at time of the visit. Dr. El-Kholy also noted that Bhat was taking Metformin for high blood sugar, Lisinopril for high blood pressure, and Lipitor for high cholesterol. Reviewing Bhat's symptoms including disturbed sleep, fatigue, lack of motivation, obsession with her job and shame, anxiousness, restlessness, and sadness, Dr. El-Kholy diagnosed "major depression recurrent this year, but which started about a year and half before the visit." Dr. El-Kholy acknowledged that the open-heart surgery Bhat's husband underwent could have been a contributing factor, but Bhat did not mention it, and Dr. El-Kholy opined that work-related stresses were the cause of Bhat's depression.

Dr. El-Kholy increased Bhat's Prozac dosage to 40 milligrams once a day, and scheduled Bhat to return weekly. Due to her loss of medical insurance, however, Bhat could only continue these meetings on a monthly basis, and she met with El-Kholy on May 6, June 3, and July 17, 2003. Dr. El-Kholy's notes show that Bhat was depressed and preoccupied with her termination, unable to garden and write papers, unhappy attending a wedding ceremony, and worried about job interviews. By June, her mood had improved, and Dr. El-Kholy continued her on 40 milligrams of Prozac. Dr. El-Kholy noted that, during her May visit, Bhat advised that she was taking only 20 milligrams and was still feeling depressed, so Dr. El-Kholy advised her to take the full 40 milligram dose. She still had pills left when she returned in July, however, and it was Dr. El-Kohly's impression that Bhat did not take her medication consistently, because "maybe she didn't feel like she needed the full dose." Bhat reported she remained depressed, and Dr. El-Kholy recommended another antidepressant, but Bhat refused it. Dr. El-Kholy confirmed that sleep disturbance can be associated with depression, but she reiterated that Bhat was not taking her medication.

On May 9, 2003, Dr. El-Kholy signed a letter which Bhat drafted for her signature. Dr. El-Kholy did not know what Bhat intended to do with the letter and testified that at the time she signed it, she thought it accurately reflected her views,

but she did not read it carefully. In general, she thought the letter simply requested some time off work, and Dr. El-Kholy testified that "...if she wants to present it to somebody, I can say, yes, you know she has depression, she can use some time off." The letter, however, went further and contained statements which Dr. El-Kholy later recanted because she had no direct knowledge of the matters mentioned. She singled out, for example, certain references to Bhat's health-related problems after "January 3," the discussion about Bhat's diabetes and hypertension and whether they were work-related problems, and the reference to doubling the dose of flouxetine which Bhat actually did not take. On reflection, Dr. El-Kholy concluded in her deposition that she should not have signed the letter.<sup>39</sup>

While there is no record of any treatment for emotional distress between June, 2003, and November, 2003, Dr. Lawrence Hyman, a psychiatrist, saw Bhat on November 13, 2003, and he treated her, at least, through January, 2004. He reported that Bhat experienced mood swings, and he was impressed that she was partially responsive to the 40 milligram dose of Prozac. Dr. Hyman changed her prescription to 75 milligrams of Effexor with increases to 150 milligrams as needed.

By December, 2003, Bhat's symptoms were returning. Dr. Hyman reported that Bhat had trouble finding a job and was sad, tearful, embarrassed she was terminated, and felt hopeless about finding another job. He did not think she had ADHD, although he noted that another physician had placed her on a trial of Ritalin. Dr. Hyman described Bhat as depressed and changed her medication to Lexapro, 20 milligrams a day. Thereafter, on January 19, 2004, he saw Bhat again, shortly after her return from an extended vacation to India. CX130 at 17, citing CX123, p. 762. He opined: "My sense was at the time of the visit she was currently in remission. My plan was for her to continue the Lexapro at 20 milligrams a day and to return in a month or as needed." Dr. Hyman explained, "[W]hether or not going to India was helpful and the antidepressant was helpful we'll certainly find out the next time..." On February 16, 2004, Dr. Hyman's notes show that Bhat was "dwelling on issues of job loss again" and he decided to

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<sup>39</sup> WASA seeks to impugn Bhat's credibility because she drafted the letter Dr. El-Kholy signed but latter refuted, in part. As WASA's counsel, no doubt, fully appreciates, parties or their counsel often help witnesses prepare and assist in the drafting of draft letters, documents, and affidavits for experts and others to read, modify, and execute as they deem appropriate. Should the expert sign, but later question, the document, its evidentiary weight may be diminished in whole or in part, but it does not reflect adversely on the credibility of the layman who prepared the draft which the expert failed adequately to review before signing, absent evidence of any effort by the layman to deceive the expert. In this, instance, no evidence of deception was adduced. Had Dr. El-Kholy read the letter more carefully, it would have been readily apparent to her then, as it was at her deposition, that the letter addressed matters she was not prepared to discuss.

renew her medication. Dr. Hyman acknowledged that a prior head injury is a possible cause of depression, but he opined that Bhat had been depressed and lost her job, and explained: “[a] person who has got a recurrent depressive disorder is going to be more susceptible to major life stressors; and, so, I certainly had no reason to question that the loss of her job probably had something to do with precipitating that exacerbation or a worsening of her depressive symptoms.” CX 130 at 21-22.

### Depression Causation and Severity

WASA contends that Bhat has failed to prove, by a preponderance of the evidence, that she suffered an appreciable exacerbation of her emotional distress symptoms as a result of her termination by WASA. It emphasizes that Dr. El-Kholy opined that Bhat recovered from her emotional distress because she was not following the medication regime that Dr. El-Kholy had recommended. It notes further that Dr. El-Kholy essentially withdrew the opinions expressed in a letter Bhat drafted and Dr. El-Kholy signed and which was submitted to OSHA to justify a recommendation that Bhat be awarded compensatory damages for emotional distress. Although other aspects of the letter concerned her, contrary to WASA’s contention, Dr. El-Kholy did not negate her diagnosis of depression or her opinion that the termination was an etiology of the mental condition she treated. In her deposition, Dr. El-Kholy expressly confirmed her diagnosis, indicating Bhat’s depression was the reason she signed the letter, because a patient with depression “occasionally needs some time off.”

Consequently, while Dr. Bensinger, Complainant’s osteopath, declined to comment on her emotional state beyond discussing her history, the two psychiatrists who evaluated Bhat’s mental condition both diagnosed depression, and both cited the loss of her job as an etiology of her condition notwithstanding other hypothetical, potential etiologies WASA suggested, such as head trauma or her husband’s heart surgery. Dr. El-Kholy, moreover, was aware of Complainant’s prior history of depression. In summary, WASA adduced no medical opinion evidence to refute either the diagnosis of depression or the work-related etiology of Bhat’s condition.

WASA argues further that the severity of Bhat’s emotional distress is not as compelling as it may first appear. Bhat clearly is able to focus on her business and professional affairs. Her depression did not demonstrably suppress her zeal for water quality issues or her willingness or ability to communicate her views to public officials or the community at large.

Bhat further contends, however, that after her termination, and despite her husband's recovery, she had to take higher dosages of anti-depressant medicine than before to deal with her condition. She claims she went from taking no medication as of December, 2001, to 20/mg Prozac as of January, 2003, to 40 mg/day of Prozac as of April, 2003. On November 13, 2003, Dr. Hyman, thinking that 40 milligrams a day of Prozac was only partially effective, changed her medication to the stronger drug, Effexor, starting at 75 mg/day, and subsequently increasing to 150 mg/day. Here again, however, the evidence is mixed. To be sure, Dr. Hyman, in November of 2003, changed Bhat's prescription and continued to treat her depression; but by January of 2004, he opined that she was in remission or was close to remission, but was again feeling depressed by February, 2004.

Dr. El-Kholy thus seemed a bit vexed by the apparent incongruity between the severity of Bhat's depression-related complaints and her unwillingness to take medication in sufficient strength to quell her symptoms. While Complainant argued that Dr. El-Kholy may have been unaware of antidepressant medication she was getting elsewhere, Dr. El-Kholy specifically relied on Bhat's own report that she was taking a 20 milligram dose rather than the 40 milligram dose of Prozac Dr. El-Kholy prescribed, causing Dr. El-Kholy to opine that Bhat may have decided she did not need the whole dose. Consequently, while Bhat's chart indicated to Dr. Hyman that Dr. El-Kholy prescribed the 40 milligram dose of Prozac, it is unclear whether he realized that Bhat may not have been taking the prescribed dose when he concluded that 40 milligrams of Prozac were only partially effective. Indeed, Dr. El-Kholy specifically concluded that Bhat's symptoms may not have subsided precisely because she was not taking the prescribed dose of Prozac. Under these circumstances, the significance Bhat would have us place on the alleged need to increase the strength of her antidepressant medications, particularly from Prozac to Effexor, is not entirely supported by this record. Thus, the evidence demonstrating the severity of Bhat's depression and emotional distress is mixed.

#### Measure of Damages

In Smith v. Esicorp, Inc., 1993-ERA-16 (ARB Aug. 27, 1998), the ALJ recommended an award of \$100,000 in compensatory damages; however, the ARB, noting that it is appropriate to consider the range of awards made in similar cases when awarding compensatory damages, reduced the award to \$20,000. In so doing, the Board reviewed other decisions awarding compensatory damages for emotional distress and deemed such comparisons an appropriate analytical tool in evaluating compensatory damages. Accordingly, the following cases provide us with guidance in calculating Bhat's damages here: [Van der Meer v. Western](#)

[Kentucky University](#), 1995-ERA-38 (\$40,000 for public humiliation and a statement to a local newspaper questioning complainant's mental competence); [Gaballa v. The Atlantic Group](#), 1994-ERA-9 (Sec, Jan. 18, 1996) (\$35,000 for blacklisting and adverse career impact, mental and emotional suffering); [Creekmore v. ABB Power Systems Energy Services, Inc.](#), 1993-ERA-24 (Dep Sec Dec., Feb. 14, 1996) (\$40,000 for emotional pain and suffering and disruption of family life); [Michaud v. BSP Transport, Inc.](#), 1995-STA-29 (ARB Dec. Oct. 9, 1997) (\$75,000 for emotional distress confirmed by a licensed clinical social worker and a psychiatrist, foreclosure on complainant's home and loss of savings); [Morriss v. L G & E Power Services, LLC.](#), 2004-CAA-00014 (ALJ January 13, 2005) (\$65,000.00 for temporary depression, nervousness, trouble sleeping, crying spells, decreased appetite, weight loss, negative affect on credit rating, and increased irritability due, in part, to the termination, but are in large part to the degeneration of the marriage, and the lack of family harmony); [Smith v. Littenberg](#), 1992-ERA-52, (Sec. Sept. 6, 1995)(\$10,000 for mental and emotional stress with evidence from a psychiatrist of depression, obsession, ruminating and post-traumatic problems); [Blackburn v. Metric Constructors, Inc.](#), 1986-ERA-4 (Sec. Dec. after Remand, Aug. 16, 1993)(\$5,000 for mental pain and suffering, moodiness and depression, and anger directed at wife and children); [Bigham v. Guaranteed Overnight Delivery](#), 95-STA-37 (ARB, Sept. 5, 1997) (\$20,000 for mental anguish); [Lederhaus v. Paschen](#), 1991-ERA-13 (Sec, Oct. 26, 1992) (\$10,000 for mental distress, foreclosure proceedings, harassment of wife by bill collectors , and disruption of family life); [Jones v. EG & G Defense Materials, Inc.](#), 1995-CAA-3 (ARB Sept. 29, 1998) (\$50,000 for pain and suffering, emotional turmoil, panic response to debts, embarrassment as neighbors witnessed the repossession of car and truck, loss of medical coverage and delayed surgery, inability to provide continuing financial support to two stepdaughters attending college, and injury to credit rating); [Roberts v. Marshall Durbin Co.](#), 2002-STA-35 (ARB Aug. 6, 2004) ( \$10,000 for humiliation and emotional distress); [Jackson v. Butler & Co.](#), 2003-STA-26 (ARB Aug. 31, 2004), (\$4,000 for emotional distress); [DeFord v. Sec. Of Labor](#), *supra*. (\$50,000 for embarrassment and humiliation, chest pains, difficulty in sleeping, and severe depression); [McCuistion v. Tennessee Valley Authority](#), 89-ERA-6 (Sec'y Nov. 13, 1991) (\$10,000 for exacerbation of pre-existing hypertension, stomach problems, sleeping difficulty, exhaustion, depression and anxiety); [Beliveau v. Naval Underseas Warfare Center](#), 1997-SDW-1 and 4 (\$50,000 for emotional distress); [Crow v. Noble Roman's, Inc.](#), 95-CAA-8 (Sec'y Feb. 26, 1996) (\$10,000 for financial distress).

The Board has also invited consideration of the level of compensatory damages awarded in employment discrimination cases brought in other

jurisdictions. Doyle, *supra* and Leveille, *supra*. Since this case arises in the District of Columbia, it thus seems appropriate to consider compensatory damage awards arising in the D.C. courts. Thus, in Peyton v. DiMario, 351 U.S. App. D.C. 118, 121 (D.C. Cir. 2002), the Court affirmed a \$300,000 award in compensatory damages to the victim of a retaliatory hostile work environment where complainant adduced evidence of her depression, anger and lost self-esteem, affecting her quality of life. In Dickerson v. HBO & Company, 1995 WL 767193 (D.D.C.), an award of \$100,000 was entered in compensatory damages for pain, suffering, and mental anguish suffered after retaliation in part because of the impact of the adverse actions on plaintiff's relationship with his children. In Leveille v. New York Air National Guard, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999), the ARB found that a compensatory damage award of \$25,000 for damage to professional reputation was appropriate where Office of Personnel Management still had adverse information on file, and this information would be available to any other federal agency. Liberatore v. CVS New York, Inc., 160 F.Supp. 2d, 114, 121 (2001) (\$200,000 awarded where complainant worried about money, had to relocate to find work in his profession, and felt humiliated in front of friends and family.

In addition, the Board has held that the more inherently humiliating and degrading the respondent's action, the more reasonable it is to infer that a person would suffer emotional distress. Smith v. Esicorp., *supra*. Applicable case law also indicates that the award of damages for emotional distress in discharge cases are generally higher than those involving demotions or instances of harassment, *See Webb v. City of West Chester, Ill.*, 813 F.2d 824, 836; McCuisition, *supra*, and that awards tend to be higher when expert testimony addresses the severity of the pain and suffering.

Bhat also relies upon several cases as guidance in awarding the compensatory damages she seeks, citing in particular, Hall v. U.S. Army, Dugway Proving Ground, 1997-SDW-5 (ALJ, 2002); Hobby v. Georgia Power Co., 1990-ERA-30 (ARB Feb. 9, 2001); and Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000). In Hall, the ALJ awarded compensatory damages of \$300,000 for mental anguish and emotional distress and \$50,000 for adverse physical and mental health consequences to a complainant who suffered from "severe stress, sleep disorders, anxiety and symptoms of clinical depression" which adversely impacted Hall and his family.<sup>40</sup>

In Hobby, the Board adopted a compensatory damage award in the amount

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<sup>40</sup> On appeal, the Hall decision was overturned by the Board in a decision which issued after Complainant's brief was filed. *See, Hall v. U.S. Army, Dugway Proving Ground*, 1997-SDW-5 (ARB, Dec. 30, 2004).

of \$250,000 under circumstances which revealed that Hobby, former director of the Edwin I. Hatch Nuclear Information Center at Georgia Power, earned over \$100,000 per year. After his termination, he experienced difficulty finding work in his chosen profession and experienced emotional distress tied to his depleted finances, repeated requests of friends and family for money, and the obligation to inform those responsible for his professional development that he had been fired from his job with Georgia Power. In terminating Hobby, Georgia Power severely damaged his reputation and his very promising career.

In Berkman, the Board affirmed the ALJ's award of \$70,000 in compensatory damages premised upon Berkman's clinical diagnosis of major depression and the severity of the impact of the Academy's actions on his personality. Board also affirmed the separate award in "remuneration for the cost of obtaining medical treatment and medications for his diagnosed major depression caused by Respondent's wrongful conduct." Before the agency's actions, Berkman was "very outgoing and just bubbling with enthusiasm," but subsequently, he was "obviously stressed out." The complainant also suffered anxiety attacks, which were treated with Prozac and other anti-anxiety medications. Two physicians testified that he suffered from depression and anxiety. Based on this evidence, the Board affirmed the award of \$70,000 for the anxiety, personality changes, and the exacerbated depression the complainant suffered. The Board also awarded complainant the costs of obtaining medical treatment and medications for his diagnosed major depression.

Bhat argues that a comparison of the damages in Berkman with her case is striking, although her damages, she believes, are more severe and warrant a larger award. As in Berkman, the record establishes that Bhat's predisposition toward depression was triggered by Respondent's retaliatory treatment. Like the complainant in Berkman, Bhat also went on medication and frequent psychotherapy to treat her depression after WASA fired her.

While the foregoing cases provide valuable guidance in assessing damages, aspects of the circumstances presented in this record are distinguishable from the precedents. Bhat's situation, for example, would not warrant the magnitude of the damage awards entered in Hall, Hobby, or Berkman. For example, the record establishes that she has suffered mental anguish and emotional distress that has impacted her personal and family life, but unlike Berkman, the record here shows that Bhat elected not to take the full dose of medication deemed efficacious and prescribed her doctor. In addition, she was able

to participate vigorously and actively in her legal affairs and as an advocate on water quality issues, and is clearly not debilitated.

Considering the evidence in the record viewed in its entirety and in light of applicable appellate guidance, I conclude that compensatory damages in the mid-range of past awards in the amount of \$50,000.00 adequately and fairly compensates Complainant for the mental anguish, pain and suffering, embarrassment, humiliation, and impairment of her professional reputation as demonstrated on this record. A greater award would appear excessive under these circumstances, and less would be unfair in light of the the pain and suffering she clearly experienced.

Finally, Bhat requests interest on all awards, however, interest is not awardable on compensatory damages. Blackburn v. Metric Constructors, Inc., *supra*; Smith v. Littenberg, *supra*; Creekmore v. ABB Power Systems Energy Services, Inc., 93-ERA-24 (Dep. Sec'y Feb. 14, 1996).

#### Out-of-Pocket Medical Expenses

##### Related Medical Expenses

It is well settled that a complainant may recover the out-of-pocket costs for medical treatment and medications related to the emotional upset caused by a respondent's wrongful conduct. Doyle v. Hydro Nuclear Services, 89-ERA-22 (ARB Sept. 6, 1996), Fabricius v. Town of Braintree/Park Dept., 1997-CAA-14 (ARB Feb. 9, 1999). Bhat thus submitted, post-termination, out-of-pocket medical expenses, including costs for visits to psychiatrists and costs of prescription drugs from the date of her discharge until the time of the hearing. These costs include: Medical Doctors: 3/24/03: \$145.00 (Patuxent); 4/29/03: \$175.00 (El Kholy); 4/30/03: \$60.00 (Patuxent); 5/6/03: \$125.00 (El Kholy); 6/3/03: \$125.00 (El Kholy); 6/24/03: \$170.00 (Patuxent); 7/17/03: \$125.00 (El Kholy); 11/13/03: \$80.00 (Hyman); 11/17/03 \$125.00 (Patuxent); 12/08/03 \$70.00 (Patuxent); 12/17/03 \$80.00 (Hyman); 1/19/04 \$80.00 (Hyman); 2/16/04 \$80.00 (Hyman); 2/16/04 \$125.00 (Holzman): totaling \$1,565. Her related medications allegedly included: 12/20/03: \$7.50, Lexapro (depression); 2/24/04: \$186.99, Effexor (depression); \$73.99, Lexapro (depression); 2/25/04, \$109.08, Fluoxetine (depression); 2/25/04; \$36.99, Lisinopril (high blood pressure); totaling \$414.55. She may recover for her injury-related medical expenses and her antidepressant medications up to the date of her reinstatement.

## Unrelated Medical Expenses

Bhat also alleges that her symptoms of diabetes and high blood pressure are also due to the emotional distress caused by her discharge from WASA, and notes that Dr. El-Kholy's diagnostic impressions included major depression, high cholesterol, and diabetes mellitus. Dr. El-Kholy reported that Bhat was on Megamorphin, 500 mg. p.o.b.i.d. for increase sugar in blood, and Lisinopril, 10.0 mg. p.o.q.d. for high blood pressure. Yet, the evidence Bhat cites fails to explain or establish the etiology of her high blood pressure or her diabetes.

The mere diagnosis of a condition in a physician's report, and the use of medication to cure or control symptoms of the condition, provide no evidentiary link to the underlying etiology of the ailment. Unlike McQuiston, *supra*, where evidence was adduced which related blood pressure to job stress, neither Dr. Bensinger nor Dr. Hyman attributed Bhat's high blood pressure or diabetes to her termination, and Dr. El-Kholy specifically withdrew those portions of her letter that discussed these conditions as matters about which she had no direct knowledge. Under these circumstances, recovery is not available for Bhat's diabetes and high blood pressure treatment or medications.

## Future Medical Expenses

As of February 16, 2004, the last time Bhat was seen by her psychiatrist before her testimony at the hearing, her prognosis was mixed, in that she had good and bad days and still experienced depression related to her termination from WASA and was required to take medications to control it. Bhat argues her out-of-pocket medical expenses can be expected to continue for some time, "particularly as she remains out of work, which her doctors testified was a primary source of her depression." Since she will be back at work as a consequence of the order herein entered, her health benefits will be restored in the future.

## Exemplary Damages

Under the SDWA, 300j-9(i)(2)(B)(ii)(IV), exemplary damages, where appropriate, are specifically authorized. In this instance, Bhat believes that the amount of exemplary damages should be set at no less than \$300,000. We shall examine her request in light of the applicable case law.

In Johnson v. Old Dominion Security, 86-CAA-3, 4 and 5 (Sec. 1991) (a pretext case), the Secretary determined that exemplary damages may be imposed if: (1) the wrongdoer demonstrated reckless or callous indifference to the legally protected rights of others; and (2) the wrongdoer engaged in conscious action in deliberate disregard of those rights. Smith v. Wade, 461 U.S. 30, 56 (1983). In Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 534 (1999), the Supreme Court noted that punitive damages are available when the employer discriminated "... in the face of a perceived risk that its actions will violate federal law...." *Id.* The amount of the award should be sufficient to punish and deter the reprehensible conduct. BMW v. Gore, 517 U.S. 559 (1996). The factors weighed in determining whether punitive damages should be awarded and in what amount, include: (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the respondent's actions; and (3) the sanctions imposed in other cases for comparable misconduct. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 523 U.S. 424, 434-35 (2001).

In the administrative arena, the Board has adopted a three-step analysis: (1) whether the applicable Act provides such relief; (2) whether the complainant has adduced evidence of the requisite state of mind (i.e., intent and resolve actually to take action to effect harm); and (3) whether complainant has demonstrated the purposes of the statute cannot be served without resort to punitive measures. Jones v. EG&G Defense Materials, Inc., 1995-CAA-3 (ARB Sept. 29, 1998). As a caveat to its methodology, the Board in Jones noted that mere indifference to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind necessary to support an award of exemplary damages, Johnson v. Old Dominion Security, 1986-CAA-345 (Sec. May 29, 1991); and even where a complainant demonstrates the existence of factors authorizing the award of punitive damages, the decision to do so is purely discretionary, and favorable discretion should not be exercised if there are other means to obtain statutory objectives. Jones v. EG & G Defense Materials, Inc., 1995-CAA-3, n. 20 (ARB Sept. 29, 1998).

Bhat bases her exemplary damage demands on several factors. She contends that WASA has a proven record of indifference towards health, safety, and water quality violations and has demonstrated hostility toward employees who reported such issues. In support of these charges, she relies upon a report by the D.C. Inspector General, alleging that WASA engaged in retaliatory or hostile treatment of employees who came forward with health and safety concerns, and demonstrated "reckless indifference to its employees' right to have potable water...." In Bhat's view, exemplary damages should be awarded to prevent other

employees from being singled out for similar treatment such as Bhat suffered. Finally, she distinguishes cases in which exemplary damages were denied on the ground that the conduct which caused the violation was “largely in the nature of omission.” *See, e.g., Johnson, supra* at 17.

WASA refutes Bhat’s contentions and denies she is entitled to exemplary damages. It argues that Bhat has failed to adduce any evidence that WASA knowingly singled her out for adverse treatment because she had engaged in whistleblower activity. It emphasizes that Bhat’s job was to maintain ongoing communication with federal and state regulatory authorities regarding WASA’s clean water programs and compliance activities, and she was not removed after WASA management learned of her July 30, 2002 email to the EPA. She continued to perform her regulatory functions and actively participated on WASA’s management team in crafting corrective actions to the lead exceedance problem. WASA, moreover, finds nothing reprehensible about its decision to terminate Bhat based, it claims, on her record of unsatisfactory performance and the antipathy she exhibited toward her immediate supervisor over the two-year period prior to the date of the alleged protected activity.

For guidance in determining whether punitive damages should be awarded and, if so, in what amount, we again turn to the case law. In Ruud v. Westinghouse Hanford Co., 1988-ERA-33 (ALJ Dec. 8, 1998), the ALJ recommended exemplary damages of \$12,500, based on a comparison with other cases. In Sayre v. Alyeska Pipeline Service Co., 1997-TSC-6 (ALJ May 18, 1999), a “moderated” award of \$5,000 was entered because the respondent’s alleged statements concerning future discrimination were unclear and because of the mitigating fact that complainant was eventually rehired. In Jones v. EG & G Defense Materials, Inc., 1995-CAA-3 (ARB Sept. 29, 1998), complainant sought \$150,000 in exemplary damages. The ARB found that no exemplary damage award was warranted, because “mere indifference” to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind for an award of exemplary damages.

Similarly, in White v. The Osage Tribal Council, 95-SDW-1 (ARB Aug. 8, 1997), the tribal council for the Osage Nation discharged an environmental inspector with responsibility for monitoring and reporting on Respondent’s compliance with certain provisions of the SDWA. The ALJ recommended an award of \$60,000 in punitive damages, but the Board reversed and declined to award any punitive damages because the respondent “was wrongly operating under the assumption that it was not subject to the employee protection provisions of the SDWA.” The Board concluded that the respondent was “now on notice that it must

comply," and the Board expected future compliance. Thus, it ruled that punitive damages were not necessary to deter further violations by the Osage Nation.

The situation at WASA, however, does not instill the same measure of confidence in future compliance that the Board reposed in the Osage Nation. In 2000, the D.C. Inspector General found that WASA employees were reluctant to discuss safety and health issues for fear of retaliation and concerns that any effort to bring such issues to management's attention would be futile; and more recently, WASA was found in violation of the whistleblower provisions of the Clean Air Act and the SDWA for retaliatory action against another employee in Bobreski v. D.C. Water and Sewer Authority, 2001 CAA 6 (ALJ July 11, 2005).<sup>41</sup>

Having considered the Board's tripartite test and the level of exemplary damages awarded in other cases, I find and conclude that: (1) the applicable statute provides for exemplary damages; (2) WASA discriminated against Bhat and caused her damage when it terminated her notwithstanding the knowledge of its senior management that she was not accorded the benefits a proper PIP and thereafter was subjected to a discriminatory termination; and (3) the purposes of the statute most likely cannot, in light of other similar violations by Respondent WASA, be served without punitive damages. Accordingly, in the absence of the mitigating factors the Board considered in Sayre, I conclude here that exemplary damages in the amount of \$10,000.00 are necessary in the public interest to serve adequately to signal Respondent that its future compliance with the statute in the public interest is also consistent with its own pecuniary interests.

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<sup>41</sup> On August 24, 2005, Complainant moved to re-open the record and re-moved the admission of OSHA's determination letter in the Bobreski case which had been marked as CX 125 and excluded as an exhibit at the hearing. WASA opposed the motion arguing that the Bobreski decision is interlocutory and not yet subject to appeal, and further Bobreski involved different supervisors and therefore circumstances distinguishable from Bhat's situation. Since extraordinary justification does not exist to reopen the record, Complainant's motion is hereby denied. Judge Alice Craft's decision in Bobreski, however, is a published decision which may be cited as an adjudicated disposition on the merits of the violations charged in the complaint in that case. It is an interlocutory decision only to the extent that it was bifurcated on the issues of relief. Indeed the court's have recognized decisions of the Secretary and the ARB finding violations notwithstanding the appealability of those decisions. *See, e.g., Yellow Freight Systems v. Martin*, 983 F.2d 1195 (2nd Cir. 1993) at fn. 1; *see also, OFCCP v. Yellow Freight Systems, Inc.*, 1989-OFC-40 (ALJ May 17, 1994) at 34. Further, the fact that Bobreski involved different supervisors does not render Judge Craft's decision inapposite for purposes of evaluating the justification for exemplary damages. WASA may not so easily separate itself from the decisions of those it places in supervisory capacities. Further, as noted above, the test is not whether Complainant has established under Fed R Evid. 406, as WASA insists she must, that it is WASA's routine practice or habit to discriminate against whistleblowers. The ARB in Jones v. EG&G Defense Materials, Inc., *supra*, articulated the applicable exemplary damage criteria, and the Bobreski decision is one factor indicating that the criteria set forth in Jones have been satisfied.

## Attorney Fees and Costs

Under the SDWA, a prevailing party is entitled to recover attorney fees and litigation expenses and costs. 42 USC §6971. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Gutierrez v. Univ. of California, 98-ERA-19 (ARB 2002). Accordingly, Complainant's attorneys will be afforded an opportunity to submit an application for fees, together with supporting data, including, *inter alia*, their professional qualifications, an itemization of the hours expended on complainant's behalf in this case, and their hourly billing rate. DeFord, *supra* (Sec. June 30, 1982). Therefore:

### ORDER

IT IS ORDERED that the District of Columbia Water and Sewer Authority forthwith reinstate Seema Bhat to her former position as a Director of the Water Quality Division or to a comparable position, with full back pay and benefits, and with interest commencing March 5, 2003, to date and continuing until she is reinstated, and;

IT IS FURTHER ORDERED that the District of Columbia Water and Sewer Authority pay to Seema Bhat the sum of \$50,000.00 in compensatory damages, and further pay her out-of-pocket medical expenses and prescription costs related to her mental and emotional condition, and the out-of-pocket expenses she incurred to replace medical, dental, and vision healthcare insurance benefits lost due to the termination, and;

IT IS FURTHER ORDERED that Respondent pay to Seema Bhat the sum of \$10,000.00 in exemplary damages.

**A**

Stuart A. Levin  
Administrative Law Judge

## **APPENDIX A**

### **FINDINGS OF FACT**

#### **BACKGROUND**

1. Respondent, the District of Columbia Water and Sewer Authority, (WASA), is an independent authority of the District of Columbia, created by the Water and Sewer Authority Establishment and Department of Public Works Reorganization Act of 1996, and the federal enactment of the District of Columbia Water and Sewer Authority Act, 110 Stat. 1696 (1996). WASA replaced the District of Columbia Water and Sewer Utility Administration, formerly a subdivision of the District of Columbia Department of Public Works. WASA provides water to the District and sewer services to the residents of the greater Washington metropolitan area.

2. Jerry Johnson is the General Manager of WASA. Tr. 1751-1785. Michael Marcotte is WASA's Chief Engineer and Deputy General Manager. Marcotte supervises all technical operations at WASA, including the Water Services Department. Tr. 1312-1571. Since August 2000, the Director of Water Services has been Kofi Boateng. Tr. 1005-1240, 1792-1793. WASA's Director of Human Resources is Barbara Grier; she reports to Johnson through the Interim Assistant General Manager. Tr. 1585-1728.

3. The Water Quality Division is one of five divisions within WASA's Department of Water Services. WASA created and solicited candidates for the position of Water Quality Manager in early 1999. At that time, Seema Bhat was a lead chemist in the laboratory at the WA water treatment facility operated by the U.S. Army Corps of Engineers ("USACE"). Tr. 1886-1887.

4. Complainant, Seema Bhat, came to the United States from India in 1977. She earned a Master's Degree in analytical chemistry at University of Maryland. Tr. 83, and began working in the water quality industry in 1991 as a chemist for the Army Corps of Engineers, Washington Aqueduct (WA), a supplier of water to WASA. Tr. 83-84.

5. Bhat was selected for the position of Water Quality Manager and began employment with WASA on March 29, 1999. Tr. 84, 1879, 1883-1884. When Bhat joined WASA, she was supervised by Melvin Lewis for approximately six months. Tr. 95. For the next eight months, Michael Marcotte, Deputy General Manager, was Bhat's direct supervisor. Tr. 1318. From August, 2000, until the time Bhat was discharged from WASA, Kofi Boateng, Director of the Department of Water Services (DWS), was Bhat's supervisor. Marcotte was Boateng's supervisor, and Jerry Johnson, WASA's General Manager, was Marcotte's supervisor. Tr. 95-96.

6. Bhat's role at WASA was, in large part, to promote compliance with the water quality requirements of the Safe Drinking Water Act, 42 U.S.C. 300j-9; Tr. 87-89; CX3. Marcotte explained that her hiring "marked a specific emphasis on the water quality issue I think that had not been prevalent in WASA to that point." Tr. 1318.

7. Before Boateng joined WASA, Bhat recommended to Marcotte moving the Water Quality Division out of the Department of Water Services and giving it more independence under the Board of Directors, the general manager, or the deputy general manager. Tr. 545-546; 1568-1569. WASA did not adopt her recommendation.

8. The job description for WASA's Water Quality Manager included interaction: "with other units and agencies within and outside WASA in developing and coordinating water quality programs." CX 3. Among the essential duties and responsibilities listed in the job description were the planning and management of water quality parameters to achieve compliance with the SDWA, and management of the lead monitoring program, pursuant to the Environmental Protection Agency's Lead and Copper Rule. 40 C.F.R. § 141.80, *et seq.* The manager was expected to have regular communications with the EPA and the D.C. Department of Health (DCDH). Tr. 1318-1319.

9. The Lead and Copper Rule (LCR) governs the methods and procedures for monitoring lead levels in the District's water supply. The LCR provides that if test results on the water distribution system exceed the Lead Action Level ("LAL") for a given monitoring period, the system is required to take corrective action to reduce lead levels in the water. CX 4.

10. Bhat's role regarding lead and copper monitoring was to implement, monitor and direct a program under 40 C.F.R. Section 141.80, an EPA regulation regarding the control of lead and copper. Tr. 97; CX4. She explained that LAL under this regulation was 15 parts per billion, or "ppb," for the 90th percentile sample. *Id.* Bhat testified: "What that means basically is that if 100 sites as established by the EPA criteria are sampled, no more than 10 samples in those 100 sites should come out more than [the] 15 ppb lead level." CX4; Tr. 97-98. The LAL is exceeded if the concentration of lead in more than 10% of the tap water samples properly collected during any given monitoring period is greater than 15 ppb. Stated differently, the LAL is exceeded when the "90<sup>th</sup> percentile" of all lead sample tests is at a level greater than 15 ppb. CX4. Bhat explained: "... in the specific case of WASA, if we had 50 samples, the 90th percentile will be .9 multiplied by 50, that is the 45th sample and the 45th sample should not have lead action level greater than 15 ppb..., and if it does, we are exceeded. It is below 15 ppb, we are within compliance." Tr. 97-98. The LCR requires that lead monitoring samples be taken during the warm weather months of July, August, September and the following June because warmer temperatures contribute to the maximum level of lead solubility in water. CX 4.

11. If a utility exceeds the 15 ppb LAL, the required corrective actions include implementation of a public notification campaign, replacement of seven percent of the utility's lead service lines each year, and if it is on reduced monitoring, it must return to standard monitoring. CX4; Tr. 97-98.

12. At the direction of her first supervisor, Bhat, in 1999, applied to EPA for reduced lead-copper monitoring status for WASA beginning with the 2000-2001 monitoring year. CX5; Tr. 100. Because WASA had favorable results for a number of years before 1999, the EPA approved reduced monitoring. CX127. This schedule permitted WASA to reduce the number of approved volunteer sites tested from 100 sites every six months to 50 every 12 months. Bhat

testified that “no more than 10 percent of the samples that are tested should ... have greater than 15 ppb [of lead], and if they do, there is a follow up corrective action that has to be implemented.” CX4; Tr. 97-100.

13. Marcotte and Boateng testified that, within the parameters they defined, they depended on Bhat to keep them informed of issues that impacted upon the water quality programs and provide them with her best judgment and advice on how WASA was to comply with the LCR. Tr. 503-504, 1044, 1081-82, 1319. She attended monthly senior management meetings of the Water Services Department and was expected to report on major developments in her area of responsibility. She submitted monthly water quality reports to General Manager Jerry Johnson, through Boateng, which Johnson relied upon to make water quality reports to the WASA Board of Directors, Tr. 592-596; RX 56, and she provided technical data and analysis of water quality matters for inclusion in WASA’s annual Consumer Confidence Report which was required under the SDWA. Tr. 590-91; RX 51. Bhat clarified, however: “WASA management was just interested in the final results. They did not want any communication regarding any data or they were not interested in any data.... They just were interested in looking at the final reports, and as long as it was in compliance, they were happy and signed it.” Tr. 104-105. She received little guidance from her supervisors, even when she requested it. Tr. 109; 554

14. Bhat “felt that her primary responsibility was for policing water quality and ...the public health and ...water quality came first with [her].” Tr. 520. One colleague, Jacqueline Oliver, who worked with Bhat and attended several meetings weekly with her, testified that Bhat “ate, slept and breathed water quality.” Tr. 746. Another colleague, Martin Wallace, a current WASA manager, testified that Bhat was zealous regarding water quality. Tr. 1293. Boateng agreed that Bhat was “very focused on” and conscientious about water quality issues, Tr. 1086, at times, even “overzealous about water quality.” Tr. 1089.

15. Bhat communicated frequently with the George Rizzo, EPA’s Program Manager for the area including Washington, DC. Tr. 102-103; CX127. She testified that she depended on him for help in understanding EPA’s complex regulations. Tr. 102, 109. She explained, “He was an EPA consultant, and guided me on various projects in which I wanted clarifications, and... explained new programs....” Id. Rizzo did not testify in this proceeding.

16. According to an OSHA record of an interview with Rizzo regarding Bhat’s case, Rizzo had: “an informal relationship with [Ms.] Bhat in which she was free to contact him with questions or to request his input about water quality issues.” CX127. Bhat and Rizzo had a working relationship and authored an article together in 2000. CX6; Tr. 108, 109. The OSHA investigator reported that: “Rizzo’s experiences with [Ms.] Bhat were entirely positive....[Mr.] Rizzo did not have any problems communicating with [Ms.] Bhat.” CX127.

The 2000-2001 Lead Monitoring Period  
July, 2001 Communications

17. At times herein relevant, Elizabeth Turner was the Lab Chief at WA. Bhat regularly received and reviewed data from Turner to ensure that WASA was complying with EPA

regulations. Tr. 87-89, 92-93; CX3. Approximately 15% of Bhat's job entailed monitoring lead and copper levels in the drinking water. Tr. 89. She spent 85 percent of her time on the consumer confidence report, the administration of the corrosion monitoring program, the flushing program, or her administration of the bacteriological and chemical programs. Tr. 94. The corrosion monitoring program impacted the lead levels, because if the drinking water is chemically corrosive, lead from service lines may "leach" into the water. Tr. 91. Bhat explained lead leaching as follows: "[C]orrosive water that is acidic or that is unclean and it is bacteria floating on it, passes through pipes made of lead or lead/copper solder, they eat up or leach the lead in the pipes and that lead gets into the water and into the people's drinking water." Tr. 92-93.

18. On July 10, 2001, Bhat learned from Turner at WA that seven Washington DC properties showed high lead levels, in excess of EPA limits, for samples obtained in June, 2001, the last month of the 2000-2001 monitoring period. CX9; Tr. 127. Bhat emailed Turner on July 17, 2001, (CX9) regarding Bhat's investigation of those high results through re-testing, re-sampling and quality control, which was necessary because the high results in some instances were inconsistent with prior data she had from some of the same properties. Id.; see CX14. Seven high lead properties represented an increase over the prior testing period when only two properties had high lead levels. Id.; CX10. Bhat believed WASA would not meet the LAL for 2000-2001 if the high lead results in July, 2001, were investigated and confirmed. Id.; CX10.

19. On July 17, 2001, the same date that Bhat wrote to Turner regarding her investigation into the high results, Bhat wrote to Boateng and Marcotte reporting a total of nine high lead results. Bhat reported:

This means that we will:

Not be in compliance with the 15ppb action level for lead in drinking water.

Have to go to standard (increased) monitoring and

Have to deliver public education program [sic] per 40 CFR 141.85

Unless on investigation it is found that the high lead samples meet sample invalidation criteria which may put us in compliance.

I am currently investigating into the lead results above the action limit. Also we are simultaneously sampling at the meter to determine the contribution of the service line to the lead concentration. Under federal law we are required to replace the lead service line that we control if the line contributes to lead concentration of more than 15 ppb after the corrosion control program is in place.

I will keep you informed. CX 10.

20. Along with this email, Bhat forwarded to Boateng and Marcotte her email to Turner regarding her investigation of the seven high lead results from June, 2001. CX 10. Boateng acknowledged that he knew from Bhat's July 17, 2001, email (CX10) that WASA had high lead levels and that WASA was close to exceeding the LAL for 2000-2001, Tr. 1072, and he asked her to keep him informed. Tr. 1053,1072, 1074, 1082.

21. Marcotte also was aware that WASA was close to exceeding the LAL in summer 2001, Tr. 1440; RX9, although he did not read the data attached to Bhat's email. Tr. 1442. He acknowledged that Bhat's email made him aware of the consequences of exceeding the LAL. Id. Bhat had not previously reported data regarding the LAL in 2000-2001, to Boateng, and Marcotte felt that Bhat was putting out an "early warning" in her July 17, 2001, email regarding the LAL. He appreciated her feedback, Tr. 1442, and was pleased with Bhat's handling of the likely LAL exceedance reporting for 2000-2001. Tr. 1443. Marcotte felt no great concern, because within a few weeks, he received a report that WASA did not exceed the LAL. Tr. 1440, 1444.

22. As of July 17, 2001, when Bhat wrote to Boateng and Marcotte reporting the likely LAL exceedance, she "had not had the opportunity to look at all of the monitoring results," but she "felt it was important to alert Mr. Boateng and Marcotte ... about the possibility of exceeding high levels." Tr. 1861-1862. Ultimately, after reviewing the complete data, Bhat testified that she consulted with Rizzo and determined that she had ample, valid low lead results available from approved sample sites and was only required to report two of the seven high lead results from June, 2001, CX10, as part of WASA's official lead monitoring results. Tr. 129, 138-139, 1861. Bhat testified that she believed WASA was only required to report two of the seven high lead results from June, 2001, to the EPA, because the other five high lead samples listed on July 17, 2001, were "backup" samples not in the original list of approved sampling sites submitted to the EPA for the monitoring period 2000-2001 or valid substitutions. Tr.138-139, 1861.

23. As of July 17, 2001, Bhat believed she might need to use these five backup sites, because after initially reviewing the fall 2000 results, she was missing samples from approved locations where volunteers failed to submit proper data. Tr.1861; see CX154-155, 157-159; see generally Tr. 1819-1866. She ordered backup samples analyzed in case she did not have data from 50 approved regulatory sample sites. Id. Bhat testified, "[A]fter I looked at [the data], I realized that we had enough samples from the 50 original ... sites from the ... original sample list, and we did not have to use the backup samples." Tr. 1862.

#### 2000-2001 LAL Report to EPA

24. On August 6, 2001, WASA reported to the EPA a total of four high lead results for the 2000-2001, monitoring period; two from the fall of 2000, and two from June, 2001. This was one below the five-high-results maximum. CX17; Tr. 143-144. Thus, WASA believed it was not immediately required to implement any compliance measures. Id.; CX127. Rizzo, in his OSHA statement: "recalled that WASA's lead and copper tests for 2001 were very close to the EPA

standard of 15 parts per billion. EPA does not require any action on the part of a supplier, nor does it take any action until such time as it exceeds the” 15 ppb LAL. CX127.

25. Bhat initialed an August 6, 2001 report (CX17) and took it to Boateng’s office on that date. Tr. 144-145. Bhat provided Boateng with all of the lead data for 2000-2001, and explained how WASA had narrowly missed exceeding the LAL. Tr. 1865; CX18. She testified:

I discussed with [Mr. Boateng] the [lead/copper monitoring] results, and at that time I briefed him on ... what had happened in our investigation and the invalidation of the results ...in concurrence with Mr. Rizzo, and also talked to him that ... the results ... showed that we barely missed the lead action level and so we have to take more proactive steps so that we have almost a year now to take proactive steps so that we are not in the same position for next year....Proactive steps in the sense that there were a lot of actions that WASA can take ....[T]hey can evaluate the water chemistry and phosphates to the water and look -- revisit the pH of the water and correspond with Washington Aqueduct to increase the pH which only Mr. Marcotte ...had the authority. ...I informed Mr. Boateng that these are the steps that we could take to...see that we decrease the lead levels in the water, and we do not come under the same situation next year regarding the lead leaching. Tr. 144-145.

26. Boateng initialed the August 6, 2001 document and sent it forward to Marcotte. Id.; Tr. 1081. Boateng acknowledged that the report he signed indicated that WASA was very close to exceeding the LAL on the first and second draws. Tr. 1081.

27. Marcotte signed the final August 6, 2001, report, CX17, without comment to Bhat regarding its contents. Tr. 149. In his view, the August 6, 2001, letter reflected “no particular level of concern” because WASA was “fully in compliance.” Tr. 1332. He did not review the note of the samples annotated in the report, Tr. 1337, 1444, and he spent “a minute or two” reviewing the EPA report before signing it. Tr. 1445. Marcotte regrets not looking at this report more closely because the data made it clear “how close a margin there was.” Tr. 1445, 1567.

#### The 2001-2002 Lead Monitoring Period

28. Boateng did not followed-up with Bhat to discuss the July 17, 2001, email or otherwise to discuss lead and copper monitoring. Tr. 1073-1074. Boateng testified that he never specifically requested Bhat to provide any particular data regarding lead and copper regulatory monitoring results between July 17, 2001, and July 30, 2002, Tr. 1073, and further testified that it was not necessary for Bhat to send him the full printouts of data on lead and

copper monitoring on a regular basis. Tr. 1074. He could not recall ever asking Bhat about lead results where she failed to answer him. Tr. 1073.

29. In August 2001, immediately after the completion of the 2000-2001 lead regulatory monitoring year, Bhat, in conjunction with her technician Jerome Krough, continued to investigate the apparent spike in lead data first revealed in Turner's July 10, 2001, email. Tr. 154-157; CX19-20. The email Bhat received August 7, 2001, from Turner (CX19) included regulatory samples for 2001-2002, investigations of 2000-2001 samples, and internal, drinking fountain (i.e., non-regulatory) lead data. Tr. 155-156. Bhat testified:

I was conducting an investigation and research going further into ... each of these sites, I was looking at the customer, the customer sample, the sample in WASA service line as well as the WASA hydrant in order to find out ... where exactly the lead was coming from because these were historical sites, and it was the first time in 2000-2001 we had observed that these sites were high. [The] same sites could be used for the 2001-2002 monitoring if my investigation showed that there was no unusual situation....such as construction work in the area or major water repair in the area which would lead to the disturbance of the distribution system and cause [a] temporary high lead situation. So if none of these were the case, I could apply [the new high lead sites] for the 2001 and 2002 monitoring, but still it was not determined at this stage whether these samples were -- could be applied for the regulatory or could not be applied for the regulatory monitoring.

30. During her investigation, Bhat did not forward the complete August, 2001, high lead investigation data to WASA management; she never forwarded raw data to her supervisors, and she had never been asked to do so. Tr. 157. She did, however, advise Boateng about the status of her investigation. Tr. 158, 165; see also Tr. 163-164; 517.

31. Bhat testified that her division's focus shifted away from lead monitoring following the September 11, 2001, terrorist attacks, in that: "most of the programs were shifted to monitoring of ... reservoirs and so [the] focus was changed to monitoring of water, water tanks and reservoirs and for a brief period." Tr.163. September, 2001, also coincided with the end of the first part of the 2001-2002 monitoring period which resumed in June, 2002. Tr. 163.

32. Bhat recalled a discussion she had with Boateng about high lead levels in late November, 2001, after she received a visit from Rizzo of the EPA. Tr. 158-160. According to Bhat, Rizzo visited her as part of extensive security checks of reservoirs and water tanks in the aftermath of September 11, 2001, and they discussed high lead levels. Bhat testified:

[Mr. Rizzo] inquired about the lead results, and I gave him a general status and also showed him the results at that time.

[A]fter that, I called Mr. Boateng and briefed him on the EPA visit to Fort Reno [a facility where Ms. Bhat's office was located as of November 2001], and that they had visited all the Reno tanks and reservoirs as well as Mr. Rizzo had been to my office and I had shared the ... lead detail with him and kept him abreast on the status of our monitoring....

As I had done before, I had told [Mr. Boateng] that we were still in the investigation phase but ... my talks with the water control room ..., which looked into the construction at various sites as well as what were being replaced, did not indicate that there was any unusual situation at these sites, and these sites may apply to the regulatory [reporting.] [I]n that case, we were having high lead results, and that mean[t] that we had to implement the follow up actions that I had discussed with [Mr. Boateng] in August of 2001, and we had to take proactive steps as -- look into alternate chemical treatment, increase our pH and also lead [line] replacement policy. Tr. 158-160.

33. Bhat testified that she deferred action on the high lead results in late 2001, because EPA advised her that there were no actions to take prior to the end of the period when the follow-up corrective actions would be triggered. Tr. 713. Marcotte agreed with Bhat's assessment of EPA's advice. Tr. 1418. Rizzo's statements to the OSHA investigator were consistent with Bhat's recollections: "EPA does not require any action on the part of a supplier, nor does it take action until such time as [the supplier] exceeds" the 15 ppb LAL. CX127. The OSHA investigation report stated: "Sometime in the fall of 2001 [Ms.] Bhat communicated with [Mr.] Rizzo that she thought that WASA was going to exceed the LAL, but they would not have the final results until 2002. [Ms.] Bhat was trying to keep [Mr.] Rizzo apprized of the lead content levels so that [Mr.] Rizzo could tell WASA what it was going to need to do if it in fact exceeded the LAL level." CX127.

#### February 2002 Communications

34. Bhat compiled information for Boateng regarding the developing 2001-2002 lead monitoring data and her investigation of the high results which she planned to discuss with him at a meeting they had scheduled on February 8, 2002. Tr. 179. Boateng cancelled the February 8, 2002, meeting. Bhat recalled, however, that she spoke to Boateng briefly about the lead results on February 7, 2002, in preparation for the February 8 meeting. Tr. 179-180, 187.

35. On February 22, 2002, Bhat discussed high regulatory lead results she was receiving with Boateng. Tr. 191, 568-569. She testified that she told Boateng that if her investigation validated the lead results, then WASA would exceed the LAL. Tr. 568, 569. *See also* Tr. 191. Bhat told Boateng that the follow-up actions after the LAL exceedance were spelled out by the EPA. Tr. 568. She did not provide Boateng individual results because he "had said he did not ... want raw data. He wanted a gist of analysis," which Bhat gave him. Tr. 568-569.

## March 2002 Communications

36. On March 5, 2002, Boateng sent Bhat an email entitled “Cu/Pb Sampling Results,” saying “Please let me ASAP [sic] the status of these samples.” CX25. It is undisputed that Boateng was referring only to the in-house lead/copper sampling, from employees’ drinking fountains, and not to regulatory lead data. Tr. 201-202. Bhat testified that on March 5, 2002, Boateng had also called her regarding the in-house lead results, not the regulatory lead results. Tr. 192-194, 201-202.

37. On March 11, 2002, Boateng visited Bhat at the Fort Reno facility. Tr. 193. At that time, Bhat gave him the in-house lead results and told him that she was developing a memo regarding the partial results from regulatory lead monitoring for 2001-2002. Id., 203. Bhat testified that she advised Boateng of the likely consequence of the high lead results she was receiving and that WASA would have to implement follow-up corrective actions and return to increased monitoring by the EPA. Id.

38. Bhat also provided Boateng data on approximately 11 or 12 volunteers with high lead results that were analyzed up to the end of August, 2001. Tr. 195, 214, 570. She showed Boateng information including graphs of the historical pH, suggesting that the pH was lower when lead was leaching in August 2001, and that WA should consider raising the water pH to avoid leaching. Tr. 572. Bhat mentioned that WASA should investigate how the addition of polyphosphates might impact the increasing lead levels. Id. In their March 11, 2002 discussion, Bhat testified that Boateng did not comment on her references to the regulatory lead data. Tr. 194-195.

39. Bhat testified that after her discussion with Boateng on March 11, 2002, she began drafting the memo she promised him regarding the complete regulatory lead data and the likely LAL exceedance. Tr. 195. She reviewed the July and August, 2001, data for the sites submitted to Rizzo as the 2001-2002 regulatory monitoring sites and sought to make a list by which she would calculate the 90<sup>th</sup> percentile lead result for 2001-2002. Tr. 196. On March 12, 2002, she allegedly sent Boateng an email, “2001-2002 Lead results,” requesting feedback from him and advising him that she was calling customers with high lead to find out if they had installed water softeners. CX26; Tr. 203-06. Boateng testified that the first time he saw the March 12, 2002 email was at the hearing, Tr. 1058, however, the email was an exhibit at his deposition. Tr. 204.

40. On March 14, 2002, Bhat met with Lallis Everest, WASA’s Safety Director, who was preparing a presentation for the WASA Board of Directors primarily about in-house lead levels, but also about regulatory lead-copper monitoring. Tr. 209-212; CX29. Bhat told Everest about the regulatory lead data in 2001-2002 and that WASA “had considerably high lead levels for the monitoring period.” Tr. 211. Bhat testified she repeated her conversation with Everest to Boateng, including the discussion of the high regulatory lead levels. Tr. 211-212.

41. Boateng called and sent an email to Bhat on March 19, 2002, requesting lead and copper test results. Tr. 197. Bhat confirmed that he did not want the regulatory lead data,

only the internal, drinking fountain lead results: "I'm referring," he stated, "only to the fountain tests." Id.; CX 30.

42. On or before March 19, 2002, Bhat asked Turner to send her all of the monitoring results for the 2001-2002 monitoring period. Tr. 213. Turner sent Bhat the regulatory lead results along with other lead results on March 19, 2002, (CX31), and Bhat highlighted all the high lead results so that they were easily noticed "when scanning through the data." Id. She planned to provide Rizzo and Boateng this highlighted data to show them that the results "were genuine high samples." Id. She testified that she had already shown Boateng some of this same data during their March 11, 2002 meeting. Tr. 214-215. She attached electronic versions of the highlighted data she received from Turner on March 19, 2002, to an email she sent to Rizzo on March 21, 2002, and allegedly, to Boateng on the same date. Tr. 215, citing CX33-34.

43. The email allegedly sent to Boateng on March 21, 2002, stated: "I am very much concerned that with the high lead results [17 samples] so far it may not be possible to meet the 0.015 mg/l lead action level. I have highlighted the high lead results in the attachment." CX33; Tr. 219. The email also noted, "We may luck out. However the samples with high lead concentration are greater this monitoring period and it is improbable that they may be invalidated. We will be able to resume sampling testing again in June 2002. I will inquire of Mr. Rizzo regarding follow-up action if we exceed the action level." CX33. The email then explained Bhat's understanding of the significant regulatory compliance measures required after a utility exceeds the LAL. Id. Boateng did not respond to Bhat's March 21, 2002 email. Tr. 222.

44. Bhat wrote in her journal March 21, 2002: "Send results Kofi-Marcotte and Rizzo." RX109. WASA employed an expert to examine Bhat's journal. The expert report opined that two pens were used on that page of Bhat's journal, and that the ink used in the phrase "Send results..." was applied later. RX109. The expert's report gives no indication how much later the ink was added. It could have been added within moments, or later the same day. Bhat explained that she wrote frequently with different pens and at different times of day in her journal, i.e., that one entry may have been composed in several sittings.

45. The email Bhat sent to Rizzo, attached the highlighted data, and indicated that there were 17 regulatory samples showing high lead to date and "it may not be possible to meet the below .015 mg/l of lead action level." CX34; Tr. 221.

46. Bhat testified that although the emails regarding lead monitoring for the 2001-2002 period were sent one immediately after the other at 12:34 p.m. on March 21, 2002, they were not both composed at this time. Tr. 215-216, 222. The emails were drafted separately as Word documents and in draft Lotus Notes emails. Id. Bhat claims both emails were already written, so she only needed to cut and paste them into blank emails and send them. Id. Bhat initially testified that she thought she may have inadvertently sent Rizzo and Boateng emails with different data summaries, i.e., 39 samples versus 37 samples tested. Tr. 730-732.

47. Bhat did not include the "We may luck out..." discussion in Rizzo's email because she felt it was an "internal talk" and she "did not feel that it was necessary to express

that to Mr. Rizzo.” Tr. 222. Rizzo responded to the email by thanking Bhat and telling her he would look at it the following week. CX35; Tr. 222-223. Ultimately, Rizzo responded by saying that Bhat had to wait to begin implementing corrective actions because the “monitoring was not complete yet and I had to wait until the end of the monitoring period for him to come down, analyze and suggest the follow-up actions.” Tr. 223; see also CX127.

#### June 2002 Communications

48. On June 5, 2002, Boateng talked to Bhat about the lead program and EPA regulations after discussing lead line replacement and budgeting with Jerusalem Bekele of the D.C. Department of Health. Tr. 1142. Boateng asked Bhat for a budget for lead line replacement. Id. He testified that he did not speak to Bhat about the LAL, but he had “latent knowledge” that WASA was very close to exceeding the LAL in 2001 and that LAL exceedance requires lead line replacement. Tr. 1143-1144. Thereafter, Bhat tried to contact Boateng, CX41, and testified Boateng was not responsive. Tr. 1146. Boateng testified that “the EPA was not [his] preoccupation. That was Ms. Bhat’s job.” Tr. 1199; Tr. 1145.

49. On June 24, 2002, Bhat sent Boateng an email stating, among other things, “The lead and copper monitoring has to be completed in June for 2002, and the new monitoring for 2003 started in July. Thus I am using some of my flushing employees on O.T.” CX42. Bhat testified that her email was confirmation of a conversation she had with Boateng regarding the lead and copper monitoring program during a managerial training workshop on the same date. Tr. 252. In the managerial seminar on June 24, 2002, Boateng and Bhat were on the same team, and Bhat chose the lead and copper regulatory monitoring as a training model. Tr. 252-253. Their team discussed: “how we would prioritize the [lead and copper monitoring] project and what [was the] immediate necessity regarding the implications and the health [effects].” Tr. 253. Bhat discussed “at length the impact of exceedance of the lead action level at that meeting,” and testified that she indicated that WASA was likely to exceed the lead action level in the 2001-2002 monitoring period which “was basically the reason for prioritizing” lead and copper monitoring in that training scenario. Id.

50. On June 26, 2002, Denmark Slay, representing the D.C. Inspector General, called Bhat regarding the lead and copper monitoring data, hoping to set up a meeting. Tr. 270; CX51. Bhat wrote an e-mail to Boateng telling him that she had received a call from the Inspector General and that Slay wanted to meet to discuss the lead and copper data. CX51; Tr. 270-271. Boateng told Bhat that she should cooperate fully, but that she should solicit in advance a written request for any specific information. CX51; Tr. 271. Boateng testified that he did not recall that Bhat was in contact with the IG in summer 2002, Tr. 1185; however, the record shows he was, at some time, aware of her contact. Tr. 1185-1186.

#### July, 2002, Communications

51. On July 8, 2002, Bhat met with Boateng and brought the lead/copper monitoring results for the 2001-2002 period, telling Boateng that she was going to meet with the IG the next day and what information she planned to divulge. Tr. 271. Bhat testified, “[I] had

formulated the lead results that I had obtained. It ...did not include the June [2002] monitoring results that I had [gotten], but other than that, it was -- it had pretty much about 39 samples for the monitoring period ... which I discussed with Mr. Boateng and ... showed ... to him.” Tr. 272-273. Bhat testified, “Mr. Boateng told me that since the 2001-2002 monitoring was not complete and the data was incomplete, not to take that data with me.” Id. Boateng did not respond to the lead data she showed him on July 8, 2002, and asked for no additional data, but he did ask that she send him a copy of whatever package she gave to the IG. Tr. 273.

52. On July 9, 2002, Bhat had a meeting with Slay, and recalled that “during that meeting he asked me details about the lead and copper monitoring, what our procedures was, what we do with the high results, who do we send the results, and then he asked me to explain the process and that was basically information exchange meeting.” Tr. 272. Slay related that an anonymous person alleged that “WASA does not report all the lead copper results.” CX51; see CX126-127. Bhat noted that Slay: “asked for some documents which I did not have, and I told him that our protocol was that he give me a written request which he said he would fax, and then I collected the items that he had requested and [I] gave one package to the IG and one package to Boateng except I did not give the IG 2001-2002 monitoring results because Boateng instructed me not to do so.” Tr. 272; see also Tr. 274; CX51. On July 22, 2002, Bhat gave Boateng a copy of the package she transmitted to Slay, plus the 2001-2002 lead/copper regulatory monitoring results. CX50; Tr. 270, 274. Marcotte also reviewed a copy of what Bhat provided the IG in July 2002. Tr. 1359-1360. After reviewing those results, Marcotte did not ask to see the 2001-2002 regulatory lead data although, by then, the monitoring period was complete. Tr. 1360. The IG ultimately determined there was no merit to the allegation of incomplete reporting and the matter was closed. CX126.

53. On July 11 and 15, 2002, Bhat received data from Turner showing more high lead results from June, 2002, the final month of the 2001-2002 monitoring period. CX44; Tr. 258-261. On May 2, 2002, Boateng had sent Bhat an email setting up a meeting to talk about the budgeting process at WASA. CX40; Tr. 246. At that meeting, which took place on or about May 3, 2002, Boateng indicated that his administrative coordinator, Tsedale Berhanu, would send Bhat the budget format for information regarding all of the programs in her division and the budgetary requirements of each. Tr. 246. On July 17, 2002, approximately two days after receiving the final lead data for 2001-2002, Bhat submitted her annual budget package to Boateng’s administrative coordinator, Tsedale Berhanu, with a copy to Boateng. This budget outlined the “Major Changes/Projects” in Bhat’s Water Quality Division. CX46; Tr. 248, 1182, 1184. Bhat included as one of her “Major/Changes/Projects” an item, “Replace lead service lines in distribution system,” with the explanation that:

[I]n the year 2001-2002 there are [a] large number of homes exceeding the lead action level and DC may not meet the lead action level for 2002. Also there is increasing public request to replace lead service lines....There are large number[s] of homes with elevated levels and these home[s] also have lead service lines. CX46, page R768.

54. Bhat testified that in her proposed budget (CX46): “It was clearly evident at this point that we would exceed the lead action level and that this was a major change that was required and I gave the details and justification for it because it would require the lead line replacement following that exceedence.” Tr. 249-250.

55. Boateng directed Bhat to compile a budget that included lead line replacement, Tr. 1180, and she submitted her budget to Boateng’s administrative coordinator. Tr. 1181; see also Tr. 1413. Boateng testified, however, that he did not read the budget document Bhat submitted, Tr. 1185, until late September 2002, after the LAL was formally announced, when he asked Bhat for additional justification for her lead service line abatement program. Tr. 250, 345; CX67. Marcotte did not learn of Bhat’s July 17, 2002, budget submission before August, 2002,. Tr. 1413, and he presented the budget to the Board in November, 2002. CX79. Marcotte testified that budgets are developed “each summer” for the following year, and that they are produced into a final budget in the August/September timeframe. Tr. 1342, 1412.

56. On July 19, 2002, Bhat testified that she announced at a staff meeting with all Department of Water Services managers: “that WASA had exceeded the lead action level and we would have to implement the follow-up steps, and [she] was in the process of getting details from Mr. George Rizzo.” Tr. 264-266. The minutes of the staff meeting reflect that “Lead concentration action level monitoring---may not meet levels.” CX47 at R3446; Tr. 1053. Boateng was present at the July 19, 2002, staff meeting and heard Bhat’s announcement. Tr. 266, 1070. He testified that, since the preceding year, Bhat predicted an LAL exceedance and “it turned out everything was fine.” Therefore, when Bhat mentioned the LAL exceedance during the 2002 staff meeting, “it was another piece of information” and Boateng was “not at all concerned.” Tr. 1056-1057.

57. Boateng’s Executive Assistant, Jill McClanahan recalled Bhat’s announcement of the LAL exceedance in July 2002, Tr. 1252-1253, and Martin Wallace also remembered Bhat’s announcement that the high lead level trend continued, WASA would probably exceed the LAL. Tr. 1289-1290.

58. The July 19, 2002, staff meeting was not the first in which Bhat discussed the high lead levels. Jacqueline Oliver, who was a DWS colleague of Bhat’s under Boateng’s supervision and who attended all DWS staff meetings with Bhat, testified that Bhat brought up the issue of the LAL exceedance frequently at WASA staff meetings “maybe a year” before Bhat left WASA, i.e., in early 2002. Tr. 744-745. Oliver thought Bhat appeared to be asking Boateng for help in these staff meetings but his response was “increase the samples,” i.e., take more lead samples. Tr. 744. Bhat’s response was, “I’m not going to do that, Kofi, I’m just not going to do that,” because “It’s not right.” Tr. 747. Oliver observed that, apart from saying “increase the samples,” Boateng did not show any particular interest in Bhat’s discussion. Tr. 746-747.

59. Boateng testified that after the July 19, 2002, staff meeting, he did not initiate any follow-up communications with Bhat regarding her announcement of the likely LAL exceedance. Tr. 269, 1070. According to Boateng, Bhat should have given him “the courtesy

of a sit-down meeting” about the LAL, but neither did Boateng request such a meeting after July 19, 2002. Boateng was not aware of what, if any, efforts Bhat made to meet and discuss the LAL with him. Tr. 1159, 1161.

60. Boateng knew that the annual lead monitoring results arrived in July every year, and Bhat alerted him in her June 24, 2002 email that 2001-2002 monitoring period was concluding. CX42; Tr. 1179-1180. The information she imparted to him, however, was not “active in [his] mind.” Tr. 1160. Boateng was not focused on lead at that time. Tr. 1070.

61. Boateng testified that he never specifically requested from Bhat any particular data regarding lead and copper regulatory monitoring results between July 17, 2001, and July 30, 2002. Tr. 1073. He further testified that it was not necessary for Bhat to send him the full printouts of data on lead and copper monitoring on a regular basis. Tr. 1074; *see also* Tr. 1416-1417. Because WASA managers only wanted conclusions, Bhat generally did not forward raw data to WASA management, Tr. 157, 494, and Boateng never requested raw data results. Tr. 1073. Evaluating the data was her responsibility. Tr. 157. Bhat understood that Boateng: “did not ... want raw data. He wanted a gist of analysis,” and she gave it to him regularly. Tr. 568-569. In summer-fall 2001, Bhat generally informed Boateng that properties were yielding high lead results, but did not give him data about particular properties. Tr. 509, Tr. 604-605.

62. On July 22, 2002, in the process of compiling a final memo regarding the LAL exceedance, Bhat forwarded to Silas Obasi, a new water quality technician, the email she had sent to Rizzo on March 21, 2002, (CX34), because the data attached to it already had “highlighted all the detail of the high lead levels which would be easy for him...[s]o [the] only data that he had to consider [was] the new data that had come in June of 2002.” Tr. 268-269, 606; CX49.

63. During the last week of July, 2002, after Bhat received the results of June, 2002, monitoring which completed the annual monitoring cycle, she combined the results with the fall, 2001, results and met with Boateng. She testified that she informed him that she was writing a memo indicating that WASA had exceeded the LAL. Tr. 262-264. At their July 26, 2002, meeting, CX52, Bhat testified that she told Boateng that she would contact Rizzo to clarify the follow-up procedures and arrange a meeting with Rizzo to meet with WASA officials. Tr. 262. Boateng asked no questions about the lead results. Tr. 277-278. At the hearing, Boateng could not recall discussing the LAL exceedance at the July 26, 2002 meeting. Tr. 1057.

#### July 30, 2002 Disclosure to the EPA

64. Bhat sent Rizzo an email on July 30, 2002, regarding the LAL exceedance, entitled “Lead and Copper monitoring for the period July 2001 to June 2002.” CX54; Tr. 279-280. She also sent a copy of the July 30, 2002 email to Boateng. *Id.* In the July 30, 2002 email, Bhat discussed her March 21, 2002, email to Rizzo (CX34) which had notified him that “there were a number of high lead results and it did not appear that WASA would meet the Lead action level for the subject monitoring period.” CX54. She stated that she: “received the electronic copy of the lead and copper analysis performed in June 2002. This

completes the July 2001 to June 2002 monitoring.” Id. Bhat announced, “On initial evaluation I regret to note that WASA did not meet the Lead Action level both for the first and second draw.” Id. Bhat also noted in her July 30, 2002, email (CX54) that she had not yet completed investigating the samples to see if any could be invalidated. She testified that this was a reference to the June, 2002 samples, but she concluded that WASA could not meet the LAL in any event because she had already thoroughly investigated the samples from 2001. In Bhat’s opinion, there was “no way” WASA would fall under the 15 ppb cap for the 90<sup>th</sup> percentile sample, because 17 out of 50 were well over the limit of five high samples. Tr. 282-283. Bhat asked Rizzo for advice:

I needed some feedback from you on the follow up action. As I interpret the rule WASA has to go back on increased monitoring....Does this apply from July 2002-June 2003. Also has WASA to implement any public education program is [sic] there a time limit within which to implement it etc. Id.

Bhat explained at hearing why she sent the July 30, 2002 email:

I just felt that I had repeatedly told Mr. Boateng and there was absolutely no response, and this was a public health issue....[E]xceedence of [the] lead action level is not an EPA violation. However, [the failure to implement] the follow-up actions is a violation, and there is a time limit within which we have to implement all the follow up actions, and also I was not sure but the next monitoring had to be immediately followed up ... -- this was already July, and August and September were remaining for the ... 2002-2003 monitoring, and I had to get clarification. There was too much work to do and there was public notification, there was -- we had to go on standard monitoring. We had to collect 100 volunteers and [we] had to identify all the high lead lines, and within the time limit which is 60 days for at least providing the new volunteers as well as the public notification. I thought it was too short of a time. We would, we would be under violation if we did not implement these follow up actions ...I felt this was a public health issue ... -- addressing steps [which] had to be taken and unless EPA came and imposed -- mandated WASA to do something, I just didn't see anything moving. Tr. 280-281.

65. It was not Bhat’s fault that WASA exceeded the LAL and there was nothing lawful she could have done to prevent the exceedance. Tr. 1158, 1416. On July 31, 2002, Bhat discussed her July 30, 2002, disclosure regarding the LAL exceedance in a phone conversation with Rizzo. CX53; Tr. 284.

66. Boateng did not open Bhat’s July 30, 2002, email to Rizzo, “Subject: Lead and Copper monitoring for the period July 2001 to June 2002” (CX54), until August 12, 2002.

Tr. 1067. After opening the email, Boateng sent a copy to Marcotte. Tr. 1067; CX136. Boateng testified that the first time the LAL exceedance “really hit” him, and the first time he was “actually engaged,” and paid attention to the LAL, was when he read this email. Tr. 1058, 1069.

67. Although Boateng forwarded a copy of Bhat’s email to Marcotte on August 12, 2002, Bhat had already forwarded the July 30, 2002, email to Marcotte on August 2, 2002,. (CX55-56). Neither Marcotte nor Boateng ever responded to the message. Tr. 281, 305-307. Marcotte admitted that this email put him on notice that Bhat had communicated with the EPA that WASA had triggered the compliance measures for an LAL exceedance. Tr. 1410-1411. Bhat sent the email to Marcotte because she did not receive a response from Boateng and because she needed to respond to an inquiry from the D.C. Department of Health regarding WASA’s lead line replacement policy which would be impacted by the LAL exceedance Tr. 305-306; see CX57-58, Tr. 306-313.

68. Marcotte testified that he did not learn about the LAL exceedance from Bhat’s email (CX55), which he opened on August 2, 2002. Tr. 1409. He learned about it a day earlier in a phone call with Boateng. Tr. 1409. Boateng did not say how he learned of the LAL exceedance. Tr. 1409-1410. Marcotte testified that when he read Bhat’s email to Rizzo that WASA had exceeded the LAL, he was dismayed and it “caused [his] heart to skip a couple of beats.” Tr. 1363.

69. Because Boateng did not open Bhat’s July 30, 2002 email until August 12, 2002, Tr. 1067, he could not have been discussing this email with Marcotte on August 1 or 2 of 2002. Tr. 1067. For Boateng to inform Marcotte about the exceedance on August 1 or 2, Tr. 1362, 1409, Boateng must have known about the LAL exceedance at least 10 or 11 days before he viewed Bhat’s email to the EPA. Yet, Boateng, contrary to Marcotte’s testimony, denied that he knew about the exceedance before August 12, 2002.

70. On or before August 26, 2002, Bhat reviewed the final data for the 2001-2002 monitoring period and drafted a final letter to the EPA transmitting the data regarding the LAL exceedance for Marcotte’s signature. Tr. 319-320; CX60. The data reflected that the 90<sup>th</sup> percentile regulatory first draw sample contained 75 ppb of lead, five times the LAL. CX60; Tr. 321-322, 1174. Bhat sent the draft letter advising that “DCWASA does not meet the EPA established action level for Lead,” to Boateng, who forwarded it to Marcotte, who signed it and sent it to EPA. Id. Boateng and Marcotte did not communicate with Bhat regarding the letter before they sent it to Rizzo at the EPA. Tr. 320.

#### Compliance Efforts After the 2001-2002 Lead Exceedance Initial Compliance Efforts

71. On July 31, 2002, Bhat received a call from Jerusalem Bekele, the water quality manager at the D.C. Department of Health (DOH), who was attempting to respond to a customer regarding the nature of WASA’s lead line replacement policy. Tr. 307-308; CX57. Bhat could not find any statement of WASA’s policy, Tr. 308, and on August 2, 2002, Bhat wrote to Boateng inquiring about the lead line replacement policy because, following the

LAL exceedance, “people [would] be calling and I want to know what should I tell the people, ...and so what [are] our policies.” CX58; Tr. 310.

72. By August 19, 2002, having received no response to her August 2, 2002, inquiry to Boateng, Bhat sent him a follow-up email with a copy to Marcotte and another WASA manager, Martin Wallace inquiring regarding the policy. Boateng responded: “Nothing has really changed about the WASA lead replacement policy.” CX 58. He continued:

WASA will accommodate specific customer needs, and generally refrain from replacing all lead services. As an instant [sic], in a situation when a customer with a demonstrably high concentration of lead in their service line opts to replace their section of the line, DWS may consider replacing our section of the service, and thus meet the customer half way. These instances, however, have so far been purposefully few due to our available resources. I have particularly been careful about making a big announcement to the public on this as DWS have very limited resources to deal with any significant customer lead service replacement requests. CX58 at R781.

73. Bhat testified: “[T]he impression that I got [was that Mr. Boateng] wanted to keep quiet regarding this lead issue. He didn't want to just openly state to the public that we are going to replace lead lines even though we had exceeded the lead action level....[T]he people who constantly called, ... if they ...make a hassle, to replace theirs but [other] than that, we want to keep quiet.” Tr. 312, citing CX58 at R781. Boateng explained what he meant to convey to Bhat, was:

You're not just going out to the public and telling them that, look, we're going to do this [i.e., replace lead lines] because we've exceeded the lead action level when you've not even talked to EPA and inquired about what...the requirements actually meant and put the resources together....It doesn't make sense to me, Ms. Bhat. Tr. 1197-1198.

74. Marcotte did not comment on Bhat's August 2, or August 19, 2002, emails nor did he comment on Boateng's response to those emails. CX58 at R781; Tr. 1474-1475. At hearing, he testified that he told Boateng “that things were changing very quickly.” Tr. 1476-1477.

75. Bhat sent Rizzo an email setting up a meeting sometime in August or early September, 2002, about the lead exceedance and Bhat's request for clarification on the follow-up monitoring actions. Bhat thought the meeting occurred on September 4, 2002. Tr. 314. Marcotte thought this meeting took place during the “first couple weeks of August,” Tr. 1363, but he acknowledged that he could have been wrong. Tr. 1513.

76. Prior to the meeting, Bhat met with Boateng and Marcotte regarding the LAL exceedance. Tr. 324, 326. Marcotte testified on direct examination that he “wanted to understand...whether this was irrevocable.” Tr. 1364. Marcotte wanted to know if there was “an opportunity to expand the sampling pool” or increase the number of samples to come into compliance, as in biological testing, and Bhat advised that was not an option. Tr. 324-25; Tr. 1382, 1512.

77. Bhat and Boateng met with Rizzo and James Jerpe of the EPA to discuss the follow-up actions after the LAL exceedance. Obasis and Curtis Cochrane, a WASA engineer, also attended. Bhat’s meeting minutes reflect that the parties discussed the possible causes for the exceedance, namely, elevated water pH in the distribution system and a change in the disinfectant WASA used in the water from chlorine to chloramines. CX 61 at R1731. Bhat also raised the possibility of sampling selection error, namely, that low lead volunteers withdrew from the program, leaving a disproportionate number of high lead volunteers. Id. According to Bhat, Rizzo explained the required compliance measures, including public education by October 2002, increased monitoring, and lead service line replacement. Id. at R1732. After discussing lead line replacement, Rizzo, according to Bhat, suggested adjustments to the water pH and increased emphasis on corrosion control programs, such as use of polyphosphates. Id.

#### Lead Line Replacement

78. On September 13, 2002, Bhat, Boateng and Cochrane met with Rizzo, Jerpe and WA officials, including Turner and Lloyd Stowe, WA’s operations chief, regarding the LAL exceedance and necessary compliance measures. CX63; Tr. 331. Bhat testified:

[W]e wanted clarification from Mr. Rizzo regarding the lead line replacement ...-- the regulations were not very explicit ... regarding the seven percent lead line replacement...[T]he regulation said that if the WASA lead service line after testing indicated that it was less than [15] ppb which was the lead action level, WASA could consider that lead line as replaced. So.... the [lead] line remained in the ground. So do we consider the line permanently replaced or what happens because the lead concentration will vary year by year. (Emphasis added.) Tr. 332-333. See CX63,

79. On September 16, 2002, in an email about the meeting to Marcotte, Boateng wrote: “[i]f the [testing-out] interpretation holds we could potentially narrow the replacement list down significantly by just conducting tests. There were other possible interpretations that were presented by the EPA representatives [i.e., a requirement of 7% physical replacements] which did not quite compliment our position as much.” CX63. Boateng explained that actual replacement was “going to take a long time,” so testing was preferable. Tr. 1206-1207.

80. On September 18, 2002, Cochrane sent an email to top WASA officials, including Marcotte and Boateng, “Subject: Lead Problem,” summarizing a conversation with Rizzo.

CX66. Cochrane estimated that WASA had 22,000 lead service lines and calculated that WASA would have to replace 1540 lead service lines (7%) by December 31, 2003. Id. at R1831. Cochrane related, “I asked George Rizzo if we tested lead services and found them to be below the action level and were not required to replace them, could we use these to count towards the 7% per year replacement requirement. Rizzo did not think that they would count...” Id. Cochrane stated, “WASA will have to replace approximately 1540 services unless testing and finding a service under the action level will count as a replaced line....Estimated cost to replace 1540 services is 7.5 million dollars.” Id. at R1832.

81. Boateng and Marcotte knew that compliance measures would cost WASA an estimated \$7.5 million in the first year. Tr. 1186-1187, 1514. Marcotte acknowledged that the lead line replacement is now expected to cost tens of millions of dollars, about \$20 million in 2004 alone. Tr. 1514-1515.

#### Altering Water Chemistry

82. At the September 13, 2002, meeting Bhat discussed increasing pH to reduce high levels of lead. Tr. 332. She first discussed altering water chemistry to reduce lead levels with Boateng on March 11, 2002. Tr. 572. Boateng noted, however, that: “On the subject of pH increases of the treated water, [WA] did not seem too amenable to such an action,” CX63, and “he did not want to press them.” Tr.340.

#### Public Education After the LAL Exceedance

83. On September 18, 2002, Bhat began corresponding with Boateng and Marcotte and other WASA officials, about the public education requirements in 40 CFR §141.85, in light of the LAL exceedance, CX65, and forwarded to Rizzo internal WASA communications regarding the development of the compliance effort. Id. On September 27, 2002, she sent Boateng, Cochrane, Marcotte and others her first draft of the public education information regarding the LAL exceedance. The draft used the EPA’s mandatory language and was drafted in coordination with Rizzo, CX68 at 340, 343-349; Tr. 347, and Bhat forwarded it to Libby Lawson, WASA’s public relations director, who was responsible for publishing the required public education brochure. Tr. 348; CX72.

84. During a seminar on October 30, 2002, Bhat saw the final public education brochure. CX73. She testified:

When I received the brochure, I said where is the information we sent[?]....[T]he brochure looked very pretty, but I could not find the information that we had forwarded as the final draft ... to public affairs.... It looked like a brochure telling the effects of lead rather than what had happened at WASA and what the people should do. Tr. 350-351.

85. Bhat told Boateng that she objected to the revised brochure and that she had advised Rizzo of her objections. Tr. 351-352. Boateng did not respond to Bhat's comments. Tr. 352.

#### City Counsel Contacts

86. On October 15, 2002, Bhat communicated with Jeannette Lowe, a staff member of D.C. City Councilmember Kathy Patterson's office. Bhat was responding to an inquiry that resulted from calls received by a Councilmember's office about high lead levels. Tr. 359-360; CX75. Lowe initially contacted WASA's public affairs office and was referred by that office to Bhat. Tr. 361. Lowe needed educational information to respond to the public concern, and Bhat provided educational material about safe usage of the water, water filters, and copies of the reports sent to the EPA indicating the LAL exceedance. Tr. 359-360; CX75. Neither Boateng nor Marcotte commented to Bhat about her communications with the City Council. Tr. 361; Tr. 1370.

#### Addition of Polyphosphates

87. In late August 2002, Rizzo and Bhat communicated regarding a meeting at the Washington Sanitary Suburban Commission (WSSC) in which Dr. Mark Edwards was scheduled to speak about polyphosphates, a chemical which many water utilities use to avoid the leaching of lead. Tr. 314-315; CX59. Bhat attended, with Boateng's knowledge. Tr. 318-319.

88. Bhat suggested to Marcotte that polyphosphates be introduced to prevent the leaching of lead as many utilities were doing. Tr. 326. Marcotte testified that his conversation with Bhat about phosphates was brief, but he told Bhat that he was not prepared to say phosphates were "the answer" to the lead leaching problem, Tr. 1379-80, in part, due to the cost of phosphate removal, Tr. 1496, but he remained receptive to Bhat's further input about phosphates. Tr. 1497.

89. Bhat planned a training seminar at WASA about phosphates in the fall of 2002. Tr. 1497. She invited Boateng, Marcotte, and Johnson to attend, CX76, and later invited Rizzo (CX77), who attended the seminar with other EPA officials and WA officials. Tr. 362-363. The WASA officials Bhat invited did not attend the seminar. Tr. 362-363.

#### Compliance Measures

90. Throughout the fall of 2002 and early 2003, Bhat was involved with the lead line replacement effort and other compliance efforts resulting from the LAL exceedance. See, e.g., Tr. 357, 371, 1369, 1198-1199, 1513; CX71, CX79, CX83, CX97. She also worked with Rizzo during this period. CX85; Tr. 376.

## Volunteer List

91. Bhat compiled the lead and copper volunteer list for January-June, 2003, to comply with EPA lead regulations, Tr. 1513, and in response to Boateng's inquiries she consulted with Rizzo about the exclusion of some volunteers. Tr. 379; *see also*, Tr. 380-81; 401; CX86 at R2389. Bhat reported Rizzo's response in an email to Boateng on December 18, 2002:

Mr. Rizzo (EPA) informed me that excluding volunteers with historical[ly] high lead levels from the sampling plan because their [lead service lines] are scheduled to be replaced is not justified. Mr. Rizzo further stated that these volunteers continue to have their portion of the [lead service line] and in most cases are homes built prior to 1982. Thus they satisfy the criteria for volunteer per the lead copper rule. The volunteers cannot be abruptly dropped from the plan. Also Mr. Rizzo further stated that the essence of the Lead copper rule was to maintain consistency of the volunteer group for monitoring the corrosion control program. Thus the same volunteers that meet the selection criteria have to be studied for compliance with the lead copper rule year after year to determine if the corrosion control program is working. Only existing volunteer[s] that do not want to participate have to be replaced. In such cases the particular volunteer has to be replaced by volunteer closely matching the one excluded. With this EPA directive in mind I have applied the best strategy possible to formulate the updated volunteer list [120 sites]. CX86 at R2388.

92. A lead-copper volunteer list Bhat prepared in coordination with Obasi was sent to Boateng on January 21, 2003. CX93, CX98, CX100; Tr. 391. In her January 21, 2003, email to Boateng, Bhat indicated that the data included both low and high lead volunteers, complying with Rizzo's guidance, that it was improbable that WASA would meet the LAL during the first monitoring period of 2003, and that she planned to forward the same list to Rizzo. CX100. Boateng responded; "Thanks." CX100, Tr. 402. Bhat submitted the list to Rizzo on January 22, 2003, and received the EPA's approval the same day.

### Early Friction Between Bhat and WASA Management August 2000 – October 2001

93. In May 2000, Bhat and WASA Compensation Manager, Linda Brown, exchanged email correspondence in which Brown disagreed with Bhat's proposal to require a bachelor's degree in chemistry and 5 years' experience in water quality programs as minimum qualifications for a clerical support position in the Water Quality division. Bhat responded to Brown, copying General Manager Jerry Johnson in her response. This caught the attention of WASA Human Resources Director Grier, who resented that Bhat circumvented her by going directly to Johnson with complaints about the service of the Human Resource Department. RX

121. This incident occurred in the spring of 2000, before Boateng's arrival and before the 2001 performance review period. Tr. 1598-1599. There were no actions arising from this incident which contributed to Bhat's termination. Tr. 1429. Marcotte did not remember ever speaking to Bhat about the issue, Tr. 1321-1322, and Bhat was never counseled or disciplined concerning this incident. Tr. 1428-1429.

94. While still Bhat's supervisor, however, Marcotte received complaints from Grier and Pumping Station Manager, George Papadopolis, regarding Bhat's tone of communication. Tr. 1325. Marcotte testified that he asked Bhat to be sensitive to the issues of working with other people and treating others with respect, and she reacted in a "generally defensive tone," blaming others for failing to understand her needs and expectations. Tr. 1322-1323. Marcotte formed the opinion that Bhat's teamwork skills were very limited because she found it very difficult to give and take and was very uncomfortable sharing information with others. Marcotte spoke to Bhat about her lack of teamwork skills. While Marcotte believed that she accepted the criticism as valid, he did not see any particular change in her behavior. Tr. 1326.

95. Marcotte wanted his managers to be clear and direct with him in defining problems and proposing resolutions. Although Marcotte told Bhat what he expected, he testified that he felt he was "...pulling information out of Ms. Bhat." Tr. 1323-1324. When Kofi Boateng was hired for the post of Water Services Director in August, 2000, Marcotte informed him that Bhat was "one of the most challenging employees to manage that Marcotte had ever come across." Tr. 1327. None of Marcotte's criticisms were documented contemporaneously, Tr. 1428, and none were not part of either Bhat's 2001 or 2002 performance evaluations or had an impact on her eventual termination. Tr. 1402.

96. Shortly after being appointed Water Services Director, Boateng claims Bhat accused him of incompetence during a senior staff meeting of Water Services managers. Bhat was angry because Boateng had failed to gain approval from WASA's Human Resources Department to hire individuals Bhat deemed qualified for clerical support positions in her division. Tr. 1013-1015. She denies calling Boateng incompetent, but she did tell him in front of colleagues that she wanted him to pressure the Human Resources Department to act on her requests. Tr. 484-485.

97. When Boateng spoke with Grier regarding Bhat's complaints, Grier complained to him that Bhat had been rude and abusive toward her staff and uncooperative when asked to comply with requirements of the progressive discipline policy. Tr. 1597-1598. At hearing, Grier testified that she had also received complaints about Bhat's abrasiveness and lack of cooperation from Jackie Oliver, one of Bhat's co-workers, who had previously worked in the Human Resources Department and who had tried to assist Bhat in hiring clerical help. Tr. 1602.

98. After conferring with Grier, Boateng counseled Bhat to tone it down when requesting program support. He also counseled her to refrain from characterizing other managers in the Water Services Division as incompetent. Tr. 1014-1015. Boateng reported an incident with Linda Brown in 2001 in which, according to Boateng, Bhat "just single-handedly put somebody else in [a] position...essentially bypassing the...established human resource procedures for filling those positions. And so what happened essentially was that we had to re-interview the

applicants and she ultimately hired somebody else instead of the person that she had initially hand-picked.” Tr. 1015. Grier also testified that “all of the qualified applicants were not being interviewed for the position and Bhat was directed to do so.” Tr. 1600. Grier alleged that Bhat made a recommendation for hire prior to interviewing qualified applicants. Tr. 1600. The record shows, however, that Human Resources referred only applicant Patel for the position, and Bhat selected her as the only applicant. Tr. 1656-1657; CX150. Grier acknowledged that it was not Bhat’s fault that her initial interview decision was limited to one candidate. Tr. 1658. HR only referred one candidate, and Bhat selected that candidate. Tr. 486-488. When HR rescinded the selection, and referred an additional candidate, Bhat selected the other candidate. Id.

99. Within a few months of Boateng becoming Water Services Director, he expressed concerns to Marcotte regarding Bhat’s lack of teamwork and communication skills, and the impact that was having upon his team building efforts. Tr. 1327. According to Marcotte, Boateng, over time, became less and less optimistic about his ability to make Bhat a fully functioning part of his team. Tr. 1328.

100. Early in fiscal year 2001, WASA initiated an annual performance management program for non-union employees and managers. An initial performance planning meeting was held between Boateng and Bhat to define performance expectations. Among other categories of performance, Bhat was informed that she would be rated in the areas of teamwork and communications. WASA’s rating form defines relevant behavior in the teamwork area to include getting along well with fellow workers both inside and outside the work unit; being open, honest, respectful, courteous and cooperative with others; and reliably doing one’s share of the work that is assigned jointly to the crew. The form defines examples of relevant behavior in the communications area to include communicating well both orally and in writing; communicating so that there are rare misunderstandings or confusion; using language or gestures that are appropriate for the time, place and audience; and, communicating professionalism through actions and appearance. RX 24.

101. In June 2001, WASA staged a simulated water quality emergency to test WASA’s emergency preparedness procedures. During a retrospective meeting held to discuss the exercise, Bhat announced that she had been in charge of the operation. In fact, Boateng was in charge and after the meeting, he chastised her for stating otherwise. Bhat responded that her remarks were “just something to say.” Boateng deemed Bhat’s conduct an attempt to undermine his authority. Tr. 1018-1019.

102. Shortly after the run-in about who was in charge of the simulation exercise, Bhat again angered Boateng by allegedly failing to provide him with an advance report he requested on a back flow incident at the Smithsonian “Embassy.” Tr. 1019. He testified he had requested the report about a week before a meeting with senior WASA and outside officials to discuss the matter, but Bhat delivered the report to him immediately prior to the start of the meeting, rendering him unprepared for the discussion. Tr. 1020. Boateng confronted Bhat after the meeting to complain about her failure to comply with his order in a timely manner.

103. Bhat testified that Boateng asked her to prepare the report the day before the meeting, and she stayed up until 3:00 a.m. drafting it. The next morning she gave it to him when

she saw him at about 7:30a.m. Tr. 491-92. According to Boateng, Bhat claimed that she had tried to contact him at 5:00 p.m. the night before the meeting, and was unable to reach him, but he viewed her excuse as inadequate and disrespectful. Tr. 1019-1020.

104. Boateng testified that he was so frustrated with Bhat's behavior that in mid-July 2001, he recommended to Marcotte that she be terminated. Marcotte told Boateng at the time to continue to work with her. Tr. 1020-1021. He did not, however, express to Bhat any displeasure over the Smithsonian meeting preparation, did not document it, Tr. 492, 1116, and did not discipline Bhat or mention the incident in Bhat's performance evaluation. Tr. 1085.

105. Boateng praised Bhat at the hearing and in her 2001 performance evaluation for completing assignments timely. Tr. 1084. Bhat's timeliness in completing assignments was not an issue leading to the proposals to discharge her. Tr. 387.

106. In September, 2001, Bhat terminated a technician who worked in her division. The technician later sought employment at WA, and Boateng and Marcotte did not oppose the technician's effort. On or about October 24, 2001, Bhat confronted Boateng regarding the technician's employment by WA. Boateng testified that Bhat was very rude and disrespectful toward him during that meeting. She called Boateng "foolish" for permitting the WA to hire the technician to work in its laboratory. Boateng counseled her that she should avoid talking to him or anyone else like that. He told her that he felt that the technician was capable of doing a good job at WA, and that he had supported Bhat's decision to terminate the technician simply because she and technician did not get along and the technician was a probationary employee. Tr. 1022-1023. At the hearing, Bhat denied calling Boateng "foolish." Tr. 514.

107. On October 26, 2001, Bhat sent an email to Boateng and Marcotte about the situation involving the technician, because she "strongly felt that the...public safety of over a million people was at stake, and that time was a critical time of September 11.... [T]he previous day in our workshop, Marcotte had said that we had...to be absolutely diligent about such matters." Tr. 518; RX23; see also Tr. 1452. The technician demonstrated a "very violent, unpredictable nature, and he was not in control of himself...and [she] felt very much concerned regarding the water quality and the danger that [he] might expose people to...." Tr. 706-707; see also, Tr. 1099-1100. Marcotte testified that the technician was "a pretty good guy" and recommended him to WA. Tr. 1351-1352, 1452-1453. Marcotte testified that Bhat's call to him expressing her opinion regarding technician was appropriate, Tr. 1451, but her email, nevertheless, raised some serious concerns in his mind "about her thought processes and the basis for her recommendation," and her judgment. Tr. 1347, Tr. 1450.

108. On October 30, 2001, Bhat sent Boateng a memorandum via email revisiting the topic of the technician's employment at WA. RX 23. Bhat stated that the primary reason she terminated the technician was because he: "thrived in spending long periods of time giving unnecessary and misleading information to the public informing them as to how the contaminants in DC water could cause various health problems further stating if it was him he would not drink that WASA water." Bhat wrote that: "it is unimaginable that [Boateng] should take such a dangerous risk jeopardizing the safety and security of drinking water quality supplied

to over a million people.” In the memorandum, Bhat also commented that Boateng failed to recognize her achievements and failed to provide her with guidance and support. She stated:

I have a few very basic expectations of my supervisor. Chief among them is at least to recognize my work and support an appropriate action taken by me as a management staff. However, instead of understanding, supporting and appreciating my work and the actions taken per WASA policy what I am experiencing is that you are taking advantage of a situation nullifying actions whether it is the case of Mr. Krough or otherwise.

109. In the same memo, Bhat challenged Boateng’s conclusion that her feelings concerning the technician grew out of their lack of compatibility. Bhat concluded her memorandum by asking that Boateng “consider the facts [she had] mentioned above as a positive suggestion” and that Boateng not “let them reflect negatively on [her] annual performance rating.” Bhat then sent a copy of the email to Marcotte, Boateng’s supervisor. RX 23.

110. Bhat testified that she was frustrated about Boateng’s decision not to oppose the technician’s employment at WA despite her concerns about his possible involvement in terrorist activity and that her memorandum accurately reflects the substance of her earlier conversation with Boateng. Tr. 514-515, 519. She maintained that, even in hindsight, given her concerns about possible terrorism, the remarks she made to Boateng in the October, 2001, memorandum were appropriate. Tr. 517-519.

111. Boateng was so distraught when he read Bhat's October 30, 2001, email and attached memorandum that he destroyed them. Tr. 1024. When Bhat visited him a week later to inquire if he had received her email and what he thought of it, Boateng reprimanded her for having made such accusations without any factual support. Tr. 1024-25. He told her that the tone of the memorandum was very insulting to him and made him “very, very angry.” Tr. 1025. Boateng told her that he had the impression that she failed to understand what he had been trying to communicate to her. Tr. 1025. He reiterated that he thought he had made the right decision in refusing to block the technician’s employment with the WA, Tr. 1025, and Bhat testified that she disagreed with his assessment. Tr. 517-519.

#### 2001 Performance 2001 Performance Evaluation

112. Boateng testified that he considered firing Bhat in 2001, but told her she performed very well. Tr. 1102-1103. Boateng claimed that he first proposed Bhat’s discharge in a conversation with Marcotte on July 18, 2001, the day after he received Bhat’s email advising of the likelihood of the LAL exceedance for 2000-2001, and while he, Bhat, Marcotte and others were in discussions with the EPA concerning the aftermath of a backflow incident at the Smithsonian. Tr. 1105-1107.

113. Boateng advised Bhat that she performed well during the 2001 performance year, and successfully kept her program on track while managing to relocate her operation. Tr.

1101. Boateng never told Bhat in 2001 that he had considered firing her, and in her 2001 performance evaluation he did not mention any possibility of her being discharged. Tr. 1102.

114. Boateng notified Bhat of the results of her FY '01 performance review on or about December 26, 2001. Tr. 1024-1026; RX 24; Tr. 165-166; CX21. In her discussions with Boateng and Marcotte regarding her 2001 performance, they did not criticize her for failing to provide adequate data to WASA managers. Tr. 166. Boateng thought Bhat had excellent technical abilities, Tr. 167, and was "very safety and security conscious;" "plan[ned] well and [was] results oriented" who had "done a commendable job...in keeping her assigned personnel on task while maintaining a very credible water quality program;" a supervisor who held "employees accountable for completing assigned work," was "Fair and consistent in assigning work to employees," was "quick in identifying problems," and "commendably [took] initiatives to address them." CX21.

115. Bhat achieved all of her "Performance Goals," including implementing a direct main flushing program, developing a consumer confidence report, enforcing and implementing the installation of ten back-flow preventers, obtaining a chloramine grant and implementing chloramines related studies, and starting inter-agency ventures. Id.

116. The review was, however, critical of Bhat's performance in teamwork and communication, and in other areas where she performed satisfactory, but Boateng noted criticisms about her performance. Boateng's written comments referred to his negative experiences with Bhat during the performance year. RX 24.

117. Boateng found that Bhat "occasionally did not meet expectations" with respect to observing WASA policies, regulations and rules. He observed that Bhat did "not take instruction well," often appeared "unreceptive to others opinions and views," was "apt to question/challenge needlessly," and often displayed "overly aggressive tendencies in asserting her views – usually seemingly oblivious to other issues and views." Boateng commented that Bhat should learn to observe other organizational protocols, follow proper chain of command in her routine work activities, be more receptive to instructions, organizational dictates/directions, and be more open to the opinions, views and responsibilities of others. RX 24 (R000627).

118. The performance evaluation noted further that Bhat "occasionally did not meet expectations" in the area of customer service, observing that Bhat's "approach to interfacing with both internal and external customers is often construed as 'rude,' 'disrespectful,' and 'argumentative.'" Boateng counseled that to be an effective professional, Bhat must make an effort to improve her interactions with others. RX 24 (R000627).

119. Bhat was also rated as "occasionally not meeting expectations" in the area of dependability and responsiveness. Boateng commented that Bhat had a "'strong' proclivity for independent work and recognition," but he noted that "these tendencies usually overshadow her alignment with departmental, team, and other group goals and objectives." He observed that these traits could have "a potential to mar her overall responsiveness and dependability on [an] organizational level," and he recommended that Bhat "sensitize herself to these tendencies and

avail herself of managerial training opportunities to improve her performance in this area.” RX 24 (R000628).

120. Boateng rated Bhat as “rarely meeting expectations” in the area of teamwork. Tr. 1026; RX 24. While he praised Bhat for being highly focused on water quality issues, he was highly critical of her approach, which he concluded “often antagonizes needed cooperation by others.” He viewed her approach as inappropriate in a manager and he wrote that Bhat had to improve her skills “to fully recognize and respect the shared ownership needs and responsibilities of others” above and below her in the chain of command, as well as managers and employees outside the Water Services Department. RX 24(R000628). Boateng reported that he had previously discussed this deficiency with Bhat without success. RX 24 (R000628).

121. Bhat was rated as “rarely meeting expectations” in the area of communication. Tr. 1027; RX 24. Boateng observed that while Bhat possessed fairly strong writing and verbal skills, “her medium or style of communication often tends to undermine projected goals.” He wrote that “[t]o be more effective, [Bhat] must consider the needs of her intended audience, perhaps on their particular communication needs and concerns; anticipations, and even sensibilities.” Boateng reported in the 2001 review that he had had prior discussions with Bhat regarding these issues as well. RX 24(R000629).

122. The evaluation rated Bhat as “occasionally not meeting expectations” in the area of supervision. Boateng observed that while Bhat held subordinates accountable, “employees construe her style as being disrespectful of them,” and that Bhat should address this perception. RX 24 (R000630).

123. At the conclusion of Bhat’s 2001 performance evaluation, Boateng wrote:

Seema has performed very well during this reporting period. She has very successfully kept her program on track and assumed responsible charge of the Water Quality Program at DWS. She has managed to relocate her group to the Fort Reno facility successfully. As we move into the next reporting period, I challenge Seema to take advantage of available training opportunities to enhance her team and communication skills. CX 21.

124. Although Boateng praised Bhat’s strengths in her 2001 performance appraisal, he rated her “Level 1,” the lowest rating, and rated her “Rarely Meets Expectations” in teamwork and communication. RX 24. Boateng’s chief criticisms of Bhat’s teamwork skills were that she “antagonize[d] needed cooperation by others” by not fully recognizing and respecting “the shared ownership needs and responsibilities of others...for her’s [sic] and other DWS/WASA programs.” Cx 21. With respect to her communication, Boateng urged Bhat to “consider the needs of her intended audience.” Id.

125. Boateng met with Bhat on December 26, 2001, for approximately an hour and a half to discuss her 2001 performance review. He used this session as an occasion to counsel her

regarding her deficiencies in the teamwork and communications area, but, according to Boateng, Bhat was not receptive. Tr. 1026-1028. He described her as “impervious” to his counseling and “very defiant.” Tr. 1028. Bhat told Boateng that she thought she communicated very well and that his evaluation was baseless. Tr. 1027-1028.

#### Bhat 2001 Performance Review Appeal

126. On January 17, 2003, Bhat filed an appeal of Boateng’s 2001 performance rating with Marcotte. RX 25. In the appeal, Bhat addressed the performance evaluation, and Boateng’s comments during their December 26, 2001, discussion of her review.

127. Commenting on the teamwork rating, Bhat responded to Boateng by indicating “that staff reductions must be geared according to program needs and one cannot be expected to implement programs [in this case, EPA-mandated water quality programs] without tools, staff etc.” RX25 at 643. She testified that she deemed it inconsistent that Boateng assessed her as meeting all of her project goals, which required teamwork, and then rated unsuccessful in this area. Tr. 583.

128. Responding to Boateng’s comment explaining the communication rating, Bhat replied in her appeal:

The issue under consideration was the resumption of normal water service to a facility [the Smithsonian Arts & Industries facility] after the water service was terminated following a back flow occurrence. I indicated that Mr. Wallace, the distribution chief should not restore the water service to a facility until objective analysis results were available to the WQD-Manager to assure the safety of water per the EPA (SDWA). The issue under consideration was the water safety and when service should be resumed under similar situations....The issue was not who gives the command to resume water service but when to resume service before or after the availability of the laboratory results. There is no dispute who is DWS chief! (Emphasis in original.) RX25 at 646.

129. he Smithsonian facility incident related to the presence of nitrates/nitrites in the water, which are dangerous to infants, Tr. 1107-1008; see also CX137, and the Smithsonian had a daycare center on the premises. Tr. 1107-1108; CX137.

130. On June 22, 2001, Bhat emailed to Marcotte with a copy to Boateng, complaining that Boateng authorized resumption of water services at the Smithsonian facility before installing a backflow preventer and before doing adequate testing for harmful chemicals. Tr. 1108-1111; CX137. Marcotte thought Bhat was exercising considerable caution with regard to drinking water in the building. Tr. 1446.

131. In the policies and procedures area, Bhat denied Boateng's criticism that she was not receptive to instruction and other opinions and views. She characterized his comments as "inappropriate," asserting that "there were no instances when [she] did not take instructions well." Bhat claimed that she was "always receptive and respected others' opinions and views in vertical and lateral communication." She described her communication skills as "the basis of her success as an excellent manager." She thought Boateng's comment that she was "apt to question/challenge needlessly" had no basis, and she denied that she had ever "challenged needlessly on any issues." RX 25 (R000635).

132. Responding to Boateng's criticism that she failed to observe WASA's chain of command when she had copied Marcotte on the October 30, 2001, email/memorandum criticizing Boateng for permitting WA to hire the technician she had fired, Bhat disagreed with Boateng's action, and argued that he should not have used it as a basis for penalizing her in her performance review. In her appeal, she repeated her criticism of the way Boateng handled the technician incident, describing Boateng's action as "ridiculous." RX 25(R000636).

133. In response to Boateng's criticism of her conduct toward internal and external customers, Bhat categorically denied that she had ever been rude, disrespectful or argumentative. She stated that she resented Boateng's comments during her performance review that her interactions and opinions had aggravated fellow employees such as the Human Resource staff, and she defended her conduct in connection with the certain personnel matters that had arisen during the rating period, and noted that the problems were with Human Resources personnel. RX 25 (R000637-638). At hearing, Bhat was asked whether, in hindsight, she believed her approach on appeal was effective and persuasive, and testified that she was merely stating the circumstances as she saw them. Tr. 544.

134. In the area of dependability and responsiveness, Bhat disagreed with Boateng's criticism that her desire for independence and self-recognition interfered with her ability to work effectively with others. Boateng had identified Bhat's failure to work cooperatively with Martin Wallace in the development of a preventive maintenance plan as an example of why he viewed her as undependable and unresponsive. Bhat informed Marcotte that she had given Boateng and Wallace a copy of a prior plan she had developed in 2000, prior to her six-week vacation in India in April, 2001. She claimed she was scheduled to meet with Wallace on several occasions, but he rescheduled each time, and they never met.

135. Wallace said that he was supposed to work on a preventive maintenance plan with Bhat, Tr. 1280, but he could only remember once trying to call Bhat about the December, 2001, main break meeting which involved an incident which Boateng did not mention. Tr. 1300. Tr. 1956-1958. He could not recall if Bhat tried to contact him. Tr. 1299. Bhat sent him an email with an agenda attached; informing Wallace about what she planned to say at the main break meeting in December, 2001. CX161. She testified that Wallace never responded to her emails about the December, 2001 meeting, Tr. 1868-1869, however, Bhat recalled that she and Wallace met and discussed the presentation extensively before she even drafted the meeting agenda. Tr. 1869. According to Wallace, he did not recall specifically complaining to Boateng about any coordination problem with Bhat. Tr. 1281, 1294; Tr. 1309; Tr. 1295; 1298.

136. Bhat noted that Boateng and Wallace never commented on her plan, and she concluded: “The invalid incidence Mr. Boateng refers to shows not my alignment but exposes Mr. Boateng’s handling of the situation and unjustifiably penalizing me on my performance evaluation.” RX 24 (R000639).

137. In the teamwork area, Bhat emphasized that she played an important role as a team player contributing to the success of WASA’s interagency and intra-agency goals and projects, and she provided specific examples. She noted, however, that:

I developed creative innovative methods of monitoring field work, absenteeism, etc. At know time did Mr. Boateng have any suggestions as to how things might be done differently or better or even appreciation of my efforts. This kind of teamwork goes unrecognized! By his baseless remarks Mr. Boateng is suppressing individuality and hindering personal growth. Synergy or togetherness is not about blocking free speech and personal growth. He asks for suggestions and turns around and crucifies the messenger instead of understanding the underlying message. My managerial and teamwork skills instead of being used positively are used as a tool to affect my performance negatively. RX 25 (R000641) (emphasis in original).

At hearing, Bhat testified that this passage reflected her frustration and after re-reading it, her opinion would not change. Tr. 549.

138. Bhat also wrote regarding a staffing level meeting that:

Mr. Boateng and other staff members not understanding the gains and the benefits that can be achieved by healthy suggestions, is not my fault. They have to have an open mind and be receptive and courageous to accept and implement the healthy suggestions.... Mr. Boateng is trying to block individuality, free speech and participation by a staff member. Other co-managers... respected my opinion.... However, Mr. Boateng implies that they were offended and is penalizing me for my assertive opinion/suggestions on issues which has (sic)nothing to do with teamwork. RX 25 (R000643)

139. Bhat’s 2001 appeal also commented on Boateng’s criticism of her communication style. While emphasizing her accomplishments which demonstrate her communications skills, Bhat also noted that Boateng had not previously criticized her communications skills:

Only at the time of performance evaluation he came up with comments and makes (sic) baseless issue (sic) to undermine my achievements and accomplishments. His comments are nothing but biased and prejudicial based on his resentment and anger on the memo referenced in PF-1 and Mr. Boateng’s repeated comment

during the evaluation discussion 'You send me a strong memo and c.c to Mr. Marcotte.' Rx 25 (R000645)

Later, reflecting on the incident at the Smithsonian, Bhat explained that:

Mr. Boateng confused the issue and insisted that he was the DWS chief and he direct (sic) actions. There was no dispute as to who is DWS chief it was irrelevant. However, without looking at the underlying fundamental principle Mr. Boateng takes such items personally as a challenge and insult. Mr. Boateng is confusing issues and affecting my performance. Performance standard must be based on objective criteria relating to the goals not on views and opinions. RX 25(000646) (Emphasis in original).

140. Bhat also responded to Boateng's criticism of her supervisory style and his impression that employees perceived her as disrespectful of them. She defended her administrative, managerial, and supervisory actions. Bhat suggested that Boateng "has to look at the facts," and noted among other issues that some employees felt they should be paid for doing nothing. "This is," she wrote, "the mentality I have to discipline to be an effective supervisor." Bhat concluded that she deserved an outstanding rating in this category, as in all of the other categories addressed in the performance review. RX 25 (R000650).

#### The McNeil Incident Report

141. On February 20, 2002, Bhat had a disagreement with the security guards as she tried to enter the headquarters location of the Water Services Division at Bryant Street in Northeast Washington. According to the incident report filed by, Officer McNeil, the guard claimed that Bhat resisted her direction to use the West Gate rather than the Main Gate and stated that "the officer at the West Gate is so stupid." The guard reported that she challenged Bhat for making such a statement, and Bhat just shrugged her shoulders. RX 26.

142. Bhat wrote two emails to Boateng regarding the guard's report. The first was sent on February 21, 2002. Bhat explained that she was scheduled for a meeting with Boateng, but the security guard at the east gate denied her entry onto the property, and sent her to the west gate. Officer McNeill then denied her entry through the west gate, and walked away from her. Bhat commented: "How stupid can this get," and McNeill started shouting at Bhat. Bhat returned to the east gate where the guard discovered that she was on an approved entry list and this time let her pass. RX 27. Officer McNeil, who works for a WASA contractor, was scheduled by WASA to testify in this proceeding, but she did not appear when she was called to testify.

143. On February 25, Bhat drafted a letter or e-mail to Boateng, but apparently did not send it. RX 28. She did send a second e-mail to Boateng on February 26, 2002, after she learned that he referred the guard's complaint to WASA Security Manager, Jesse Villareal, for a determination of whether Bhat had engaged in abusive behavior. Tr. 560; RX 30. In it, she recounted a summary of the incident and claimed that the security guards, by not following

standard procedure, deprived her of the “right as a WASA management employee to park in WASA facilities by security personnel....” She then commented on Boateng’s “attitude towards whole incident and particular towards [her].” RX 30; Tr. 561.

144. Bhat wrote that Boateng came to meeting on February 22, “prepared to snub [her] without any basis.” She referred to the guard’s incident report, which she stated “you [Boateng] instigated her [McNeill] to write,” and commented that: “You tied this incidence (sic) to support your biased perception and unfair rating on my performance evaluation in December 2001.” She described the incident as a minor misunderstanding between the guard and her, but evidence of Boateng’s “behavior and treatment of your managerial staff even in the insignificant matters like this.” Bhat continued that Boateng was “questioning her integrity,” and that his handling of the incident “shows your biased behavior and intent to capitalize on trivial situation to support your comments in my December, 2001 evaluation.” Finally, while Bhat denied the allegations contained in the guard’s incident report, Tr. 1866-1867, noting the guard misinterpreted her remarks, Bhat argued that even if she did call the guard “stupid” it would not be an “abusive remark,” because the dictionary meaning of “stupid” is simply “given to unintelligent decisions or acts.” RX 30.

145. Boateng did not necessarily formulate an opinion about whose side of the story was correct, Tr. 1118, and Bhat was never notified of any accusation of wrongdoing arising out of this incident. She was never disciplined, reprimanded, or formally counseled in any way concerning the incident, Tr. 704-705, 1118, and it was not mentioned in her 2002 performance evaluation or in the proposals to discharge her.

#### The Outcome of Bhat’s 2001 Performance Review Appeal

146. On March 1, 2002, Marcotte issued a decision in response to Bhat’s 2001 performance review appeal. He agreed to raise Bhat’s rating in the category dealing with observance of WASA policies, regulations, and rules from occasionally does not meet expectations to meets expectations consistently. Marcotte concluded, however, that the tone and content of Bhat’s appeal of Boateng’s comments relating to her reaction to instruction and her receptiveness to differing views “appear to validate Mr. Boateng’s concerns.” For the most part, Marcotte rejected Bhat’s 2001 performance evaluation appeal during the first week of March, 2002. CX24; Tr. 302-304. Although Marcotte did not agree with Boateng that Bhat warranted an “occasionally does not meet...” rating on “Observation of WASA Policies, Regulations, Rules,” he did agree with the overall rating. CX24.

147. In an email dated March 15, 2001, Bhat acknowledged receipt of Marcotte’s decision, and indicated that she planned to respond further. RX 36. On April 5, 2002, she sent a memorandum to Marcotte requesting reconsideration of his determination with respect to the teamwork and communication elements, again seeking to have her ratings in those areas raised by two levels from “rarely meets expectations” to “consistently meets expectations.” RX 43, 44. In support of her request, Bhat claimed that she had “kept [her] supervisors and others informed via oral, written communication on status of project,” and that she had “[c]omplied with all regulatory requirements, developed relevant reports and other certification requirements.” RX 44.

148. Marcotte acknowledged receipt of Bhat's request for reconsideration by memorandum dated April 19, 2002, RX 45, and later Marcotte denied it. RX36, RX43-45. He affirmed his previous determination without change, and Boateng subsequently refused to make any changes. RX 50.

Boateng Places Bhat  
on a Performance Improvement Plan(PIP)

149. On April 29, 2002, Boateng finalized a written Performance Improvement Plan (PIP) for Bhat. RX 48. Although Grier first thought that Boateng submitted the PIP Bhat late, Tr.1030, 1127, Tr. 1659, 1693, 1707, he discussed with Bhat the need for a PIP while her appeal was still pending, and he testified that Bhat persuaded him to postpone formal action until Marcotte had issued a decision. Tr. 1030, 1127.

150. On May 12, 2002, Boateng sent the PIP to Bhat. It began on April 29, 2002. Tr. 224, 227, CX36. Bhat met with Boateng regarding the PIP on May 13, 2002. Tr. 234; CX36.

151. In the PIP, Boateng identified communication and teamwork as the areas in need of improvement. He wrote:

“[Bhat's] communication style often tends to undermine needed cooperation. Others construe her style as disrespectful and insensitive to alternative views and opinions. [Bhat] shows an unusually strong bent for independent work and recognition, and does not align herself much with the broader departmental and team goals or objectives.”

With respect to performance changes he expected in the future, Boateng wrote:

“[Bhat] will strive to communicate better with others, including subordinates, peers and superiors. She will do this by avoiding overly aggressive language and respecting others' opinions and communication needs. [Bhat] will learn to recognize the equal sense of value and interdependence that must be attributable to all WASA programs. She will learn to recognize the shared ownership needs that others must have of the Water Quality Program. She will present program support requests in a way that will garner cooperation from others, and not antagonize needed support. [Bhat] will also work better with others as a team player, the key being embodied in the concept of 'synergy.'”

152. Boateng listed six Action Items to be accomplished by Bhat under the PIP. The first and second Action Items were to be completed by July 31, 2002. Bhat was to complete a short

managerial training course in communication for a technical professional in a managerial role, and another in organizational management and team building. The third Action Item directed her to “inform and discuss major initiatives with her department director prior to formerly engaging others, particular other agencies outside of WASA” during “informal meetings set twice weekly, tentatively.” The remaining Action Items directed Bhat to “follow the proper chain of command in conducting business within the organization;...to avoid the overly aggressive approach to her program support requests within the Department of Water Services and elsewhere in the WASA organization;... to pay closer attention to her interactions with others (subordinates, superiors, etc) in understanding their particular communication needs...[and to make] “an effort to understand and respect others’ shared ownership needs and responsibilities for the Water Quality Program and, on a broader organizational level, for programs within the Department of Water Services and WASA.” CX36;RX 48.

153. Bhat was provided with a copy of the PIP prior to meeting with Boateng to discuss its contents. She prepared written comments which she initialed and dated May 12, 2002. As Bhat made clear in her comments, she did not accept the validity of Boateng’s criticism of her communication and teamwork skills. She wrote:

I am always open to further excelling in my performance. However both in communication and teamwork I have conformed to the work behaviors exemplified and agreed upon in the performance plan. As a sincere team player I have volunteered information and other support to the fullest extent available assisting in departmental and divisional goals of DWS/WASA. In communication likewise I always (sic) been open and frank targeting strictly on tackling programs and issues for (sic) best possible resolution. I have readily shared my thoughts and ideas on approach to problem solving or resolutions of issues when like situations arose. I have exceeded the agreed upon target requirement for each one of my performance factors and goals which have contributed to DCWASA.” RX 48 (R000712).

154. Bhat responded to the requirement that she notify Boateng before communicating outside of WASA, testifying:

[P]art of my responsibility...was to engage other agencies, the Department of Health, the DCRA, that is the D.C. Regulatory Agency as well as EPA to discuss in my regular -- water quality projects, to implement them, to clarify them as well as...coordinate with the department of health in case of water quality emergencies. In fact, the protocol that WASA has developed for public notification, in case of emergencies, I was the ... first point of contact for any water quality emergencies and Mr. Boateng was never available nor Mr. Marcotte many times and I felt that it was a great public risk...[B]asically he was not allowing me to do the responsible things that they hired me for. Tr. 227-228.

155. Addressing the chain-of-command provision, Bhat noted that it was her understanding that Boateng and Marcotte “did not want any damaging information [going to outside public agencies] even if it was for public health, whether it was lead or copper, or whether it was any other [health risk.]” Tr. 229; *see also* Tr. 234. As an example, Bhat cited the changeover in March, 2002, in the disinfectant used in the D.C. drinking water, from chlorine to chloramine. Tr. 230-234. Bhat testified that she only knew by chance from a meeting at WA about the changeover, which shocked her because the changeover could impact dialysis patients. Tr. 230-231. Bhat informed the DOH, the agency responsible for communicating with dialysis centers, and the EPA about the changeover, and told Boateng about her communication, at which point, “he was very angry and chastised me.” Tr. 230-231; CX 37.

156. Bhat interpreted the PIP to require regularly scheduled meetings with Boateng, which he failed to keep. Boateng admitted that he kept a busy schedule and frequently cancelled scheduled meetings. He stated, however, that he was available to Bhat through email and he claimed they met several times between May and July in connection with staff meetings, training sessions, and one-on-one meetings. Tr. 238-240, 1136-1137. Bhat explained that, with respect to the chloramines changeover, she sent Boateng an email before she went to DOH and EPA, but he did not respond for several days, so she went ahead with the public notification, given the urgency of the situation. Tr. 230-232. Bhat was thereafter in communication with an EPA official responding to a customer’s complaint about a chlorine odor and, according to Bhat, Boateng told her she was not to call the EPA directly. Tr. 233.

157. Bhat understood that Boateng wanted her always to come to him before going to Marcotte and Johnson, regardless of Boateng’s own availability. Tr. 236. Boateng testified that he set forth Action Item 3 because “the information was not coming to [him] as readily as they [sic] should have.” Tr. 1032. Marcotte acknowledged that Bhat could have read Action Item 3 to mean that she should not go to the EPA before going inside with water quality information. Tr. 1461.

158. Boateng testified that in Action Item 4, he was referring to instances where Bhat had gone to Marcotte with a problem, e.g., regarding bacterial contamination (total coliform), whenever she “wasn’t able to...get support from the other managers to get these things done.” Tr. 1033. Boateng objected to Bhat going to Marcotte, but he acknowledged that a total coliform positive could lead to an EPA violation if it were not addressed urgently. He also acknowledged that he does not always respond to emails within 24 hours, and that Bhat may have tried to contact him regarding total coliform before she went to Marcotte. Tr. 1104-5.

159. With respect to the comment about her “overly aggressive approach to her program support,” Bhat testified:

I had no ... administrative support for my programs which were mandated by EPA, and when I just asked [Mr. Boateng] for administrative support during the programs, ... and I asked him repeatedly because I had the vacancies ... ever since Mr. Boateng came [to WASA] except for a brief period ..., and he

thought that I was aggressive in asking program support. [H]e equated asking [for] an administrative assistant to implement the program to asking for program support. Tr. 235-236.

Boateng acknowledged that his reference in this Action Item was to Bhat's "requests for getting positions filled in her area." Tr. 1034.

#### Execution of the PIP

160. At the beginning of a PIP, a WASA employee is not eligible for termination for performance reasons. Tr. 1658-1659. HR Director Grier testified that the intent of a PIP is to bring an employee's performance to a satisfactory level. Tr. 1658. The PIP allows an employee an opportunity to improve and if the employee improves sufficiently, the employee will not be fired based on performance. Tr. 1658. Boateng described the PIP as a means of helping employees "remedy the areas that they will need some help in," Tr. 1029, and a "tool to help employees improve" and "not a disciplinary matter." Tr. 1127. The purpose of a PIP is for "coaching and counseling an employee." Tr. 1131.

161. On August 26, 2002, Boateng reported that he engaged in "unrelenting efforts" to counsel Bhat during the PIP (Tr. 1166), although he could not recall "any counseling" that he had with Bhat during the PIP. Tr. 1129. Boateng testified that he "continually counseled" Bhat as her manager, but never in writing. Tr. 1090, Tr. 1127-1128. At his deposition, Boateng said that January 28, 2002, over a year prior to Bhat's discharge, was the last counseling of Bhat that he could recall. Tr. 1092, 1128-1129.

**162.** Bhat was never told that she was failing on the PIP or on any element of the PIP. See, e.g., Tr. 702-704, 1131. She was never told that any of her performance problems occurring prior to the PIP continued during the PIP. Id. Boateng admitted that he did not think "Ms. Bhat realized that [he] was dissatisfied with her progress" on the PIP. Tr. 1131.

163. The WASA Human Resources Department expected Boateng to provide Bhat relevant examples of deficient behaviors in regular meetings during the PIP period and document such discussions. Tr. 1661-1662, 1665-1666. Boateng did not meet with Bhat specifically to address her PIP after May 13, 2002, when she first met with Boateng to sign the PIP. Tr. 702-704, 1128, 1131, 1665-1666; CX151.

164. Under Action Item 3, the PIP says, "Informal meetings set twice a week, tentatively," and HR expected Boateng to meet this schedule. Tr. 1661. HR's basis for approving Action Item 3 of the PIP was that Boateng set forth a two meeting per week requirement. Tr. 1661. Grier testified on re-direct that Bhat should have sought feedback on the PIP, Tr. 1714, but Grier had no knowledge of the extent to which Bhat sought feedback during her PIP. Tr. 1663.

165. Boateng testified that he and Bhat "had this supplemental meeting...as part of the PIP,...even though I couldn't make all of them. We met on some occasions," Tr. 1233, and he advised in his OSHA affidavit that: "I held regular meetings, at least once a week, with [Ms.]

Bhat subsequent to her PIP...I think I documented some of these meeting [sic] in a notebook....” CX139 at p. 5. He testified, however, that he did not have informal meetings with Bhat twice a week regarding Action Item 3, or any meetings with her specifically regarding the PIP. Tr. 1094, Tr. 1128-1129; *see also* Tr. 240.

166. Bhat never received any written feedback on her PIP. Tr. 1131, 1662-1663, 1665-1666; CX151; *see also* Tr. 239, 1455, 1457. WASA policy indicates that Boateng should have communicated Bhat’s unsatisfactory performance to her, discussed ways to correct the problem, attached a note of the discussions to Bhat’s performance plan, have a formal review with Bhat during the performance year, and meet with her regularly to coach, counsel and give her feedback. CX138; Tr. 1133-1134, 1454-1457, 1661-1663, 1665-1666.

167. Bhat’s PIP was originally scheduled to end on about July 29, 2002, about 90 days after it began. CX36; Tr. 1136, 1660; *see also* Tr. 1454. On July 26, 2002, Boateng extended Bhat’s deadline for completing the training portion of her PIP to September 30, 2002, because he preferred her to attend local training, rather than the only available training before September, which was out-of-state. Tr. 238-239; CX37. At their July 26, 2002 meeting, Boateng and did not make any comment critical of Bhat’s performance in handling the lead and copper program or regarding her performance otherwise. Tr. 277-278.

168. Bhat completed the training courses before the deadlines. CX38; Tr. 239-240. Boateng never contacted HR to extend Bhat’s PIP. Tr. 1660, 1707-1708, citing CX37. Grier testified that there was no indication on the face of the PIP that the entire PIP, beyond the training requirement, was extended. *Id.* Under WASA policies, a supervisor must notify an employee if a PIP is to be extended, Tr. 1455-1456, 1660, but there is no evidence Bhat was notified of any extension of her PIP, apart from the extra time to attend training seminars.

169. Marcotte testified that Bhat’s performance management progress was not handled as well as it might have been. Tr. 1455.

#### Boateng’s Participation During the PIP

170. Bhat prepared a color-coded calendar which she provided to Marcotte and Johnson to document Boateng’s failures to meet with her one-on-one during the PIP between May and July, and throughout 2002. She submitted this calendar as part of her 2002 performance evaluation appeal. CX39; Tr. 241, 243, 255, 1457-1458. Bhat compiled the calendar retrospectively in about December, 2002, when she was challenging her 2002 performance evaluation. Tr. 243. The calendar was not a compilation of every time Boateng and Bhat saw each other or had brief conversations, but of “one-on-one meetings” to discuss water quality priorities and Bhat’s performance.

171. The record shows that Bhat erred in documenting May 13, 2002, as a date on which Bhat and Boateng failed to meet. CX39; Tr. 242. The calendar reflects that Boateng was out-of-town, and he was for part of the day (*see* CX43 at 31), but they met later in the day when he returned. CX39. Similarly, on July 26, 2002, the calendar indicates that Boateng was a “No Show,” but Bhat went to Boateng’s office where they met. Tr. 275.

172. Bhat based the calendar on her email correspondence with Boateng, (CX43), her work calendar and personal notebook. Tr. 255. The calendar shows a total of six one-on-one meetings in 2002, five between January and March, and one in December, with one meeting rescheduled by Bhat. CX39. Boateng canceled, did not show up for, or otherwise missed all of the other one-on-one meetings with Bhat scheduled during 2002. Id. Boateng explained that because of his schedule, he “couldn’t make many of those meetings.” Tr. 1130.

173. On February 5, 2002, Bhat wrote: “There have been five separate occasions that your scheduled meeting[s] with me at Reno have been cancelled and on one occasion the meeting was delayed.” CX43. On May 6, 2002, Bhat wrote, “You had informed me on Friday May 3, 02 that you will meet with me today May 6, 02. However you did not come. Please let me know whether you will be here tomorrow.” Id. Boateng responded saying that the two could meet the following afternoon. Id. Boateng again, on May 7, 2002, did not show up, prompting Bhat to send an email asking, “Well Kofi what happened?” CX43. At 5:25 p.m. on May 8, 2002, Boateng responded, saying only, “Sorry I have not been able to make it up there yet.” CX36 at R713. On June 5, 2002, Bhat hand-wrote Boateng a brief note about his unavailability to discuss her PIP, in which she said, “It is becoming difficult to meet with you in person.” CX41. She elaborated at hearing, saying, “I was not being able to meet with him in person [and] he did not return my e-mails or ...my phone calls.” Tr. 250. Bhat sent Boateng an email, in part, regarding compliance with her PIP on June 24, 2002, in which she observed, “I left you several messages and also sen[t] you emails however have not heard from you.” CX42. On July 26, 2002, Boateng formally invited Bhat to a one-on-one meeting at Bhat’s Fort Reno facility, (CX52), which he subsequently canceled. Nevertheless, Bhat then traveled to Boateng’s facility and met briefly with him there. Tr. 275. On August 19, 2002, Bhat called Boateng’s attention to his failure to respond to her inquiry of August 2, 2002 regarding lead line replacement in the aftermath of the LAL exceedance. CX58. On December 12, 2002, Bhat noted in an email that she had not received a response to a conversation about her performance evaluation on December 6, 2002, and had left two follow-up voicemail messages on December 9 and 11, 2002, but Boateng did not respond. Id.

174. Boateng’s failure to attend scheduled meetings was the subject of critical comment in his own performance review. Johnson discussed the subject with Marcotte, Tr. 1767, 1772-1773, and suggested that “... perhaps Marcotte needed to spend some time working with that supervisor to ensure that these kinds...of things didn’t happen in the future...” Tr. 1763. Marcotte, as Boateng’s supervisor, counseled him during Boateng’s performance evaluation: “that there needs to be an emphasis on holding meetings that were scheduled despite other competing priorities within the group.” Tr. 1535. Marcotte acknowledged that the basis for this counseling was Boateng’s failure to meet with Bhat, which merited mention in Boateng’s performance review. Tr. 1535-36.

175. Rizzo reported to OSHA that he too experienced communications difficulties with Boateng, Marcotte and Johnson. OSHA noted:

Rizzo found that part of the problem at WASA was that Bhat, her supervisor Kofi Boateng, and General Manger Jerry Johnson

and Deputy General Manager Michael Marcotte were located at different sites and therefore had a difficult time in communicating effectively. Rizzo cited a personal example that if he wanted to communicate with a supervisor, that he could walk to a nearby office and speak with [him]. However, this was not possible with WASA as they are at different locations. He further noted that when sending communication to Johnson or Marcotte, he finds it beneficial to send carbon copies to their subordinates as they are very busy and sometimes do not review emails for several weeks. This is problematic as many of the issues that Rizzo discusses with WASA are time sensitive and need prompt attention. CX127.

176. Boateng supervised four division managers, including Bhat, and testified that he “literally [works] 24 hours a day, 7 days a week,” and he typically had five to ten meetings a day. Tr. 1010, 1013. He has received as many as 100 emails a day, and typically has 15-20 phone calls. Id. Boateng admitted that these factors prevented him from keeping to a schedule, attending meetings with Bhat, or returning phone calls and emails promptly, if at all. Tr. 1010-1012, 1130, 1146. According to his supervisor, however, his busy schedule did not justify his failure to meet with Bhat pursuant to the PIP.

177. In June 2002, during the last month of the LAL monitoring period, Boateng acknowledged that Bhat was calling and leaving voicemail messages, and he may not have responded to them. Tr. 1146. Boateng stated that he generally opened only the emails that grabbed his attention. He did not open Bhat’s email about the LAL exceedance for 17 days. Tr. 1191, citing CX58 at R781.

#### The Events Leading Up To Bhat’s July 30, 2002 Email

178. On July 11, 2002, Bhat received an email from the WA laboratory stating that six (6) of the properties sampled in June, 2002, had tested in excess of 15 ppb. CX 44/RX 57. These properties were part of the LCR monitoring for the 2001-2002 cycle, which closed on June 30, 2002. Together with the 17 regulatory properties Bhat previously confirmed as exceeding the LAL, potentially 23 properties out of 50 would exceed the action level.

179. WASA proposed a finding that “For reasons she failed to explain at trial, Bhat did not forward Turner’s email to Boateng and Marcotte with an explanation of the possible implications as she had done in July, 2001. RX 9.” Bhat explained on numerous occasions that she did not forward WA raw data to her supervisors because they indicated that they did not wish to receive it. *See, e.g.*, Tr. 1463; 1557; CX30; Tr. 1122.

180. Marcotte acknowledged that Bhat may have been told not to go outside her chain of command, Tr. 1417, and that she could have interpreted the PIP, Action Items 4 (CX37), as a restriction in terms of going above her supervisor in the chain of command. Tr. 1462. Marcotte knew that WASA came close to exceeding the LAL in 2000-2001 but did not ask to see emerging lead results from 2001-2002, Tr. 1360, and he was unaware of Bhat’s efforts to

communicate with Boateng regarding the lead levels or her offer to provide Boateng the lead results and Boateng's refusal. Tr. 1463, 1557. Bhat testified extensively about ongoing discussions with Boateng regarding high lead results throughout the monitoring period, including discussions in October and November 2001, and February, March, June and July 2002. See, e.g., Tr. 158-160, 163-165, 179-180, 187, 191-195, 201-203, 214, 253, 272-273, 568-570, 572.

181. Boateng acknowledged that in the summer, 2001, he only paid attention to the fact that WASA "passed it [i.e., reported a 90<sup>th</sup> percentile lead result below the LAL] and that was pretty much it." Tr. 1082. He testified that he may have asked Bhat to keep him informed about the incoming lead results before WASA met the LAL for 2000-2001, Tr. 1053,1072-1074, but after that, he was not engaged or focused on or actively thinking about lead during the 2001-2002 monitoring period. Tr. 1058, 1069, 1160, 1179-1180.

182. Although Boateng thought Bhat failed to notify him adequately of the 2001-2002 results, Tr. 1122 Tr. 1232, he did not recall what efforts Bhat had made to meet and discuss the LAL with him prior to July 30, 2002, Tr. 1161, and he acknowledged that she may have tried to contact him and received no response from him. Boateng refused Bhat's offer to provide complete regulatory lead monitoring results on March 19, 2002. CX30; Tr. 1122. He testified that the regulatory lead data was not his "primary concern" at the time, and that he was only interested in internal lead results because Marcotte asked for them. Tr. 1123.

183. Bhat testified that she provided Boateng complete lead results anyway on March 21, 2002. CX33. Boateng told Marcotte it "was certainly possible" he received the email and did not take note of it or did not "grasp the significance" of it. Tr. 1532-1534, 1552. Boateng admitted that in June, 2002, during the last month of the LAL monitoring period, Bhat was calling and leaving voicemail messages, and he may not have responded to them. Tr. 1146. Boateng acknowledged that if Bhat was trying to contact him to set up a meeting to discuss the LAL and he was not responding, he did not expect her to delay notifying the EPA. Tr. 1163.

184. On July 12, 2002, the administrative coordinator for WASA's Department of Water Services requested that Bhat provide additional detail to support her FY '03-'04 budget request. Bhat responded on July 17, 2002, with a copy to Boateng. RX 59/CX46. Attached to her response was a four-page spreadsheet, the last item of which referred to the replacement of lead service lines in the water distribution system. Bhat described the project as follows:

The corrosion control program is implemented for the DC drinking water and the pH is maintained so that there is no leaching of lead. DC is in compliance with the Lead Copper rule however in year 2001-2002 there are (sic) large number of homes exceeding the lead action level and DC may not meet the lead action level for 2002. Also there is increasing public request to replace lead service lines. The customers are willing to replace their portion of the service line if WASA replaces its portion. There are (sic) large number of homes with elevated levels and these home also have lead service lines. RX 60/CX 46.

185. In response to questioning regarding Bhat's budget request, Boateng testified that Bhat proposed a \$10,000 appropriation for voluntary lead line replacement, which was only a fraction of the amount needed in the event of a regulatory event requiring a system-wide 7% annual replacement rate. In the latter situation, the cost would have been in the millions of dollars which Bhat had not included in her budget projections. Accordingly, he saw no cause for alarm. Tr. 1182-1187. Marcotte criticized the content of Bhat's July, 2002, budget submission as "incomplete" and indicative of Bhat's failure appropriately to advise WASA of the true situation regarding the lead monitoring program. Tr. 1414-1415. The record shows that voluntary lead line replacement was an item in Water Quality Division budget, but it does not show that budgeting a 7% regulatory replacement was a responsibility of the Water Quality Manager.

186. On July 19, 2002, Bhat attended a senior staff meeting of Water Service managers chaired by Boateng. Minutes of the meeting were prepared by Boateng's administrative assistant, Jill McClanahan, and on August 19, 2002, circulated to the attendees, including Bhat, for review and updates to action items the attendees deemed applicable. CX 47/R003442. The meeting minutes reflect that the attendees discussed ten topics, including Bhat's Water Quality report, followed by a round table discussion. There is no indication in the minutes that Bhat provided specifics regarding the number of properties that exceeded the LAL or by what degree, but they do show that Bhat told her colleagues that WASA "may not meet levels." CX 47/R003445. Boateng did not pay careful attention to Bhat's report, because, he contends, she failed to provide a definitive warning that WASA would fail the LCR, and because she had made a similar prediction of possible failure the previous year which did not come to pass after Bhat conducted further review. Tr. 1056-1057; RX 13.

187. There is no evidence of any written communication between Bhat and Boateng between July 19, 2002 and July 30, 2002 that would indicate that Bhat attempted to update him on the final results of the 2001-2002 monitoring period. Bhat was scheduled for a one-on-one meeting with Boateng on July 26, 2002, (CX 52), but according to the calendar Bhat prepared, that meeting was cancelled. CX 39. Bhat testified that she later visited Boateng at his Bryant Street office on July 26, 2002, with a summer intern whom she introduced to Boateng. Tr. 275-276. According to Bhat, she told Boateng on that occasion that the lead results were high. Tr. 275-276. Boateng denies any recollection of any discussion about lead results on that occasion. Tr.1057. Bhat's calendar also indicates that Boateng did not attend a scheduled one-on-one meeting on July 28, 2002.

188. On July 30, 2002, Bhat telephoned Rizzo, and sent him an email, with a copy to Boateng, stating that she received the preliminary results of the June, 2002, lead sampling from the WA, and that although she still had to review the results to determine if any were valid, it appeared that WASA "did not meet the Lead Action level both for the first and second draw." CX 54. Bhat had WA's results since July 11, 2002.

189. In July, 2001, following receipt of the June, 2001, lead exceedance results from the WA, Bhat requested that the laboratory retest and conduct quality assurance testing before finalizing the results. RX 7/CX 10. There is no evidence that Bhat made any such inquiries in connection with the June, 2002, results, or that she attempted to invalidate any of the results as

she had done in July, 2001. All six properties reported to be in excess of 15 ppb on July 11, 2002 were included among the official test results reported to the EPA on August 26, 2002. CX 60/R002900-2901.

190. Bhat met with Boateng and Marcotte on or about September 3, 2002, to discuss the lead exceedance issue. Marcotte was concerned primarily with identifying how WASA had tested in excess of the LAL. He testified that Bhat stated at the meeting that she had not informed Boateng and him earlier of the possibility of exceedance because the data had just been compiled. Tr. 1364. Marcotte further testified that Bhat made no mention at the September 3<sup>rd</sup> meeting of having informed Boateng in March, 2002, of the possibility of such an exceedance. Tr. 1365. Marcotte asked Bhat whether, in situations where WASA was in jeopardy of exceeding the LAL at the end of a monitoring period, the LCR permitted WASA to collect additional samples to add to the sampling pool. He testified that in some regulatory procedures, collecting additional samples is lawful and appropriate. In making this inquiry, Marcotte did not intend to suggest that WASA illegally manipulate the sampling process; he had just wanted Bhat to tell him whether it was lawful. Tr. 1381-82. Marcotte's explanation is credible and there is no evidence that he was motivated to hide the 2001-2002 monitoring results from the EPA. Indeed, the meeting with Marcotte took place after the formal results were released to the EPA under Marcotte's signature on August 26, 2002. CX 60.

191. Following this meeting, Bhat investigated WASA's obligations under the LCR to address the LAL exceedance. Tr. 1369-1370. On or about September 4, 2002, she attended a meeting with EPA and WASA officials to discuss the possible causes for exceedance and the actions WASA needed to take. She reported the substance of that meeting in a September 6, 2002, memorandum that she sent to Marcotte, Boateng and the EPA officials on September 12, 2002. CX 61. No attempt was made by Marcotte or Boateng to limit Bhat's ability to attend meetings with EPA officials regarding the LAL issue. Bhat further testified at hearing that WASA management placed no limitations upon her ability to communicate with EPA or community officials with respect to the lead action issue after July 30, 2002. Tr. 356-62, 371, 381-82, 393-396. Indeed, in the fall of 2002, Marcotte and Boateng charged Bhat with responding to inquiries from members of the District of Columbia council regarding the lead issue. Tr. 1369-1370; CX 75. She also communicated with EPA officials regarding the content of the public education brochure which WASA was required to disseminate in the wake of the LAL exceedance notice. Tr. 342, 348-50; CX 69. Bhat was also included in communications related to the lead pipe replacement initiative mandated under the LCR as a result of LAL exceedance. CX 79-80, 83.

192. In the fall of 2002, Bhat recommended to Marcotte that WASA insist that WA add polyphosphates to the water treatment process to address the lead leaching issue. Tr. 1378-1381. Marcotte had past experience with this treatment process and expressed his concerns that the public would resist such an additive and that it would have to be removed from wastewater prior to disposal in the Potomac River. T: 1380-1381. Despite his reservations, he approved Bhat's efforts to investigate use of polyphosphates as a future solution. Tr. 1380-1381. Bhat was given permission to organize and conduct a seminar for WASA managers, WA officials, and EPA representatives concerning polyphosphate additives. Tr. 1380-1381; CX 76-77.

August 26, 2002  
Discharge Recommendations

193. On or about August 26, 2002, Boateng sent Marcotte a draft of a memorandum addressed to Bhat informing her that she had failed to comply with stated requirements of the PIP and that she continued “to be challenged with the basic concepts of communication and teamwork.” RX 71, 72. Boateng reported that he remained concerned with her “speculative and dictatorial communication approach; non-inclusive decisions and actions on sensitive and priority matters; and inability to follow directions and chain of command.” Boateng stated that he had conducted an interim evaluation of Bhat and had determined that she repeatedly failed to meet Action Items 3, 4 and 5. Boateng identified three examples of Bhat’s performance that justified his assessment. First, he criticized Bhat for speaking prematurely and acting exclusively in reporting the lead action exceedance to the EPA on July 30, 2002. Second, he criticized Bhat for her continuing overly aggressive approach to requesting program support. Third, he criticized her for requesting the termination of the NAI contract without consulting him, demonstrating her disregard for the needs of the Department as a whole. RX 72. The memorandum was not sent to Bhat.

194. Boateng testified that Bhat’s July 30, 2002, email to the EPA made him feel “totally betrayed” (Tr. 1067) and “quite furious” (Tr. 1037), “totally blindsided” (1067) and “shocked.” Tr. 1158-1159. Boateng explained that the email made him “rather embarrassed” and “very frustrated,” but he also testified that it “was absolutely not a concern at all” to him that Bhat was communicating with the EPA in this manner. Tr. 1043-1044. Boateng felt that he was receiving the lead information “second-handedly.” Tr. 1160-1161. He was, however, copied on the email to Rizzo. Boateng knew that the compliance measures were going to have substantial resource, personnel, and time management implications. Tr. 1185-1187.

195. On about August 19, 2002, approximately one week after Boateng read Bhat’s email notifying Rizzo of the likely LAL exceedance, Tr. 1067, Boateng urged Marcotte to approve firing Bhat. Tr. 1039, 1068, 1464. This was the same day Bhat was seeking Boateng’s response to inquiries about lead line replacement in light of the LAL exceedance. Cx58 at R781. Marcotte recalled that Boateng mentioned several general concerns, but the lead issue was the only specific example Boateng cited to justify Bhat’s termination on communication grounds. Tr.1463. Boateng testified: “I wanted to recommend her termination...and he essentially told me to send him a draft of why I wanted to take this action and so I sent him an email with a draft of what ...my proposal was to Mr. Marcotte.” Tr. 1039. Boateng had already approved performance-based training for Bhat in September, 2002, when he recommended that she be fired in August, 2002. Tr. 1137.

196. One week later, on August 26, 2002, the same day Marcotte transmitted the memo regarding the LAL exceedance to the EPA (CX60), and nearly a month after Bhat’s PIP concluded, Boateng sent Marcotte his proposal to move “quickly forward” with Bhat’s termination. RX71-72; Tr. 1068, 1463. The first reason Boateng cited in his memo to justify Bhat’s termination was Bhat’s July 30, 2002, EPA communication:

On July 30, 2002 you sent an email to an EPA personnel [sic] regarding lead and cooper monitoring program. [sic] In your email you affirmed that you had not closely reviewed the lead data, yet you reported, prematurely, that WASA did not meet the established [LAL] for the specified period. At a minimum, you should have completed your review and analyses before passing preliminary information on a regulatory matter. Moreover, while you briefly mentioned to me the possibility of WASA's non-conformance, you failed to discuss with me the completed status of the lead results and its implications, prior to engaging the EPA. Such an action would have been necessary to involve the department director and, subsequently, other WASA stakeholders in devising plans to preempt any regulatory requirements and public concerns. (Emph. added.) RX 72 at R786.

197. Boateng cited the July 30, 2002, EPA communication in the August 26, 2002, memo as a "non-inclusive decision" and as an example of the "inability to follow directions." Tr. 1167. Boateng testified that Bhat should have gone outside the chain-of-command "on something as serious" as the LAL exceedance, Tr. 1189-1190, but Marcotte acknowledged that Action Item 4 of the PIP could be read as instructing Bhat to give information about water quality only to Boateng. Tr. 1460. Boateng continued: "Any drinking water-related issues that could possibly have any negative impact on the public health and cause public concern must be brought to the attention of the WASA executive team. You spoke prematurely and acted exclusively on this very important and sensitive matter." RX72 at R787. Marcotte agreed: "I felt her notifying the EPA was premature," Tr. 1419-1420, but her notification in the same email to him and Boateng was "extremely late." Tr. 1443.

198. Boateng also reported that Bhat's email of June 20, 2002, involving the NAI temporary services contract (RX53) was a factor which led him to recommend Bhat's termination on August 26, 2002, although this incident was never raised with Bhat before that memo. Boateng testified that one other situation "having to do with an individual called Mr. Permit" informed his August 26, 2002, memo supporting his termination recommendation. Tr.1037. Boateng alleged that Bhat was talking about "how incompetent everybody in the office was" in addressing the Permit scenario and "putting everybody down." Tr. 1038. However, Permit is not mentioned or alluded to in Boateng's August 26, 2002, memo (RX72; Tr. 1164). Neither is Permit mentioned in Boateng's later termination recommendation, Bhat's 2002 performance evaluation (CX89), or in Boateng's denial of Bhat's performance evaluation appeal, all of which expressly reference the July 30, 2002, email to Rizzo. Tr. 1164. Boateng admitted that Permit asked that everybody be fired, including Boateng, *i.e.*, Permit's problem was not with Bhat specifically. Tr. 1164. McClanahan, Boateng's Executive Assistant did not recall any interactions with Bhat regarding Permit. Tr. 1248.

199. Boateng testified that he recommended Bhat's termination because he had not seen any improvement in her performance, Tr. 1041, but Bhat did improve in following proper chain of command, Tr. 1139, and he could not think of any instances in which she

manifested an aggressive approach to program support during her PIP. Boateng's 2002 performance evaluation commented favorably on her improved interactions with other departments. CX87 at R808.

200. Boateng testified inconsistently both that Bhat's aggressiveness, dictatorial nature, defiance and poor communication skills did not change, Tr. 1027-1028, 1034, 1035, 1045-1046), and that her behavior did change, Tr. 1120, that she "became docile and meek," Tr. 1119, and that his concern was, in fact, that she was docile and meek, "because you want your employees to be able to express themselves." Tr. 1121. Marcotte also noted Bhat's improvement with respect to written communications issues with employees and turnover issues. Tr. 1459, 1551.

201. Boateng's August 26, 2002, memo, attached to an email to Marcotte, "Subject: Seema Bhat – Performance Plan issues," appears to be a letter addressed to Bhat discussing her "non-compliance" with the PIP, RX72 at 786, however, Boateng never sent his letter to Bhat or otherwise told her that she failed the PIP. Tr. 1135. When he reviewed the memo, Marcotte assumed that Bhat had received it because he would have expected there to be some closure on the PIP and an evaluation. Tr. 1464.

202. Another employee, David Thornhill, received a PIP which, like Bhat's, required "open communications with manager on progress of projects." CX152. Thornhill, unlike Bhat, received an in-depth evaluation of his performance on the PIP at the conclusion of his PIP, notifying him that he had failed to accomplish the designated objectives, and documenting multiple, formal meetings that had been held between the supervisor and the employee throughout the PIP. CX152; Tr. 1671.

203. Marcotte rejected Boateng's termination recommendation and suggested that he wait until the end of the performance period, *i.e.*, after the 2002 performance year which ran through September 30, 2002, evaluation, because he wanted Bhat to assist in developing the compliance plan for exceedance of the lead action level, Tr. 1367-1368, and because a discharge after the evaluation would be more "orderly." Tr. 1041-1042, 1465.

#### 2002 Performance Review

204. On November 15, 2002, Boateng completed Bhat's 2002, performance review. RX 76. This review noted improvements in Bhat's behavior since 2001, particularly in the areas of observing WASA policies, regulations and rules, in customer service, and supervision. In the area of dependability and responsiveness, however, Boateng continued to criticize Bhat's performance, noting that she would be a "much greater asset ... by striving early to engage her supervisor and/or other WASA professionals of potential problems of technical origin," which would facilitate "early planning efforts and minimize further potential adverse effects of problems." These same concerns were repeated in Boateng's assessment of Bhat's teamwork skills. He wrote that Bhat "rarely fully engages her supervisor and others in cooperative efforts to resolve problems," specifically referencing Bhat's "lapse in fully engaging her supervisor and other WASA personnel" on the issue of lead exceedance. According to Boateng, Bhat's failure fully to engage her supervisors "had caused significant delays in resource planning for dealing with a sensitive public health issue." Boateng also rated Bhat as rarely meeting expectations in the area of communication. He noted that Bhat "still faces significant challenges" because she

continues “to communicate to staff and personnel in unprofessional and demeaning manner.” For the second consecutive year, Boateng gave Bhat a Level 1 review. RX. 76.

205. After completing Bhat’s second Level 1 review, Boateng contacted Grier to discuss the procedure for terminating Bhat’s employment. Tr. 1604. Grier advised him to prepare a letter setting forth the grounds for his recommendation. On December 3, 2002, Boateng signed off on and submitted a memorandum to Grier, through Marcotte, requesting Grier’s office to take appropriate steps to terminate Bhat from the position of Manager of the Water Quality Program. RX 77. Boateng stated that Bhat had received unsatisfactory “Level One” performance ratings for two consecutive rating periods based mainly “on her lack of performance, after repeated counseling, in the two-performance factor categories of Communication and Teamwork.” Boateng indicated that a PIP had been designed to assist Bhat in addressing shortfalls in communication and teamwork, a copy of which was appended to the recommendation. He reiterated four areas of change identified in the PIP, including attending remedial courses in team building, communication and organizational development tailored for technical professionals in managerial roles; improving team performance skills by involving her superiors and other professionals within WASA on major initiatives in her area; improving her style of communication which had often been construed by others as “disrespectful,” “rude,” and “argumentative;” and improving her approach on gaining support for water quality programs by following the proper chain of command and avoiding overly aggressive behaviors. Boateng wrote that Bhat had failed to show improvement in the following performance areas:

1. With respect to the 2001-2002, lead monitoring and compliance period, Boateng wrote that Bhat had failed fully to inform and involve him and the Authority’s executive team that the Authority would exceed the EPA lead action level until late in the period, and her failure caused “significant delays in implementing the remedial programs required by the regulatory agency.” Tr. 1043-1044; RX 77.

2. Boateng noted that Bhat had prematurely requested the termination of a personnel services contract with NAI without first consulting him or others who might be impacted, or even considering how her actions would affect others. In Boateng’s view, Bhat’s conduct demonstrated a continuing pattern of attempting to circumvent strategies that he had developed to respond to the personnel turn over in her area of supervision, a disregard for the needs of others in the Department, a failure of team spirit, and an intent to ignore the proper chain of command. Tr. 1036-1037; RX 77.

3. Boateng wrote that in the course of the 2002 performance years, he had continued to be concerned with Bhat’s overly aggressive communication style. He observed that Bhat continued to “groundlessly and overtly denigrate other personnel, units and departments within the organization, including unjustly

questioning their capability, performance and productivity,” and he stated he had addressed her about her behavior over the telephone on at least one occasion. Boateng stated that Bhat’s approach caused “further disruption of any already tenuous working environment” and threatened “the fragile efforts towards team building and performance improvements” that the Water Services Department was embarking upon. Tr. 1036-1038; RX 77.

206. In Boateng’s view, Bhat’s deficiencies in the communication and teamwork areas prevented her from bringing others along in meeting WASA’s regulatory challenges, initiating public outreach programs, extending the reach of the Department’s new water conservation program for the District of Columbia, and caused the failure of WASA’s upper management to address the lead exceedance issue in a timely manner Tr. 1035-1045.

#### November 25, 2002, Recommendation

207. On November 25, 2002, Boateng again requested Bhat’s termination, and forwarded his request to Marcotte on December 3, 2002. Tr. 1047; RX77. This was the recommendation which ultimately led to Bhat’s termination. Tr. 1209. Boateng testified that nothing had occurred after he first recommended discharging Bhat on August 26, 2002, that caused him to recommend Bhat’s discharge again; he was simply “following up on administrative matters.” Tr. 1208. Boateng’s November 25, 2002, termination recommendation (RX77) cited the way in which Bhat announced the lead exceedance through her July 30, 2002, email to Rizzo. RX77; Tr. 1407-1408. His motivation for the recommendation was the same as on August 26, 2002, Tr. 1208, but the stated rationale differs from the August 26, 2002 memo. Tr. 1407; RX77. Boateng stated: “In the 2001-2002 Lead monitoring and compliance period WASA exceeded the [EPA’s] [LAL.] Ms. Bhat failed to fully inform and involve the DWS director and WASA’s executive team of the exceedance and the consequences until late in the period.” RX77.

208. Boateng acknowledged that he had already recommended firing Bhat by the time she suggested his concerns were “trivial.” Tr. 1210. Nothing happened after November 25, 2002, that changed the circumstances that led to Bhat’s discharge. Tr. 1209. There were no incidents which arose after November 25, 2002, that Boateng could recall that impacted Bhat’s discharge in any way. Tr. 1210-1211. Marcotte agreed that Boateng made substantially the same set of observations and described the same incidents, employing the same examples to justify Bhat’s termination on November 25, 2002, as he had on August 26, 2002. Tr. 1402-1403, 1406.

209. Marcotte testified that he would not have agreed to send forward to Human Resources Boateng’s November 25, 2002, discharge recommendation (RX77) if he disagreed with it or had any significant reservations about it. Tr. 1209; Tr. 1400. Marcotte had no independent justification of his own for terminating Bhat beyond what was included in Boateng’s discharge recommendation. Tr. 1402.

210. Marcotte acknowledged that the only specific performance deficiency of which he had firsthand knowledge was the way Bhat reported the LAL, i.e., in her July 30, 2002, email to Rizzo (CX54). Tr. 1421. Although Marcotte indicated he never contemplated “removing Ms. Bhat from her position as manager of water quality services as a result of the email that she sent to Mr. Rizzo on July 30, 2002,” that was the first instance mentioned in the November 25, 2002 discharge proposal. Tr. 1366.

211. Grier approved the November 25, 2002, discharge recommendation. Tr. 1679. Although it was her role to review whether or not there is sufficient basis for terminating an employee, Grier never sought to ascertain Bhat’s side of the story regarding the LAL reporting or any other issues raised in the proposal. Tr. 1679-1681. Grier also ensured consistency in the application of WASA policies and termination processes (Tr. 1678-1679), but she was aware of no evidence that Bhat received feedback on her PIP or an interim performance evaluation to which she was entitled prior to Boateng’s termination recommendation. Tr. 1675-1681.

212. Grier testified that employees should not be terminated under WASA policy without an interim performance evaluation. Tr. 1674-1676. She further testified that supervisors must communicate with an employee during an interim performance appraisal process that the employee has a performance problem and ways to attempt to address it. Tr. 1675. There are “incidents of such magnitude” for which an employee can be terminated without the benefit of an interim evaluation, but Grier knew of no such incident occurring in Bhat’s case. Id.

213. Grier testified that Bhat’s LAL communication with the EPA as the only example illustrating communications or chain-of-command deficiencies by Bhat. Tr. 1672-1673. It was her opinion, when she concurred with the discharge recommendation, that when Bhat went to the EPA about the LAL she demonstrated a failure to adhere to the chain of command. Tr. 1712.

#### 2002 Performance Evaluation

214. Boateng signed Bhat’s 2002 performance evaluation on November 15, 2002. Tr. 383, 611-613; CX87. Boateng commented positively that Bhat: “consistently observed WASA policies and regulations;” “continued to provide quality service to [WASA’s] customers;” “consistently responded to water quality complaints in a timely manner and provided technically accurate information to the public;” “improved her interactions with other WASA departments;” was “a dependable and responsive professional, rarely needing any supervision [sic] in her work;” was “deligent [sic] and perform[ed] assignments timely;” “reliably perform[ed] her part of an assigned work [sic] and work[ed] well independently;” was “well organized, detailed and a very productive professional;” was “a good problem solver;” “possess[ed] strong analytical skills and use[d] them capably in addressing problems;” was “conscious and observant about safety and security matters;” was “well organized and an effective project manager;” was “fair and consistent in supervising her assigned staff;” “respond[ed] to personnel issues quickly and firmly;” and “delegate[d] well and [held] employees accountable.” CX87. Bhat met or exceeded all of her concrete

performance goals. CX87 at R812. Boateng summarized, “Ms. Bhat is a productive professional when working independently. She has handled multiple water quality responsibilities during this reporting period.” CX87 at R813.

215. Bhat remembered receiving the evaluation on the morning of December 6, 2002, around 10:00 a.m., and drafting her response during the day, before meeting with Boateng in the evening, around 5:30 p.m. Tr. 711-712. Her son also recalled that she received her performance evaluation on that date, December 6, 2002, because she was very upset and crying when they carpooled home together. Tr. 817-818. Bhat’s emotional state also upset her son. Tr. 817-818. Boateng thought he may have given Bhat her performance evaluation on November 15, 2002, however, he acknowledged that he could not recall exactly when Bhat received her evaluation, Tr. 1214, and he did not have any knowledge as to whether Bhat was aware of the evaluation prior to December 6, 2002. Tr. 1214.

216. Again in 2002, Boateng rated Bhat “Level 1.” *Id.* He again rated her “Rarely Meets Expectations” in teamwork and communication. CX87. For teamwork, Boateng remarked:

She rarely fully engages her supervisor and others in cooperative efforts to resolve problems. An instant [sic] is when she delayed in properly communicating to me and the executive staff on the issue of WASA exceeding the EPA regulated Lead (Pb) Action Level in the year 2001/2002 sampling/testing cycle. Ms. Bhat’s lapse in fully engaging her supervisor and other WASA personnel earlier, has caused significant delays in resource planning for dealing with a sensitive public health issue. CX87 at R809.

For communication, Boateng stated:

Ms. Bhat still faces significant challenges in this area. She continues to communicate to staff and personnel in unprofessional and demeaning manner [sic]. Instances are documented employee turn-over problems in her section and encounters with contract managers, and others. CX87 at R810.

217. Beyond her unsatisfactory “teamwork” rating, Boateng also mentioned in “Dependability and Responsiveness” category that Bhat failed to communicate properly with her supervisors on the issue of WASA exceeding the LAL and in the concluding statement suggesting that she “fully and more cooperatively engage her supervisor.” CX87 at R809, R813; Tr. 1216. Marcotte testified that the quoted language, (Cx 87); Tr.1529, related to the LAL and emerging regulations concerning disinfection byproducts (DBPR) which he felt Bhat was not addressing. Tr. 1530-31; *but see*, CX95.

218. Boateng noted Bhat’s improved interactions with other areas of WASA in her 2002 performance evaluation. CX87 at R808. Marcotte testified that when Boateng

recommended Bhat's discharge, Boateng did not report to Marcotte that Bhat had problems working with any colleagues. Tr. 1466. Several of her co-workers testified that they had good working relationships with Bhat. Haider, For example, did not recall any complaints about Bhat from other managers or observe any behavior by Bhat that reflected negatively on her interpersonal skills. Tr. 766-767, 770-771. Ms. Oliver, who worked very closely with Bhat for four to five years, Tr. 737-738, testified that she and Bhat had day-to-day interactions and that they attended meetings together two to three times weekly. Tr. 739-740. Oliver said that she had a very good working relationship with Bhat. Tr. 738-740. Oliver never had any run-ins with Bhat during their years working together. Tr. 746. Oliver testified that Bhat was not rude or disrespectful. Tr. 740-741.

219. Oliver left WASA during a September, 2003, reorganization during which she received a buyout to take an early out retirement. Tr. 749-750, 761. At hearing, Oliver was told that Boateng had recommended her termination, but Oliver was unaware of this fact prior to her hearing cross-examination, noting that she had all satisfactory performance evaluations at WASA. Tr. 753, 754-755, 757; CX132-133. Although she received a letter of caution from Boateng in early 2002, CX131; Tr. 753, before leaving WASA, Oliver was offered other positions in the organization, but chose to leave. Tr. 750. By late 2003, a year and a half later, when she left, Oliver harbored no bad feelings toward Boateng or toward WASA. Tr. 750.

220. Boateng testified that turnover among Bhat's subordinates contributed to the decision to discharge her. Tr. 1096, 1151. Turnover was not, however, mentioned in Bhat's 2001 performance evaluation or in her PIP, Tr. 1095-1096, but Boateng indicated that his general reference to "program support" encompassed turnover. Tr. 1096.

221. Bhat's 2002 evaluation states that she "continued to communicate to staff and personnel in unprofessional and demeaning manner." CX87 at R810. Examples of communication difficulties included references to the NAI staffing contract, and interaction with Boateng's current Executive Assistant, Jill McClanahan. Tr. 1244. McClanahan testified that she complained about Bhat to Boateng "at least twice" (Tr. 1249), and that she "believe[d]" that she voiced other employees' complaints about Bhat to Boateng "at least twice." Tr. 1251. McClanahan could not, however, recall the time that she complained about Bhat to Boateng, and could not recall documenting any complaints about Bhat to Boateng. Tr. 1254.

222. Anthony Manley, a current WASA water quality service worker who worked for Bhat, testified that she was "very calm" and "very fair" to him. He never heard Bhat raise her voice, and never or very seldom heard his co-workers complain about Bhat. Tr. 800-807. Arthur Smith, WASA's water quality foreman, reported to Bhat. When Smith worked on the day shift, he would communicate with Bhat once a day, and she was present for crew meetings with Smith's five subordinates. Tr. 812. Smith described Bhat's interpersonal skills as "great," adding, "I didn't have no problem with her interpersonal skills." Tr. 813. Bhat had a good attitude issuing work assignments, and Smith never observed Bhat having bad interpersonal skills with the crew. Smith never heard any complaints about Bhat, and he had no reason to question her honesty. Tr. 807-814. Bhat's fellow DWS division director, Oliver, remarked that Bhat was "always willing to help her guys, all of them, the field crews... 12 or 14 of them. All of them had nothing but nice things to say about her, and that she was always will[ing] to help...them." Tr. 746.

223. The record shows that two of Bhat's subordinates were terminated, a technician, Jerome Krough, and another employee, Verena Graham. Tr. 1096, 1151. A few months after those employees were discharged, Boateng rated Bhat's performance acceptable for her supervision and her response to employees. CX22 at R630; Tr. 1094-1095. He concluded that the dismissals of Krough and Graham were proper, and he signed the termination letters for these employees. Tr. 1098-1100.

224. Apart from the lead exceedance, the only other specific example cited contemporaneously to justify Bhat's termination concerns an email she sent on June 20, 2002, regarding a temporary services contract with National Associates Inc.(NAI). RX 72 at R787; CX87 at R810, CX94 at R850; RX53; Tr. 1036-1037, 1041, 1045, 1149-1150. Boateng explained that the "communication" reference concerned the NAI contract incident. Tr. 1217.

225. Prior to implementation of the PIP, in an effort to meet Bhat's needs for clerical support, Boateng asked WASA's Procurement Department to negotiate a temporary services contract with NAI. Tr. 1036-1037. On June 20, 2002, without prior consultation with Boateng, Bhat directed a memorandum to Christine Lasiter, Director of WASA's Procurement Department, notifying Lasiter of Bhat's dissatisfaction with three NAI temporary placements and with the NAI representative responsible for the WASA contract. RX 53. Boateng was extremely angry with Bhat for sending this communication to Lasiter without first consulting him. Boateng testified that he had worked hard to get a temporary staffing contract that gave Bhat staffing flexibility to find someone she could work with and hire permanently, but her memo to Lasiter not only sought to terminate three temporary workers but also sought an "alternate vendor." Tr. 1036-1037.

226. Bhat first learned that Boateng was displeased about her email regarding the NAI contract (RX53), which he received on June 20, 2002, when she received her 2002 performance evaluation. CX89 at R827; Tr. 590, 1156. Until that time, Bhat was never counseled or reprimanded in any way concerning this email. Tr. 590, 1156. Boateng first confronted Bhat about her June 20, 2002 email, in their December 6, 2002, meeting regarding the 2002 performance evaluation. He cited the NAI situation to demonstrate Bhat's unsatisfactory communications. CX89 at R827.

227. According to Bhat, NAI sent her administrative employees who could not perform their duties. Bhat noted that the four employees NAI sent included: one with chronic health issues who could not be left alone and was hospitalized after four days on the job; one who could not generate simple, computerized reports after training; one "irregular in attendance;" and one with whom she had no problem, but who was rejected by Human Resources at the expiration of the contract. CX89 at R827; RX53; CX94 at R850. Bhat testified, "The NAI contract manager was annoyed that she had to replace several employees" who could not perform. CX89 at R827.

228. Boateng suggested that "the history [he] had with Ms. Bhat" suggested that the employees may have been having problems with her, Tr. 1152, but he also acknowledged that

her problems with the temporary employees may have been legitimate. RX72 at 787; RX77; CX94 at 850; Tr. 1151-1154; see also CX89 at R827.

229. Boateng testified that he was upset about the NAI situation because he “worked very hard” to “get a temporary staffing program in place...to give Bhat the ultimate of flexibility to hire and fire employees.” Tr. 1036. He was concerned about Bhat’s “termination” or attempt to terminate the NAI contract because it was department-wide, (CX94 at R85; Tr. 1147, and she did not consult him or evaluate the impact on other areas in DWS. CX94 at R850; Tr. 1037, 1041, 1147-1149.

230. The NAI contract expired at the end of its term. Tr. 1147. Bhat testified that she had limited authority and did not have the ability to terminate the NAI contract. Tr. 587, 1149. Grier agreed that Bhat had no authority to terminate the NAI contract, and she did not know any way Bhat could have terminated the contract without such authority. Tr. 1673-1674.

231. Before she contacted Lasiter in Procurement, Bhat contacted Trisdale Berhanu to discuss her problems with NAI’s services. Tr. 588. Boateng testified that Berhanu was the appropriate contact in his organization to deal with the NAI staffing contract, Tr. 1238, and he did not know how many times Bhat spoke with Berhanu before sending Boateng the June 20, 2002 email. RX53; Tr. 1156. Boateng acknowledged he was kept “in the loop” in Bhat’s June 20, 2002 email. Tr. 1150.

232. On June 20, 2002, Berhanu sent Bhat a follow-up email, copied to the relevant procurement official, Christine Lasiter. CX140. Berhanu reflected that Bhat should communicate with WASA’s procurement area “that the issue is in [Ms. Bhat’s] area only and that [WASA] intend[ed] to keep” the NAI contract active with respect to other lines in DWS. Id. After receiving Berhanu’s email, Bhat sent an email to Lasiter, copied to Berhanu and Boateng. RX53; Tr. 587. In her June 20, 2002, email (RX53), Bhat “request[ed] an alternative Vendor so that the Water Quality division can get the required services.” RX53 at R719. RX53; Tr. 587, 589.

233. At the hearing, Boateng and Marcotte agreed that the NAI email was not enough to fire her. Tr. 1156-1159; Tr. 1408, Tr. 1468. Marcotte and Grier had very little knowledge regarding the NAI issue, (Tr. 1467, 1673-4), and neither made any effort to investigate the matter. Tr. 1468, 1679-81.

234. Bhat drafted her response to her performance evaluation on December 6, 2002, (Tr. 613) noting, *inter alia*, that she always kept Boateng “fully informed and in written communication on all projects.” CX89 at R827; RX83. Specifically, Bhat commented regarding the teamwork and dependability/responsiveness elements that:

[I]n all phases of [the] Lead-Copper monitoring program Mr. Boateng was fully informed, involved and participated in relevant meetings. Regarding communication with executive staff Mr. Boateng had emphasized and made it absolutely clear to me in my last evaluation and on other occasions that it was his responsibility as a Department of Water Services Director to

communicate to Mr. Marcotte or other executive staff on any subject. Id.

235. Bhat characterized Boateng's comments on her performance in the teamwork and communication areas as "inaccurate," stating: "I have always kept my supervisor – Mr. Boateng, fully informed orally and in written communication on all projects. Also, in all phases of Lead-Copper monitoring program Mr. Boateng was fully informed, involved and participated in relevant meetings." This comment was directed at Boateng's contention that Bhat failed to tell him about the lead problem prior to July 2002. Tr. 614. The remainder of her comments addressed the NAI temporary services contract.

#### 2002 Performance Evaluation Appeal

236. On December 12, 2002, Boateng rejected Bhat's request to reconsider her evaluation, CX88, and she appealed on December 24, 2002. CX89, CX92; Tr. 385. Her appeal included a five-page statement addressing the teamwork and communication ratings, and a five-page table noting 45 examples of communications with Boateng regarding regulatory lead or WASA's in-house drinking fountains. CX92 at R2927-R2931. CX17; CX18; CX33; CX42; CX46; CX47; CX51; CX54. She denied any "lapse in fully engaging" Boateng and other WASA executive personnel, which had resulted in significant delays in resource planning. She specifically referenced item 10 on the list of communications, the alleged March 12, 2002 email, as evidence that she had kept him informed of developments in the lead and copper regulatory monitoring program, and a July 17, 2002 budget request that included \$10,000 in funds for lead line replacement. She also included a copy of the minutes of the senior staff meeting conducted on July 19, 2002, evidencing the fact that she had brought potential lead exceedance to Boateng's attention in the July, 2002, time frame. In the communications area, Bhat characterized Boateng's concerns about her conduct in connection with the attempted termination of the NAI contract as "trivial." RX 88 at (R002925). *See also* Tr. 643-644.

237. On January 7, 2003, Boateng rejected Bhat's 2002 performance evaluation appeal. CX94; Tr. 392-393. In a January 7, 2003, Memorandum, Boateng justified his rating, saying:

I expected you, as a Water Quality Division manager, to have fully engaged me much earlier in the June 2002/June 2002 lead monitoring and reporting period....As it turned out the first report you provided me, rather late in the reporting period, July 30, 2002, was a copy of an email that was addressed to an EPA personnel [sic], discussing a serious potential for WASA not meeting the EPA's LAL. At a minimum, you should have discussed your preliminary results, analyses, and implications with me and/or other WASA stakeholders prior to engaging others outside the organization. The communication requirement was clearly identified as part of your [PIP]....The exceedance of the [LAL] has been a major public health issue requiring WASA to embark on significant resource planning within a limited

period. Timely reporting would have prompted the early involvement of WASA's executive team....Recall, this was a major concern of the Deputy General Manager during a subsequent meeting with him on the subject. I expected you, as a manager, to employ appropriate communication approach [sic] that gain program support. CX94; *see also* Tr. 1047-1048.

238. Marcotte testified that there is no requirement with respect to notifying WASA insiders before going to outside agencies, but that Boateng's January 7, 2003, statement "can be read" to imply such a requirement. Tr. 1538-1539. Marcotte interpreted the statement "prior to engaging others outside the organization" as suggesting "a management expectation that he would receive information at the time ... that it is shared with people outside the organization." Tr. 1538. Bhat's July 30, 2002, email to Rizzo was copied to Boateng. CX54.

239. After receiving Boateng's decision, Bhat asked Marcotte to review her appeal package. Marcotte examined the communications spreadsheet she attached to the appeal and noted that there was only one written communication prior to July, 2002, when Bhat claimed to have informed Boateng of potential exceedance under the lead monitoring program. Tr. 1385-1386. On January 15, 2002, Marcotte requested a copy of the e-mail containing this communication. RX 91. Bhat responded that same day with a forwarded copy of the e-mail she had allegedly sent to Boateng on March 21, 2002 at 12:34 PM. RX 92/CX 99; Tr. 1387; Tr. 399, 618; Tr. 577-578.

240. Marcotte testified that he was confused by the contents of the March 21, 2002 e-mail and he asked Boateng about it. Boateng "didn't deny that he received it but he said that he was ...confused," Tr. 1388. Marcotte reported that Boateng "said he hadn't received this information or did not remember receiving it," Tr. 1389, but "it was certainly possible" he had received Bhat's March 21, 2002 email. Tr. 1552. In his OSHA statement (CX141 at p. 7), Marcotte reported that Boateng told him that he did not "grasp the significance" of the March 21, 2002 email. Tr. 1532-1534. Marcotte acknowledged that the statement that Boateng did not "grasp the significance" of the email "could be taken as an admission of receiving it." Tr. 1534.

241. Under the circumstances, Marcotte elected to treat Bhat's account and Boateng's account as equally credible for purposes of the appeal. Marcotte went on to conclude that, assuming Bhat had sent the e-mail on March 21, 2002, her communication was still inadequate because the issue was serious and she had not attempted to follow up with Boateng. Marcotte expected that she would have engaged in "continuing up front communication" on a major issue like the potential exceedance of the EPA lead action level. Tr. 1389-1390.

242. Marcotte never responded to Bhat's forwarded March 21, 2002, email or mentioned anything to her suggesting that there was anything suspect about the March 21, 2002 email. Tr. 400.

243. On January 22, 2003, Marcotte prepared his rejection of Bhat's 2002 performance evaluation review, "Subject: Response to Request for Review of Your FY2002

Performance Rating.” RX93; CX103. He testified that Bhat’s second negative performance evaluation was the basis for the termination recommendation he upheld. Tr. 1522. He testified that if he “withdrew [Bhat’s] negative performance evaluation, then it made it very difficult to sustain a recommendation to terminate her,” so he opposed overturning her performance evaluation. Tr. 1395. Marcotte has never recommended discharging a second-level subordinate like Bhat unless the discharge was proposed by one of his direct reports like Boateng. Tr. 1520. Marcotte’s primary function has always been to approve or deny the direct supervisor’s evaluation. Tr. 1520.

244. Because he had denied Bhat's 2002, performance appeal, Marcotte concluded that Bhat should be terminated. She had two successive Level 1 reviews, and Marcotte agreed with Boateng that her performance lapses were serious in nature, and, in 2002, had resulted in a failure to provide timely and effective warning of the lead exceedance. Tr. 1390-1391.

245. Grier testified that WASA’s performance management program requires termination of an employee with two consecutive Level 1 ratings. Tr. 1605. Marcotte also testified that termination for an employee with two Level 1 evaluations was “well-established” in his organization (Tr. 1391), and that termination in this circumstance was “a logical conclusion of people who had two level one evaluations.” Tr. 1539-1540.

246. WASA has no written policy or documented personnel program which requires termination of an employee with two consecutive Level 1 ratings. Tr. 1628-1629 (Grier); Tr. 1541 (Marcotte); Tr. 1221; CX139 at p.9. (Boateng). Grier testified that Linda Brown, WASA’s former Compensation Manager, designed WASA’s performance management program. CX153 at 93; Tr. 1641-1642. Brown did not include any provision that required the discharge of an employee who received two consecutive Level 1 evaluations, CX153 at 93. *See also* CX153 at 91-92. Although Brown is no longer with WASA, no substantial changes were made to the performance management program between the time Brown left WASA in September, 2002, and Bhat’s March, 2003, termination. Tr. 1642. As of January, 2003, Marcotte’s organization of approximately 800 employees had never discharged an employee for two successive Level 1 evaluations. Tr. 1539-1540.

#### January 30, 2003 Meeting

247. At a January 30, 2003, meeting with Marcotte and Boateng, Marcotte told Bhat that WASA had a policy of termination for two consecutive Level 1 performance evaluations. Tr. 406, 646. Bhat responded to Marcotte that she had not seen such a policy and knew nothing of it. Id. Bhat then inquired about her appeal of the most recent performance review, and Marcotte told her he had denied her appeal. Marcotte testified he asked Bhat if she were prepared to sign the acknowledgement on the termination letter indicating she had received it, but she declined to do so. He told her that as far as he was concerned the decision was final, but Bhat asked whether she could speak the General Manager, and Marcotte directed her to ask Grier. Tr. 1394.

248. Bhat testified that Marcotte told her at the January 30, 2003, meeting that she could appeal both her 2001 and 2002 performance reviews to Johnson. Tr. 404-406. Marcotte denied making any such statement. Tr. 1395-1396. Marcotte testified further that he did not tell Bhat she could appeal either her 2001 or 2002 performance appraisals, but advised her that he was the “primary reviewing authority” and “there was no further appeal.” Tr. 1396; 1543-1544; see also Tr. 647-648. Marcotte also recalled Bhat asking whether she could obtain a positive performance evaluation if she submitted a resignation, and he indicated he was not inclined to change her performance evaluation because the unsatisfactory review was the reason for the termination.; however, he advised her she could explore that issue further with Grier.

249. The January 30, 2003, letter Marcotte allegedly presented to Bhat said: “Your date of termination will be based on the date of your response to this letter. If you fail to accept the terms of this agreement, your employment will be terminated within 21 days after the date of this letter...” RX95. Bhat’s employment was terminated effective March 5, 2003, almost five weeks after January 30, 2003. A second letter dated February 10, 2003, also contained a severance proposal and had a similar 21-day termination provision, but Bhat’s termination became effective on March 5, 2003, 23 days later. CX108; Tr. 1546-1547.

250. WASA has described the January 30, 2003, letter as Bhat’s “termination letter.” Tr. 1393, 1606, 1608. On the other hand, Marcotte described the January 30, 2003, draft (RX95) as “a letter...indicating the terms of Bhat’s severance.” Tr. 1392. WASA General Manager, Johnson, did not believe that the February 10, 2003, letter, RX 97, was Bhat’s termination letter. He considered the February 10 letter as merely confirming the terms of severance, and he assumed there was a separate termination letter. Tr. 1783-1784.

251. It is WASA’s practice to put an employee’s termination letter in the personnel file. Tr. 1640-1641, 1716-1719. Asked to find Bhat’s termination letter in her personnel file, Grier could only identify the letter of March 10, 2003, stating the March 5, 2003, effective date of Bhat’s termination (CX113 at R4205), and the letter of February 10, 2003 containing the severance/settlement offer. (CX108 at R4206-4209, also RX97). Subsequently, Grier also identified a Separation Personnel Action Report which makes no reference to January 30, 2003 as Bhat’s termination letter, but shows Bhat’s effective date of separation was March 5, 2003; Boateng sent forward the Separation Personnel Action Report on March 7, 2003; it was entered into payroll March 10, 2003; and Grier signed it on March 11, 2003. Tr. 1722-1723, citing CX148 at R4199. The January 30, 2003, letter, (RX95) was not included in Bhat’s personnel file. Tr. 1640.

252. Prior to January 30, 2003, no one at WASA, gave Bhat any indication that Boateng recommended her discharge before December, 2002, or any indication of a plan or policy which would require her termination after receiving two Level 1 evaluations. Tr. 386, Tr. 636, 1218. Marcotte was not aware of any communication, document, e-mail, phone call, face-to-face conversation, or any other communication in which Bhat was informed at the time of her second Level 1 performance evaluation that she might be fired. Tr. 1552. WASA suggested that Bhat might have learned about the policy in “training” sessions, Tr. 1218, 1221; CX139 at p. 9; Tr. 1291-1292, 1552-1553; however, the record does not demonstrate that any such policy actually existed. Tr. 1811; CX153 at 91, 93. Bhat was not aware of any employees

who were terminated based on such a policy, and had never heard about any such policy during managerial training. Tr. 637.

253. Boateng was also unaware of a mandatory termination policy. After her second Level 1 performance evaluation, Boateng wrote: “During the coming performance year I encourage [Ms. Bhat] to fully and more cooperatively engage her supervisor and other WASA personnel earlier in addressing program related issues and challenges.” CX87 at R813. He also said, under Dependability and Responsiveness, “Bhat will be a much greater asset to DWS/WASA by striving early to engage her supervisor and/or other WASA professionals of potential problems of technical origin.” CX87 at R809. The record does not show that Bhat’s termination was required by the second level 1 rating. Tr. 1221-1222, 1540-1541.

#### Bhat’s Appeal to the General Manager

254. As Marcotte instructed, Bhat went directly from her meeting with Marcotte to Grier’s office allegedly to schedule an appeal with Johnson. Tr. 1395, 1396, 1400, 1402, 1555. Grier testified that Bhat had the January 30, 2003, letter when she came to Grier’s office after the meeting with Marcotte and Boateng. Tr. 1632-1635.

255. The meeting with Grier lasted approximately 45 minutes. At the outset, Bhat inquired about “the appeal process,” Tr. 1610, 1630-31, 1634, and Grier testified that she could appeal Marcotte’s decision on her performance evaluation and her request for increased severance to the General Manager. Tr. 1610, 1630-31. Grier testified that Bhat abandoned that course and stated: “she didn’t want to be there, if they didn’t want her there.” Tr. 1610. Although Grier testified that Bhat’s main concern was about severance, Grier acknowledged that when she was asked about her January 30, 2003, meeting with Bhat at her deposition, she never mentioned that Bhat inquired about severance. Tr. 1632-1634. After WASA that Bhat failed to file her complaint in a timely manner, Grier was re-deposed, and, for the first time, she reported that the principal subject of her discussions with Bhat concerned severance. Tr. 1632-1635, 1706.

256. The following day, Bhat called Grier and continued the discussion about severance benefits, asking for 24 weeks’ pay. Tr. 1612. Grier memorialized that discussion in her electronic notes file which contains no reference that Bhat wanted to appeal the termination decision. Grier’s January 31, 2003, note states in full:

Title: Seema Bhat

Called. Wants 24 weeks severance and an opportunity to discuss with Jerry Johnson. Wanted an explanation regarding the 21 days for consideration of the offer and the 21 days of severance and the 7 days for reconsideration. Advised her that I would call her on Monday regarding the meeting with Mr. Johnson. RX 96.

257. Oliver, Bhat's co-worker spoke to Bhat the next day about the meeting. Tr. 748-751. According to Oliver:

[Ms. Bhat said she] was called into a meeting with Mr. Marcotte and Kofi [Boateng], and I said, well, what happened, and she said, well, because I had two level [one performance evaluations,] they're talking about terminating me, and I said, what happens after that? And she said, well, I've asked, do I have any appeal rights and Mr. Marcotte said yes, she can appeal to Mr. Johnson. But she had to do it through the human resource director, Ms. Grier. Id.

258. Bhat submitted her 2002 performance evaluation appeal form to her second-line supervisor. Tr. 1553-1554, citing CX89 at R833. That was the only form an employee needed to complete to file an appeal with the General Manager. The employee did not need to complete a new form for the General Manager's appeal. Tr. 1645; CX148 at R4210-4211. Grier also testified that Bhat "would have to indicate in writing that she was appealing the review to the general manager," but could identify no policy or guideline which corroborated this notion. Tr. 1643-1645. The same review packet submitted to the second-level supervisor could be submitted to the General Manager. Tr. 1643.

259. On January 31, 2003, Bhat and Grier discussed providing Bhat with a workstation, a telephone and a neutral reference, which Bhat denied. Tr. 655-656, 1612-1613. Bhat said that she and Grier discussed Bhat receiving a reference in the context of applying for federal jobs and needing to have her performance rating changed for such applications. Tr. 656. Bhat was appealing to Johnson to change her performance rating. Tr. 656. Bhat testified repeatedly that she wanted Johnson to reverse her performance rating so she could continue her WASA employment, not only for the sake of an outside employment search. Tr. 715.

260. Bhat also asked Grier on January 31, 2003, to fax a form for Bhat's appeal to Johnson. Grier responded that Bhat could simply submit the same package to Johnson that Bhat submitted to Marcotte and that there was no need to file an additional form. Tr. 650, citing CX148 at R4210-4211. Grier testified first that "an employee is required to submit a ...written request for review" with the General Manager (Tr. 1620), but there was no written policy so stating, and the request to appeal to the General Manager could be on the same form that one uses to appeal to a second-line supervisor. Tr. 1642-1645.

261. According to Bhat, she asked Grier to fax her a written appeal form for submission to Johnson sometime after January 30, 2003, Tr. 650, and Grier allegedly told her she did not need to submit a new form for her appeal to Johnson, but Grier FAX'ed her the form, CX148 at R4210-4211, in case she wished to submit it. At the hearing Grier denied that Bhat asked for an appeal form. Tr. 1614. In her deposition, Grier testified she FAX'ed the form to Bhat, but testified at hearing: "I [do] not recall being requested to FAX any copies – to FAX a copy of a form to Bhat and no such document [was] FAX'ed." Tr. 1615, 1642, an apparent conflict which Grier explained was an error by the court reporter in transcribing her deposition. She recalled that she said at her deposition that: "I did not recall being requested to fax any

copies....” of the appeal form. Tr. 1614-15. Evidence is otherwise lacking that the deposition transcript was in error or that any errata was attached to it to correct any alleged error.

262. Beginning January 31, 2003, Bhat was on administrative leave from WASA. She had initially requested family medical leave during this period because of her husband’s heart surgery, and the leave was only changed to administrative leave subsequently. Tr. 719-720. She did not believe this administrative leave was leave pending termination. Tr. 720-721.

263. Although Boateng testified that he believed that Bhat’s “employment was terminated with WASA after January 31<sup>st</sup>,” Tr. 1052, Bhat continued to perform Water Quality Division manager responsibilities to keep her area running until after her appeal with Johnson, when she hoped to resume her duties full-time. Tr. 408-410, 649. During this time, Bhat listened to her voicemail messages and responded to emergency water quality issues. Tr. 409. She was involved in addressing a cross connection incident at the U.S. Tax Court Building, and was in contact with the EPA. Id.; *see also* CX127. After January 30, 2003, she was also in contact with John Wujek, who was coordinating the lead line replacement effort. CX106, Tr. 408-409.

264. Pursuant to guidance from Grier, Marcotte understood that Bhat’s appeal might modify the performance appraisal substantially and that her appeal rights which should be “carried through before any decision was made.” Tr. 1383-1384, 1542. According to Grier, as of early 2003, it was WASA’s policy that a request for review that had gone through the appropriate chain of command without resolution could be forwarded to the General Manager through the Human Resources department. Tr. 1641. See also Tr. 1764; Tr. 1542-1543. Bhat served “at the pleasure of the General Manager,” CX2; CX108 at R4206, Tr. 1558, and the record shows that performance evaluations can be appealed to the General Manager who is the final decision-maker. Tr. 1764-1765.

265. On February 10, 2003, Bhat received a letter which offered a settlement of twelve weeks severance, and three non-monetary enhancements requested by Bhat, including the use of a WASA workstation and telephone during the period of administrative leave, a neutral reference letter, and recognition that the separation would be treated as a resignation rather than a termination. RX 97; CX108. No additional severance pay was offered in the form of a sick leave buy out. Grier testified that she informed Bhat that she would have to meet with Jerry Johnson if she intended to pursue additional severance pay. Tr. 1610. The date of termination would be based on the date of her response to the letter. CX108 at R4207. Bhat testified that when she received the letter, she was focused on the upcoming appointment with Johnson, and did not “.... interpret word by word, the contents of this letter, Tr. 411. She testified that she did not feel that the February 10, 2003, letter was the “final termination” or “the decision,” but she had reduced expectations about what might come out of her impending meeting with Johnson. Tr. 411. Nonetheless, Bhat “thought that Mr. Johnson had the authority,” to make the final decision. Tr. 413. She explained: “The review process indicated that ...we had to go to Mr. Johnson as the ultimate decision maker, and in the past, there were even employees who went up to the Board and [the] initial decision was overturned.” Id. Thus, Bhat “felt that [her] review process was not complete yet.” Id.

266. On February 20, 2003, Bhat wrote to Rizzo that she was experiencing “harassment and [a] retaliatory attitude from WASA upper management” and advised him that: “I do not think I will be continuing employment at WASA.” Id. She testified that her communication was meant to express that she “was not optimistic about [her] continuing employment at WASA.” Id.

267. The OSHA interview report states that Rizzo recalled Bhat’s communication informing him that she thought she was likely to be fired because she informed him of the lead results which resulted in WASA exceeding the LAL. Rizzo was surprised by Bhat’s suspension and termination. He did not find Bhat’s contacts with him to be improper in any manner.” CX127.

268. Sometime after February 10, 2003, Grier testified that she informed Johnson that Bhat wanted to meet with him to discuss additional severance pay in the form of a buy out of her accumulated, unused sick leave. Tr. 1619-1620. Grier testified that she had no discussion with Johnson about any appeal of either Bhat’s performance review or the termination decision itself. Tr. 1621. The meeting between Bhat and Johnson was scheduled for February 28, 2003. In the past, when Johnson had been asked to hear an appeal of a termination or performance review, Grier had provided him with a packet of information setting out the grounds for termination and the employee’s appeal documents. Tr. 1758-1760. Grier provided no such packet of information to Johnson prior to his meeting with Bhat. Tr. 1621.

269. On or after February 20, 2002, Bhat had a phone conversation with Rizzo and she testified that Rizzo offered to speak to Johnson on her behalf. Tr. 417. Rizzo followed up their conversation with an email on February 25, 2002 wishing Bhat luck in her meeting with Johnson. CX110.

270. Bhat met with Johnson as scheduled at WASA’s Blue Plains facility on February 28, 2003. He recalled that the meeting lasted approximately 40 minutes, and he let Bhat do most of the talking. Tr. 1768. Bhat initially advised Johnson that: “I do not come to plead for my job.” Bhat explained that by this she meant that she was asking for an objective review and was going to beg for her job. Tr. 715-16. Johnson later indicated to Grier how he interpreted her comment. Johnson told Grier that Bhat “was not seeking her job” but was trying to show him that “she had done a good job.” Tr. 1721; *see also* Tr. 1623.

271. The record shows that she discussed the fact that she had been placed on a performance improvement plan (PIP) which required, among other things, that her supervisor meet with her periodically to discuss her progress, and gave Johnson a calendar and time line that showed him that her supervisor had canceled most of the meetings. Johnson confirmed that Bhat brought a “stack,” a “whole bunch,” and “lots and lots” of documents with her, organized in a folder or binder, and that he reviewed or, at least looked at, the calendar, the timeline, and a performance evaluation. Tr. 1771-76. She had her complete appeal packets from both 2001 and 2002 for the February 28, 2003, but Johnson could not recall seeing any severance documents in the documents she brought. Tr. 1779-81. Tr. 420-421. These packets included Bhat’s color-coded calendar showing Boateng’s failure to appear for meetings with her in 2002. Johnson made a copy of the calendar, and testified that he wanted to ensure that

managers kept their commitments to meet with employees who were on performance improvement plans.

272. Although WASA officials testified that Bhat's meeting with Johnson on February 28, 2003, was only to discuss severance, not to appeal her performance evaluation, Tr. 1770-71. Bhat denied discussing severance with Johnson. Johnson testified that he recalled that Bhat discussed severance and sick leave, but he confirmed that he could not recall seeing any severance documents in Bhat's materials. He testified that at the time of the meeting he thought Bhat was already terminated, Tr. 1768-69, but he confirmed that never met with any employee to discuss severance after the employee was terminated, and he confirmed that he told Bhat that the calendar was interesting and that Boateng had a responsibility to meet with her. Tr. 1772-1773.

273. Johnson testified that Bhat discussed her diligence as an employee and her performance, Tr. 1782; see also RX127, and he concluded the February 28, 2003, meeting telling Bhat that he would think about their conversation and that Grier would get back to her. Tr. 1756, 1783. At the hearing, Johnson explained that he meant, he would think about their conversation as it related solely to the issue of severance. Tr. 1782.

274. According to Bhat, Johnson concluded the meeting by indicating that he would talk to Marcotte about their meeting and that he would be "in touch." Id. He also asked Bhat what she would do in his situation, to which she responded, "[I]f the decision was wrong, [she] would correct it." Tr. 423.

275. Johnson did discuss the calendar with Marcotte, Tr. 1767, 1772-1773, because, if Bhat's explanations were true, Johnson concluded, "then perhaps Marcotte needed to spend some time working with that supervisor to ensure that these kinds...of things didn't happen in the future..." Tr. 1763.

#### Termination

276. On March 4, 2003, Grier called Bhat and advised her that WASA was moving forward on her termination. Tr. 1647. Grier further stated that Bhat's February 10, 2003, severance and settlement offer was about to expire, based on a 21-day period she had to consider it. CX108 at R4207; Tr. 413-414. Grier informed Bhat that although Johnson would not increase Bhat's performance rating or reject Marcotte's termination proposal, he would increase the amount of severance offered for Bhat to resign voluntarily. Tr. 413-415; Tr. 664-665; RX127. Bhat signed the February 10, 2003, offer on March 4, 2003. CX108 at R4209.

277. On March 5, 2003, Bhat timely rescinded her acceptance, CX112, and, thereafter, she received final notice of termination, Tr. 1646-1647; CX148 at R4200, advising her, by letter dated March 10, 2003, that her employment with WASA "was terminated effective Wednesday, March 5, 2003." CX113.

## Post-Termination

278. On March 5, 2003, the same day Bhat rescinded her acceptance of WASA's settlement/severance offer, she filed a complaint alleging whistleblower retaliation under the SDWA. CX114. After an investigation, OSHA found in Bhat's favor on August 14, 2003, awarding reinstatement, back pay, damages, attorneys' fees, and injunctive relief. CX115.

279. Even before her termination, Bhat began applying for jobs at other water quality agencies, including the Department of Health, the Washington Sanitary Suburban Commission (WSSC) and the EPA. CX116 at 933-958; RX116-119; Tr. 432, 657-660. On or before the February 3, 2003, Bhat applied for employment with the Bacteriology and Mycology Branch of the National Institutes of Health. RX 116. She also applied for at least three other federal positions prior to their late February, 2003, closing dates. RX 117-119. Bhat testified that she applied for jobs before leaving WASA because she was "extremely disappointed after working so hard and, ... was not optimistic as well as [she] just felt that management was not responsive [and] did not appreciate [her] efforts." Tr. 432; see also 658. Some jobs for which Bhat applied had closing dates before her March 5, 2003, termination. She applied after the closing dates, by contacting the prospective employers directly. Tr. 717-718. She also networked with environmental consultants, (Tr. 431), EPA and other agency contacts. CX109. Bhat conducted a job search electronically (e.g., on the EPA, Water Environmental Federation and American Water Works Association (AWWA) websites) and through water safety magazines. Tr. 431. She applied for approximately forty jobs between early 2003 and late February, 2004, a week before the hearing in this matter. CX116 at 886-888; Tr. 432. She testified about her difficulties in finding alternative employment, despite her efforts:

[W]hen I tried to look for jobs, it was very difficult for me to network, ...because basically water quality [is] a limited field, I had to talk with the same people who I dealt when I was the manager ...I dealt with DOH, EPA as well as ... other utilities on a managerial basis and at this time when I called ... I had to tell them some background as to my termination because they were asking why I am looking for a job....I just felt that ... at this stage I had to change my career to get a job and it was -- my entire career that I had worked and took pride in, WASA had destroyed. Tr. 446-447.

280. She was not offered any position and she was not interviewed. CX1. Bhat applied for unemployment benefits in October, 2003. CX118.

## After-Acquired Evidence

### Alleged Improper Lead Action Sampling and Reporting Procedures for the 2000-2001 Reporting Period

281. Marcotte testified that in March, 2004, a class action complaint was filed against WASA alleging that samples drawn in connection with the July, 2000/ June, 2001, lead and

copper monitoring period were improperly invalidated resulting in a one year delay in public notice that WASA had exceeded the Lead Action level. Tr. 1334. Marcotte further testified that he contacted EPA officials regarding whether EPA had authorized Bhat to invalidate any samples in the July, 2000/June, 2001, time frame and was told that EPA had not done so. Tr. 1335-1336.

282. The EPA regulations regarding lead/copper monitoring are a complex set of regulations, and, in 2000-2001, Bhat sought interpretations of the invalidation criteria and of the LCR generally from her EPA contact, George Rizzo. Tr. 1921-1922, 1960. According to Bhat, since WASA was on reduced monitoring, Rizzo told her WASA needed to report only 50 lead results from the 2000-2001 monitoring period, Tr. 1960-1961. Thus, Bhat believed she did not need to and did not seek to formally invalidate any lead samples for the 2000-2001 monitoring year, because she already had 50 valid samples. Tr. 1850.

283. At the beginning of a monitoring year, the WASA provided EPA a list of the sample sites for the monitoring period and WASA could not change the identified sites in the middle of the period, unless WASA was unable to get data from 50 approved sites. Tr. 1847. Bhat did not report every lead test result from the year; she reported only those from the pre-approved sites. Tr. 503, 1960.

284. In spring 2001, Bhat noticed that she did not have data for four volunteers from her original EPA-approved 2000-2001 list, and checked with Turner at WA to find out if the data were available. Tr. 1842-1843; CX157. When Turner reported that the results were never received, Bhat contacted Rizzo, who told Bhat to try her best to get samples from the original, EPA-approved volunteers. Tr. 1842-1943.

285. Bhat testified regarding a draft of her 2000-2001 lead report and other documents which explained why certain volunteers' regulatory lead samples were included or excluded from the final 2000-2001 report. Tr. 1821; CX154 (draft of CX155). In the first half of the monitoring period, some volunteers never provided samples, and others provided samples that failed to follow the requirements that Bhat and her staff had provided the volunteers, per EPA guidance, such as listing the address of the property on sample bottles, or taking a "first draw" sample. Tr. 1831-1835; CX156. In June 2001, Bhat obtained and reported samples from some of the missing volunteers, including a volunteer with high lead. Tr. 1836-1843; CX157; CX158 at p.2; CX168 at pp. 3-4.

286. According to Bhat, Rizzo told her that, if she were unable to obtain data from the original volunteers, she should substitute equivalent sampling sites for the originally-listed sites. Tr. 1847. Equivalent sites were those with the same plumbing characteristics in the same neighborhood. Tr. 1847, 1849. Bhat obtained samples from two substitutions for approved properties from which she had been unable to obtain results. Tr. 1849-1850. She reported these substitute results in WASA's final 2000-2001 report. Id. One of the substitute samples she reported had high lead results. CX154 at p. 4; Tr. 1860.

287. Generally, 2000-2001 was a good year with the volunteers for the lead/copper program, in that the majority of the 52 volunteers with prior EPA approval ultimately

supplied samples. Tr. 1844. Typically, 25% of volunteers fail to provide usable data. Id. Because Bhat had the mandated number of samples (50) under WASA's reduced monitoring requirement from properties with prior EPA approval or equivalent substitutes, she discarded samples beyond 50 which were unusable under EPA regulations, because, for example, no address was provided. She did not seek formally to invalidate the unusable samples. Tr. 1836. These discarded samples included low lead samples which were labeled only "Kitchen" and "Bathroom," without the address. CX158 at pp. 3-4.

288. Before knowing how many of her original volunteers would provide data, Bhat also had samples taken from backup sites in case WASA was unable to reach the 50-sample LAL compliance requirement. Tr. 1861-1862, 1923. These backup sites were not among the original list of sampling sites provided to the EPA before the monitoring period, and were therefore not proper substitutions which could be added to the final reported lead results. Tr. 1924-1925.

289. On August 3, 2001, three days before the final WASA lead report for 2000-2001 issued, and several weeks after her initial warning that WASA might exceed the LAL, Bhat received the final results from the monitoring period. CX160; Tr. 1858-1859. After all the results were examined, Bhat had 50 sites from the original list of volunteers and proper substitutions, and she did not need the results from the backup sites. Tr. 1862.

290. Five backup samples yielded high lead results, and Bhat notified Marcotte and Boateng on July 17, 2001. CX10; Tr. 1861-1862. According to Bhat, Rizzo told her to investigate the five backup samples with high leads, but not to include them in her 2000-2001 lead monitoring report. Tr. 1930-1931, 1943.

291. Bhat investigated the five backup samples and performed quality control analysis upon them not for their use in the 2000-2001 lead monitoring report, but because she wanted to begin to ascertain what might be causing the sudden spike in lead results, and because these sites might qualify for a future monitoring period. Tr. 1932-1934, citing CX14. Bhat also did quality control testing on two of the high lead results which she ultimately reported to the EPA which verified the high leads. Tr. 1862-1863, citing CX14 at R2014.

292. The 2000/2001 lead monitoring period ended on June 30, 2001. On July 10, 2001, Bhat received an email from WA laboratory director Turner informing her that seven (7) properties sampled in the June, 2001, period had tested high in lead content. RX 6. On July 17, 2001, Bhat forwarded a copy of Turner's July 10, 2001, email to Boateng and Marcotte and informed them that while the results were preliminary, unless they met "sample invalidation criteria" WASA might exceed the lead action level for the 2000-2001 cycle. Bhat told Boateng and Marcotte that she would report on the outcome of her investigation. RX 9; CX 9. She testified that when she gave notice of a potential exceedance to Boateng and Marcotte on July 17, 2001, she believed she needed the June data to meet the required 50 sample quota. Tr. 1861-1862; 1923.

293. On August 6, 2001, WASA provided its official LCR results to the EPA for the 2000-2001 monitoring period, stating that WASA was in compliance with the lead standard for

the 2000-2001 monitoring cycle based upon a first draw performance of .008 lead ppb at the 95% level. The results of 50 samples were attached to the letter, only four of which exceeded the LAL of 15 ppb. RX 13. Bhat helped prepare the letter for Marcotte's signature. Tr. 105, 148.

294. Bhat excluded five of the first draw samples indicating a lead concentration in excess of 15 ppb, based, she testified, on advice from George Rizzo, her contact at the EPA. At hearing, Bhat provided several rationales for excluding first draw samples. First draw samples may have been excluded, she explained, because the results were unreliable either because they were taken from the basements of homes or because there was a considerable difference between first and second draw results, Tr. 132-33, or due to quality control considerations because they were drawn from residences near the sites of water main breaks, Tr., 1925-26, or because WASA did not need all of the samples she had collected. Tr. 1933-34, 1942-1943. Bhat testified that Rizzo approved the exclusion of the five samples from the final monitoring results because they were unnecessary back-ups. Tr. 214, 1925-26, 1941-43. No witness from EPA testified in this proceeding to confirm or deny the testimony of either Marcotte or Bhat in respect to whether or not EPA authorized the exclusion of five samples as "excess." Tr. 1933.

295. On August 6, 2001, Bhat discussed her manner of reporting 2000-2001 results with Boateng. Tr. 1944, 1962-1963; CX18. She gave Boateng supporting documentation, the invalidation procedures, and information on the corrective actions needed in the event of an exceedance. Id. Boateng did not respond to her discussion and information, and sent forward the final 2000-2001 lead monitoring report indicating that WASA had narrowly missed exceeding the LAL. (CX17). Tr. 1946, 1963.

296. Bhat testified that her reference to invalidation of samples was not meant to refer to the practice of invalidating samples under the LCR criteria. Tr. 1836-37, 1866. Instead, she meant to use the term "invalidate" generically, in order to refer to samples collected during the period that, for whatever reason, were not included in the final results provided to the EPA. Tr. 1836-37. Bhat did explain to Marcotte and Boateng, however, in her July 17, 2001 email, that these samples would have to be reported unless invalidated. RX 9; CX 9. She also insisted that the WA laboratory retest the high lead samples drawn in June, 2001. Although these were back-up samples, Bhat had them re-tested because she was concerned about the water quality in the particular residences. Tr. 1931-32.

297. Bhat, in early testimony and in documents submitted in the case, utilized the term "invalidate" loosely with respect to the lead data, i.e., she was not always referring to the legal term, "invalidation," i.e., formal invalidation per EPA criteria. Tr. 1836-1837, 1865-1866. Bhat, in using the term "invalidate," was referring to any properties for which perfect, EPA-compliant lead results were not obtained during the first half of the monitoring period, e.g., samples that were discarded because of improper sampling per EPA guidelines, or first draw samples that were missing from the first half of the monitoring period, which were subsequently obtained. Id.

WASA raised the invalidation as an after-acquired evidence issue during the hearing. As a result, Bhat reviewed documents relating to the 2000-2001 monitoring period, which had hitherto not been at issue in the case, in order to refresh her recollection as to why particular samples were or were not reported. Tr. 1819-1820. When she was asked early in the hearing about particular lead results from 2000-2001, Bhat testified that she could not opine regarding

particular samples without analyzing and comparing the data with that provided to Rizzo, because her recollection was hazy, in that the 2000-2001 lead results had not previously been a subject of the litigation, because they were not related to her discharge. Tr. 503. On re-direct, Bhat again addressed the issue, her memory refreshed.

298. Marcotte acknowledged the propriety and importance of Bhat's investigation of the backup samples. He testified that Bhat and her staff "were certainly responsible for the quality control and the overall validity of those results, and I guess no one from a public policy standpoint would want to make the decision based on invalid results." Tr. 1564. Marcotte understood, for example, samples taken from a house left vacant or that had water that may not have been flowing would have been grounds for invalidation. Tr. 1566.

299. In 2002, while Bhat was still employed at WASA, the IG investigated the 2000-2001 lead reporting based on an allegation that data was improperly excluded. CX126. The IG found the allegation meritless. Id.

300. At the time of the IG investigation, in summer, 2002, Marcotte discussed with Bhat her process with respect to reporting the 2000-2001 lead results. Tr. 1333. The subject of invalidation came up during Marcotte's communications with Bhat at that time. Tr. 1361. In July 2002, Marcotte reviewed a copy of what Bhat provided the IG regarding its investigation of omitted samples from the 2000-2001 period, including all of the period's lead results. Tr. 1359-1360, 1567-1568.

301. In June, 2004, the EPA entered an Administrative Order finding that, for the monitoring period July, 2000/ June, 2001, WASA had failed to comply with 40 C.F.R. §141.90(g) (requiring the results of all samples taken during the monitoring period be reported to the EPA) and 40 C.F.R. §141.86(e)(requiring the results of all samples collected during the monitoring period to be included in the calculation of the 90<sup>th</sup> percentile lead level). The EPA found that of the 50 samples submitted by Bhat, two samples were repeated within the same monitoring period, and five others were taken outside the June–September period required by 40 C.F.R. §141.86(d)(4)(iv). The EPA also cited WASA for failing to report the results of six samples in violation of 40 C.F.R. §141.90. The EPA found that had WASA's report included results for the July, 2000/ June, 2001 monitoring period, WASA would have exceeded the lead action level a year earlier than reported, and it concluded that WASA failed to perform required activities following exceedance of the lead action level in the July, 2000–June, 2001 monitoring period. RX 136, ¶¶ 47-60.

302. The LCR lists four criteria that would support invalidation of test results. None of these criteria refer to invalidation of samples due to water line disruptions caused by construction or breaks. *See* CX 4, 40 §141.86(f). Moreover, the LCR mandates that water service providers report the results of all samples tested in the monitoring program, even those subject to invalidation. CX 4, 40 §141.86(f)(2). According to the LCR, any decision to invalidate a sample must be in writing, describing both the decision and the underlying rationale, and must provide all documentation supporting invalidation. CX 4, §141.86(f)(3). WASA's August 6, 2001, notice letter to the EPA failed to inform the agency that any samples had been invalidated, and did not comply with the requirements of the LCR.

303. The August 6, 2001, notice letter to the EPA was also untimely. The LCR provides that such reports be filed within ten days after the end of each applicable monitoring period. CX 4, §141.86(f)(4). Since the monitoring period ended on June 30, 2001, WASA should have finalized the report no later than July 10, 2001.

304. Although WASA argued in this proceeding that Bhat engaged in misconduct and impropriety with respect to the lead monitoring data, WASA advised the EPA that: “Based on the information we have located and reviewed to date, there is no evidence that Ms. Bhat...sought to manipulate the testing performed during the July 2000-June 2001 monitoring period in order to prevent WASA from exceeding the [LAL]. Instead, the decisions that Ms. Bhat made regarding which tests to include, and exclude, from WASA’s final report for this period appears [sic] to have reflected a good-faith effort to conduct the testing appropriately and in accordance with EPA instructions.” CX168 at p. 7.

305. During her employment, Bhat was not reprimanded or disciplined in any way for her actions regarding the 2000-2001 lead monitoring results. Nor were Bhat’s 2000-2001 lead sampling techniques part of the rationale for her ultimate removal. *See, e.g.*, RX77. Marcotte was pleased with Bhat’s handling of the lead results in 2000-2001. Tr. 1443.

306. EPA made no findings which suggested that Bhat engaged in intentional wrongdoing or impugned her motivations. RX136. EPA’s report also made findings that WASA failed, *inter alia*, adequately to replace lead service lines, publish public service announcements, and to conduct follow-up monitoring of partially replaced lead service lines. RX136.

307. The record contains no evidence that any WASA official, such as the Public Relations Director, the Deputy General Manager, the Director of DWS, the General Manager, the current Water Quality Manager, the Engineering Department Director, or any official was disciplined as a consequence of EPA’s findings.

Alleged Withholding of LAL Data  
from September 2001 Through July 2002

308. Evidence addressing Bhat’s disclosures relating to lead monitoring data from September, 2001 through July 30, 2002, is not after-acquired, and is addressed in several findings herein.

309. WASA also cites what it describes as after acquired evidence showing that Bhat was derelict in failing to report the exceedance in her monthly report to Johnson. This allegation was not among the reasons WASA cited for terminating her. The underlying facts, however, are not after-acquired, and the record does not otherwise support the allegation.

310. On August 7, 2001, Bhat began receiving lead and copper test results from the WA with respect to the new 2001-2002 monitoring period, which had begun July 1, 2002. This first batch of results indicated that 6 properties tested in excess of the lead action level. RX 14. On August 24, 2001, Bhat received a second batch of lead and copper test results from the WA.

This report indicated that 7 additional properties tested in excess of the lead action level. RX 15. On September 5, 2001, Bhat received a third batch of lead and copper results which indicated that 4 additional properties tested in excess of the lead action level. RX 17. On September 26, 2001, Bhat received a consolidated report of 17 properties tested in excess of the lead action level during the 2001-2002 cycle. RX 20. Bhat testified that she did not view these results as final, and she continued to investigate the data. Tr. 505-508, 512-513.

311. As part of her duties and responsibilities, Bhat was required to provide a monthly report to WASA's General Manager, through Boateng, for submission to the WASA's Board of Directors, setting forth the status of WASA's drinking water compliance with the Safe Drinking Water Act. Marcotte testified that at the very least she should have used the monthly report to notify the General Manager of the likelihood of exceedance of the LAL in the fall of 2001. Tr. 1342-1343. Bhat failed to do so. RX 52, 56; Tr. 594-95. Marcotte testified further that if he had been aware of Bhat's conduct in this regard it would have weighed heavily in his decision to sustain her unsatisfactory performance review and to terminate her employment in January, 2003. Tr. 1341-1344.

312. Bhat testified she did not publicly report the LAL exceedance prior to the conclusion of the monitoring period based on guidance she received from EPA. For example, regarding the Consumer Confidence Report (CCR) submitted in May 2002, Bhat discussed the matter with Rizzo, who, according to Bhat, said that the LAL exceedance needed to be circulated in a special public notification, not as part of the CCR. Tr. 591, citing RX51.

313. Bhat provided Tsedale Berhanu, Boateng's Administrative Coordinator, with a copy to Boateng, a report for Johnson in June, 2002, indicating that WASA complied with the SDWA. RX52. Bhat explained that lead exceedance is not an SDWA violation, but is a trigger for compliance measures, and as of June, 2002, the 2001-2002 monitoring period was not over, so the LAL exceedance corrective actions were not yet triggered. Tr. 593-595; RX52. The report to Johnson was only to document compliance and non-compliance with the SDWA. Id.

314. Rizzo told the OSHA investigator that the EPA "does not require any action on the part of a supplier, nor does it take any action until such time as [the utility] exceeds the [LAL]. Once a supplier reaches the LAL they are required to undertake a public information campaign..." CX127. Rizzo also stated that Bhat was trying to keep him apprized of the lead levels in the fall of 2001 so that Rizzo "could tell WASA what it was going to need to do if it in fact exceeded the LAL level." Id.

#### Fraudulent Emails

315. WASA contends that Bhat forged a March 21, 2002 email by which she allegedly presented Boateng early warning of the LAL exceedance (CX33). Tr. 1124. While Bhat was employed, Marcotte took Bhat's email "at face value" and "accepted" the email. Tr. 1389, 1532; *see also* Tr. 1627. Marcotte testified that he would have terminated Bhat if he had "any credible evidence" that her March 21, 2002, email was not genuine. Tr. 1390. Grier testified that a falsified email communication would be "a cause for termination, dishonesty...." Tr. 1627.

316. Bhat testified at hearing that she sent Boateng an email, CX 26, dated and time stamped 3/12/02; 12:29 PM, with the subject heading: "2001-2002 Lead Results." Tr. 203. The email references a prior communication between Bhat and Boateng about lead results, and Bhat's intention to investigate the use of water softeners by volunteers whose samples tested high for lead. Bhat concluded this message with a reference to potential invalidation of the high results if there were evidence of water softener usage: "This may be a justification to invalidate high lead results. The sampling has to be resumed in June 2002. I will have to bring some flushing employees on OT." CX 26; RX 89.

317. This email is not among the emails listed in the "Kofi Pb/Cu" folder that Bhat compiled in December, 2002, in connection with her 2002 performance review appeal. RX 126. Bhat testified that she must have overlooked it when she was compiling the list. Tr. 635.

318. WASA first suspected that Bhat falsified the March 21, 2002, email in November, 2002, during its investigation in preparation of its case for trial. Marcotte testified that had he known that Bhat falsified the March 21, 2003, email in order to deceive him into believing that she had informed Boateng of the potential lead exceedance issue prior to July, 2002, he would have terminated her on that basis alone. Tr. 1390.

319. WASA retrained computer forensic expert, Stevens Miller, to review its computer files. Miller testified that an unrelated draft email to a fellow Water Services manager, Jackie Oliver, created on 3/12/02 at 12:29 PM, was found in Bhat's email back up files dated August 8, 2002. Tr. 932-933; RX 120. Miller testified that in his expert opinion the email submitted into evidence as CX 26 was fabricated by Bhat at a later date by erasing the stored contents of the email to Oliver and substituting the current contents. Tr. 928-32.

320. At trial, Bhat produced another email dated 3/12/2002 and timed 12:29 PM. CX 32. This email was embedded in an email that Bhat first forwarded to her email address on the WASA server on 12/18/2002 at 4:57 PM, and then to her home email address on 1/31/2003 at 11:13:31 EST. Bhat testified that the 3/12/2002 email message embedded within CX 32 was another draft of the email message she allegedly sent to Boateng on 3/21/2002 at 12:34 PM. In the draft version contained in CX 32, Bhat reported in connection with the 2001-2002 regulatory lead monitoring that thirty-seven (37) samples had been analyzed to date, and that there were high lead results in twenty (20) samples.

321. Miller testified that the email embedded within CX 32 was created by Bhat after the alleged date of origin, 3/12/2002, by erasing the contents of the email to Oliver and substituting the current contents. Tr. 933-938. He reached this conclusion after studying emails contained in Bhat's December 28, 2002, backup files. Miller identified one of the recovered emails, RX 86, to contain an exact copy of the 3/12/2002 email message embedded in CX 32. He concluded that Bhat copied this embedded message within an email she created on 12/18/2002 at 4:57 PM, creating the email entered into evidence as RX 86, Tr. 933-938. According to Miller, she twice forwarded the embedded message contained in CX 32 to herself on 12/23/2002, in back-to-back succession, creating the email messages entered into evidence as RX87 (R000820) and (R0004958), Tr. 927-928, 931, 937-939, and modified the contents of the R000820 and R0004958, *inter alia*, by placing the salutation "Kofi" above the text of the message; changing the number of samples analyzed from "thirty-seven (37)" to "thirty-nine (39)"; changing the

number of samples remaining to be analyzed from “13+” to “11”; and by changing the number of samples that had tested above the lead action level from “[20]” to “[17].” RX 87 (R001170);Tr. 939-942.

322. The content of the email marked as RX 78 is identical to the content of the emails marked RX 87 (R000820) and (R004958). Miller testified that he traced R000820 and R004958 to an email stored in Bhat’s draft folder in the August 3, 2002, back up which was originally addressed to Jackie Oliver. RX 120. According to the revisions’ history contained within the properties file attached to RX 120, Bhat revised the Oliver email on 12/13/2002, 12/17/2002 and 12/18/2002, before she created the final revision RX87 (R001170) which, in turn, was forwarded to Marcotte on January 15, 2002, during the review of her FY 2002 performance review appeal. Tr. 927-928, 930-931, RX120.

323. Miller testified that he believed the email (RX78) came from the December 28, 2002, backup tape, but he could not confirm this with certainty at hearing. Tr. 999-1002, and the text, including the date and time sent, in the forwarded message could have been cut and pasted from anywhere, by anyone. Tr. 1001.

324. Miller compared the contents of RX 87 (R001170) with the contents of RX 92/ CX 99 and found them to be the same except for the date and time listed in RX 87 (R001170). Tr. 939-942. RX 92/CX 99 is the email that Bhat forwarded to Marcotte on January 15, 2003, as evidence of communications with Boateng. The expert concluded that no such email was sent to Boateng from Bhat on 3/21/2002. Tr. 942-943.

325. On March 21, 2002, at 12:34 PM, Bhat sent Rizzo of the EPA the email informing him that approximately thirty-nine (39) regulatory lead samples had been analyzed for the 2001-2002 cycle, and that 17 of those samples tested in excess of 15 ppb. RX 42A/ CX 34.

326. Rizzo acknowledged receiving Bhat’s March 21, 2002, LAL exceedance email. CX34, CX35. Boateng did not respond and denies he received it. Tr. 1124. Boateng told Marcotte that he could not recall receiving the e-mail or did not “grasp the significance” of the March 21, 2002 email. Tr. 1124-1125. Tr. 1532-1534. Marcotte acknowledged that the Boateng’s statement that he did not “grasp the significance” of the email “could be taken as an admission of receiving it.” Tr. 1534.

327. Bhat testified that she began drafting her March 21, 2002, email on March 11, 2002, compiling the high results she had received from Turner not the final results, finding initially that 20 of 37 samples showed high lead levels. Tr. 572-573. She testified that she typically drafted emails in Word and would then cut and paste them into emails at the moment she was prepared to send them. Tr. 215-216. Bhat also saved several drafts of certain emails in Lotus Notes. Tr. 216. She explained:

I start a particular email and...if my attention is turned to some other tasks, I leave them and then come back later to that particular e-mail and make a new draft, and sometimes I have certain thoughts in one draft which I do not incorporate in my final e-mail, however, I don't want to lose the thought because I feel that I could

use it at some later time, and so I keep a number of drafts of my e-mails. Id.

328. Bhat testified that, at 12:34 PM on 3/21/2002, she sent the same information to Boateng, with additional text warning to Boateng of the consequences of exceeding the lead limit. CX 33. This email referenced 37 samples having been tested, in comparison with the email sent to Rizzo which stated that 39 had been tested. Tr. 618-635.

329. Bhat addressed the differences in the emails sent to Rizzo and Boateng on March 21, 2002, email by explaining one of them was an early draft that she had forwarded to her home computer, and she simply overlooked the mistake in the number of the samples that reported high in lead. Tr. 616-19; RX 78; RX 79.

330. Miller testified that the email marked as CX 33 does not exist in either Bhat or Boateng's email back up files that he examined, and Bhat's backup files contain no evidence of an automated receipt following the successful transmission of CX 33, despite the existence of automated receipts for some of Bhat other emails sent on 3/21/2002. Based on his review of the back up files, Miller concluded that Bhat sent no such email message to Boateng on 3/21/2002. Tr. 924-925.

331. Miller dismissed the possibility that CX 26 and CX 33 might have been lost or destroyed prior to back up by a computer program that attacked these particular communications as beyond the realm of scientific possibility. He noted that emails containing similar parameters were not destroyed, and it would be highly unusual for all evidence of CX 26 and 33 to have been erased from all three locations in which they would have been recorded: Boateng's email inbox, Bhat's email outbox and Bhat's email receipt file. Tr. 976-977. Miller observed that CX 26 and CX 33 are not among the emails contained in a folder, which otherwise allegedly contained all of Bhat's correspondence with Boateng regarding the lead issue. Tr. 981-985; RX 126.

332. Bhat testified that she emailed a series of emails to herself on December 4, 2002, because she was preparing a water quality brochure for the George Washington University, Tr. 372-376, and the lead data attached to the CX 84/R001154/RX 79 assisted her in identifying high lead properties in the vicinity of the University. WASA speculates that in early December 2002, Bhat did not compile her emails as a resource to assist her in preparing G.W.U. brochure, but rather was searching her email data base in an effort to locate all email communications dealing with lead testing for use in her FY 2002 performance appeal.

333. The record provides other instances, unrelated to her performance evaluation, in which Bhat forwarded herself draft emails – including drafts of her March 21, 2002, email to Boateng to utilize attachments or for record-keeping purposes. Tr. 218. For example, on December 4, 2002, before she was aware of her 2002 performance evaluation. Bhat forwarded herself several drafts of the email along with other emails regarding lead. At the time, Bhat forwarded emails to help her with a project she was doing at George Washington University, developing a water quality model. CX84; RX78; Tr. 372-376; 615-616. She testified she wanted the lead data attached to the draft March 21, 2002 emails to incorporate

in the model. Tr. 616. Bhat explained, “It did not matter which of the several drafts that I had...forwarded.” Id.

334. Bhat testified that after December 12, 2002, she “was collecting each and every draft or memo that [she] had regarding lead and copper to create a timeline and that is why [she] forwarded” draft lead emails to herself on December 18, 2002, (CX32), and December 23, 2002. RX87; Tr. 626-628. Bhat noted that the drafts “triggered [her] memory as to when [she] started talking to Boateng on lead and copper.” Tr. 627. She also forwarded herself emails to re-examine the data. Tr. 735. Bhat testified she could not look at all of the information during work hours, so she forwarded the emails to herself so she could access them at home while working on her performance review appeal. Tr. 627-628.

335. According to Bhat, she did not revise her draft emails in December, 2002. Tr. 629. On December 12, 2002, the day she told Boateng she was appealing her performance evaluation, she contacted WASA’s IT department for assistance with the Lotus Notes cut and paste function. Tr. 621. She explained that she contacted the IT department to find out how to print the index page of emails sent and received, and IT suggested utilizing the cut and paste function in Word. Tr. 621. Bhat wanted to generate a list of all her emails for her performance evaluation appeal. Tr. 622. The IT department log reflecting her communication confirms: “Issue Description: Needs instruction on copying and pasting list of emails from and to clipboard.” RX85; Tr. 622.

336. Bhat compiled folders of emails related to subject matters. Tr. 623. WASA presented a printout of a folder entitled, “Kofi Pb/Cu,” suggesting that it was created December 12, 2002. RX126; Tr. 623. Bhat testified that Boateng’s March 21, 2002, email regarding high lead levels, CX33, would have been in this folder and she did not know why this email did not appear in WASA’s printout. Tr. 624. Bhat testified that she only knows how to send and receive email, and could not explain why certain emails do not appear on WASA’s printouts. Tr. 706.

337. WASA creates daily, weekly and monthly backup tapes of Lotus Notes. Tr. 920, 949. Miller did not know when the March 21, 2002 daily backup tape was recycled, or if there were any errors in the compilation of weekly backup tapes from dailies, or monthly backup tapes from weeklies. Tr. 950-952. WASA only maintains the monthly backup tapes. Tr. 920.

338. Miller requested all of the backup tapes from 2001, to present. Tr. 921. His testimony about Bhat’s emails was based on backup tapes made in August, 2002, and after, not the monthly backup tapes for March, 2002, or months before August. Tr. 922, 963-964. Miller’s rationale for choosing the August, 2002, tape was that he was operating on a limited time schedule, within a limited budget, although the backup tapes closer to March, 2002, would have been more likely to contain complete data from that month. Tr. 964-966, 991-993.

339. Miller acknowledged that there was a “cartridge missing” reflecting Bhat’s emails from the June, 2002, set of backup tapes. Tr. 922-923, 964-965, 989. Miller testified

that the backup tapes were provided to him by a representative of WASA's legal office, that Miller did not participate in the tapes' creation he knows nothing of the custody of the backup tapes he relied upon for his opinion prior to receiving such tapes. Tr. 944. He also testified that, although all of his opinions in this matter concerned Lotus Notes, he has never written any publications or attended any training regarding Lotus Notes, and he does not use Lotus Notes on a day-to-day basis. Tr. 943-944.

340. Miller testified that the absence of an email in an in-box on a backup tape does not establish that an email was not sent, within a reasonable degree of scientific certainty. Tr. 957. Bhat's response to comments on her 2001 performance review, RX44, is a memo also not on WASA's email system, although Bhat emailed it, Tr. 580-581, and WASA does not dispute that Marcotte received the document and responded to it. RX45; Tr. 1355-1356. Bhat's March 21, 2002, CX33, email to Boateng regarding regulatory lead sampling did not appear on Lotus Notes backup tapes WASA created of Bhat's and Boateng's email folders, Tr. 926, however, backup tapes would not show emails that were deleted before the backups were made. Tr. 954-955. Miller opined, however, that Bhat and Boateng did not "delete much," because they had emails in their backup tapes from 1999.

341. In support of his conclusion that Bhat never sent the March 21, 2002 email, Miller relied, in part, on the fact that Bhat had no return receipt for this email. Tr. 926. Miller testified that on March 21, 2002, Bhat obtained return receipts on several emails sent to Boateng as carbon copies, but not on the email notifying Boateng of the likely LAL exceedance. Tr. 924. The record also gives no indication that Bhat requested or received a return receipt from the email regarding LAL exceedance that she sent to Rizzo that day, and it is undisputed that he received it. *See, e.g.*, CX35.

342. Miller testified that based on the modification record he studied, Bhat began a draft document on March 12, 2002, at 12:29 p.m., RX120 at R4964, which she sent to herself and modified on December 23, 2002, RX87 at R820, to represent subsequently as her March 21, 2002 email to Boateng. CX33. Tr. 930-931, 937, 943. According to Miller, the August, 2002, backup tape showed a March 12, 2002, draft from 12:29 p.m., which was an unsent email addressed in the body to Oliver. Tr. 931-932, citing RX120 at R4964. Miller concluded that Bhat's March 12, 2002, email to Boateng, CX26 was "very unlikely" to have been created on the same date at the same time because it would "require some pretty speedy work." Tr. 933. Bhat testified that she composed email text in Word, so all she needed to do was cut and paste the text into new emails, and she contends she could have easily created several within the same minute, e.g., RX86/87 and CX26. Tr. 989; Tr. 215-216, 222.

343. Miller opined that it was even more unlikely that a third email, which Bhat forwarded herself on December 18, 2002, RX86, was also first created on March 12, 2002 at 12:29 p.m. Tr. 936. Miller erred, however, because two of the emails, RX86 and RX87 at 820, contain forwards on different dates of the identical, March, 2002, email draft text not different emails created in the same minute. RX86, RX87 at 820, RX115-64. Miller admitted that the time on the email, e.g., 12:29 p.m., could have represented 12:29:02 p.m. and 12:29:58 p.m., *i.e.*, two emails sent almost a minute apart. Tr. 974. He also admitted that there was a "measurably possibility" [sic] that two emails could be sent back-to-back. Tr. 989.

344. Miller acknowledged that when a document is merely opened, with no content changed by the user, the next time the dialogue box is inspected, it may show that the document was modified. Tr. 969-970. Miller examined a dialogue box, RX 115-65, for Bhat's December 23, 2002 email to herself of the text of her March 21, 2002, email to Boateng, RX87 at R820, and acknowledged that under some circumstances the email could say that it was modified on a particular date, e.g., December 23, 2002, when in fact it was only opened on that date. Tr. 971-73.

345. Miller also confirmed that he did not review Bhat's archived files on her local drive and that she could have saved relevant emails and later sent them to herself. Tr. 967-968. Miller also did not look at any of Bhat's folders on the WASA server, but only looked at the selected backup tapes. Tr. 978-979, 996. For example, WASA's printout of Bhat's "Kofi Pb/Cu" folder came from the December 28, 2002, backup tape, not directly from her folder on the server. Tr. 978-979, citing RX126. Items would only appear in her folders if Bhat placed them in the folders or if she created an automatic filing system. Tr. 980.

346. Miller did not look at Lotus Notes log files, which existed on WASA's Lotus server, and which would have contained a complete record of emails sent and received whether or not such emails were deleted later by employees. Tr. 945, 956. Miller did not look at records of service interruptions in March, 2002, Tr. 999, and he did not review any hard drive or local drive images of Boateng's or Bhat's computers. Tr. 962-963.

#### Pre-Employment Matters

347. Bhat submitted her resume to WASA at her interview in January, 1999, and it was a part of her official WASA personnel file from the beginning of her employment. Tr. 85, 1884; CX1; CX148 at R4258-4260. The resume summarized her experience, indicating that she had more than 15 years of "water quality management/hands on laboratory/research experience [in] Microbiology, Organic, Inorganic, and analytical chemistry," explained her research experience in analytical chemistry going back to 1971, when she earned her Bachelor's and Master's Degrees from a university in India, with experience in the United States between 1985 and 1991, when she was a research associate at Johns Hopkins and the University of Maryland. CX1. It also represented that she had 15+ years of water quality management experience, had expert technical knowledge of the Safe Drinking Water Act ("SDWA") regulatory requirements, and was then Acting Laboratory Chief at WA. (CX 1). Tr. 84, 1879, 1883-1884; CX1. Her resume reflects that she began work at WA as a chemist in 1991, and, subsequently, became the Quality Control Officer of the Chemistry Division, responsible for checking the water quality data. CX1. Bhat later became the lead or chief chemist in February, 1997, overseeing the administrative as well as the management functions of the chemistry division. Id.; see also Tr. 84, 464, 1899-1909; CX1. Bhat was the temporary Lab Chief for microbiology in the chemistry division from September, 1997, until December, 1998. Id.

348. There was no qualification requiring a particular number of years of supervisory experience for Bhat's position at the time she was hired by WASA in 1999. Tr. 1872. When Bhat helped design a description of her position in 2002, she included an "Education/Experience"

requirement of “five years of supervisory experience.” CX3; Tr. 86-87, 461-463. Bhat did not have five years of supervisory experience when she came to WASA, Tr. 84, 464, 1899-1909; CX1, and the record does not indicate that she claimed such experience.

349. On her first day of work at WASA, March 29, 1999, Bhat completed an employment application certifying that the information she provided was true and complete to the best of her knowledge, subject to the condition that should any statement prove false, misleading or erroneous, she could be terminated. RX 3 at 3. In her application, Bhat indicated that her employment with WA ended in December, 1998. RX 3 at 2.

350. Bhat did not include her second stint as Lead Chemist (*i.e.*, from January to March, 1999) under item 2 of “Employment History” (RX3 at R4253), because she overlooked it. Bhat testified that WASA “knew that [she]...had held another position, that [she] was back [working as the Lead Chemist], and [she] was working until March of ’99, at [WA]....Mr. Marcotte knew, Mr. Johnson knew, Mr. Popodopolous knew, Mr. Lewis knew it – they were all key managers that knew and in fact, there was a meeting with [WASA managers and Ms. Bhat] at [WA]” during the last months of her active employment at WA. Tr. 1886-7; *see also* Tr. 474.

351. Bhat was acting Lab Chief from September, 1997, through January, 1998, Tr. 1901-1903, not through December, 1998. She did, however, sign timecards and performance evaluations, CX 166-7, perform functions of hiring, disciplinary action, organizational restructuring, and dealt with other agencies on behalf of the lab through-out the entire period. Tr. 1899-1909. Only the Lab Chief had the ability to take those actions. Tr. 1908. Bhat received formal, Not-to-Exceed (NTE) appointments to the Lab Chief position for different portions of the September 1997-December 1998 period, but these did not cover the entire period in which she was actually performing the responsibilities of Lab Chief. Tr. 459-460, 464, 1959-1960. Bhat was paid a \$55,000 annual salary for the December, 1997-December, 1998 period. Tr. 1886.

352. WA advertised the permanent Lab Chief position in 1998, but Bhat was not selected for the position and she returned to her lead chemist position in 1999. *Id.* Bhat filed an EEO complaint regarding her non-selection. Tr. 1958. Her non-selection caused her stress, and she took two days of medical leave around March, 1999. Tr. 467, 1908; RX125.

353. Bhat was offered a position with WASA after interviewing in January, 1999, with Melvyn Lewis and George Popadopolous. Tr. 1876-1878, 1883-1884. Michael Marcotte, WASA’s Deputy General Manager, gave final approval to hire Bhat after he spoke and exchanged emails with Thomas Jacobus, the General Manager of WA, in February, 1999. Tr. 1421-1423; CX142.

354. Bhat notified WA of her intention to resign from the federal government via a Voluntary Separation Incentive Plan (VSIP), and her last day of work at WA was scheduled in coordination with WA Human Resources for March 19, 1999. CX163; Tr. 1888-1891, 1913-1916. On or about the last day Bhat was scheduled to work at WA, she learned that the VSIP was not fully processed, and at some point she learned that WA wished her to remain

formally on the government payroll, on leave, while a settlement was being negotiated by her legal counsel for her EEO complaint. Tr. 1890-1891; 1958-1959. Grier testified that an employee can be hired at WASA while he or she is still receiving the benefit of leave accrued at a prior employer. Tr. 1676-1677.

355. Bhat joined WASA on March 29, 1999. Tr. 84; CX2, CX148; RX3. Bhat never worked for WA thereafter, and she did not believe she was still an employee of WA on March 29, 1999, when she filled out WASA's Employment Application (RX3). Tr. 1887, 1959. In a May 5, 1999, letter to her WA supervisor, Lloyd Stowe, Bhat requested a transfer to another WA post in order to avoid stressful working conditions at WA. RX 135. Bhat claimed that the May 5, 1999, letter was written as part of a settlement strategy to resolve a pending EEOC claim against WA, apparently to put pressure on WA to increase the amount it would pay her to dismiss her claim. Tr. 1959.

365. Although Bhat contends that WASA management was aware of her continuing relationship with WA when she started working at WASA, Marcotte and Grier denied any knowledge it. Tr. 1317-1318, 1590-1591. Grier testified that the circumstances of Bhat's contemporaneous employment at WA and WASA, if any, "would have warranted further inquiry," not that they would have warranted discharge. Tr. 1590.

#### Relief

#### Reinstatement

357. The record does not demonstrate that reinstatement is impractical, impossible, or otherwise unwarranted. Accordingly, reinstatement and back pay rather than front pay and future benefits is the appropriate remedy here.

#### Back pay

358. In FY '02, Bhat earned a gross salary of \$73,187.14 as a WASA Water Quality Division manager, Salary Grade 18 (CX3). In FY '03, the Grade 18 salary increased high 4% per fiscal year increase. CX119 at 13. Thus, Bhat is entitled to back pay which reflects a 4% increase each fiscal year from the date of the termination to the date of reinstatement.

#### Back Benefits

359. Bhat was paying \$84.28 per pay period, \$168.56/month, for health care while at WASA. CX119 at 19. After her discharge, she paid \$480.02 per month for COBRA for 18 months. CX119 at 16, 600. Therefore, her health care costs for the first 18 months after her discharge, through September, 2004, increased by \$5,606.28 (\$311.46 X 18). WASA's plan provided for free dental and vision coverage, CX119 at 19. Bhat's demonstrated monthly costs for healthcare \$837.18 ((\$38.45 + \$8.06) X 18). CX120 at 16.

360. WASA was contributing to Bhat's pension at a rate of 6.46% of her gross salary, CX119 at 19, and she is entitled to back pension benefits paid at that rate.

#### Out-of-Pocket Medical Expenses

361. Bhat's submitted, post-termination, out-of-pocket medical expenses, including costs of visits to psychiatrists and costs of prescription drugs from the date of her discharge until the time of the beginning of the hearing (based on CX120 at 984-987, 989-994), include:

Medical Doctors: 3/24/03: \$145.00 (Patuxent); 4/29/03: \$175.00 (El Kholy); 4/30/03: \$60.00 (Patuxent); 5/6/03: \$125.00 (El Kholy); 6/3/03: \$125.00 (El Kholy); 6/24/03: \$170.00 (Patuxent); 7/17/03: \$125.00 (El Kholy); 11/13/03: \$80.00 (Hyman); 11/17/03 (Patuxent): \$125.00; 12/08/03 \$70.00 (Patuxent); 12/17/03 \$80.00 (Hyman); 1/19/04 (Hyman): \$80.00; 2/16/04 (Hyman): \$80.00; 2/16/04 (Holzman) \$125.00. Total: \$1,565.

Medications: 12/20/03: \$7.50, Lexapro (depression); 2/24/04: \$186.99, Effexor (depression); \$73.99, Lexapro (depression); 2/25/04, \$109.08, Fluoxetine (depression); 2/25/04: \$36.99, Lisinopril (high blood pressure). Total: \$414.55.

#### Compensatory Damages

##### Depression and Emotional Distress

362. Bhat testified that her life changed after her termination. *See, e.g.*, Tr. 450. Prior to March 2003, she loved to cook, write, read, garden, walk the dog, traveling, exercise on the treadmill, participate in social and religious activities, and call and visit friends. Tr. 824, 825, 820, 847-848. After her termination, she testified that she stopped these activities because she felt obsessed over her termination.

363. Bhat's family observed personality change after her termination. Her husband, Sudhakar, and son, Adityn, testified that she stopped participating in her hobbies, avoided friends, and appeared embarrassed. Tr. 819, 847-848, 862; *see also*, Tr. 450-451, 819, 822-823, 826, 849-50, 857, 858, 859, 862.

364. Before her termination, Bhat frequently went to the religious temple and participated in religious festivities with her husband, but no longer participated after the termination. Tr. 822-823, 826, 848, Tr. 858-859. Bhat stated that before her termination she especially enjoyed the November festival of lights, and "was taking so much interest lighting the lights and everything, preparing sweets and everything . . ." *Id.* Sudhakar testified that in November, 2003, Seema "didn't have any interest. Generally we go to temple, that specific day, and she [doesn't] want to go there. Generally she dress[es] up with our customary costume which is sari and she [doesn't] even do anything. She wanted to sit at home and do nothing actually." Tr. 859.

365. In May 2003, Sudhakar arranged a trip to Chicago with Seema and their son with the purpose to cheering her up. Tr. 852. Mr. Bhat testified that Ms. Bhat was hesitant to go because she did not want the family's friends to ask her about her job at WASA. *Id.* Once in Chicago,

she did not want to interact or talk to anybody. Tr. 853, 854. Sudhakar testified that she “was fearing that . . . they [were] going to ask her what you do now, how is your job doing. . . .” Tr. 853.

366. Adityn testified that before the termination, his mother loved and was dedicated to cooking for him and his father. Tr. 820. He provided an example: “[M]y father’s a diabetic, and he has a very strict diet . . . [My mom] used to watch the show, Dr. Mirkin, and she’d get advice from there and she’d make these meals for us that were . . . healthy and . . . appropriate for my father . . . .” Id. He recalled that after her termination, his mother “hardly ever makes anything . . . it doesn’t taste the same . . . she’ll just say order out or one of you guys just make something easy . . . .” Tr. 821. Sudhakar confirmed that his wife’s cooking habits changed because she no longer cooked as often and as carefully as she used to. Tr. 855. She was, according to Sudhakar, “meticulous” about her cooking and the way she kept her home. Id. After her termination, she was no longer the same because she did not care and did not pay attention to any details. Tr. 855, 856. Sudhakar offered the following example, “a couple of times she added so much salt I couldn’t eat it the dish, and that’s not her nature. She was so . . . meticulous . . . .” Tr. 855.

367. Adityn also testified that his mother enjoyed gardening, Tr. 821, but after March 2003: “she didn’t plant anything or she didn’t do anything as she did in previous years.” Tr. 822. Bhat’s husband asserted that “her garden is dried up now, not due to the winter but during that time, it was not watered or anything.” Tr. 857. She and Sudhakar bought plants for the spring of 2003, and “she was supposed to plant and still [in spring 2004] they are sitting there.” Tr. 858.

#### Family Relationships

368. Bhat testified she feels depressed and guilty for not being capable to care for her husband and son as she enjoyed doing before her termination. Tr. 453. She related:

[M]y despondent mood has just affected them deeply, especially my son, specifically when . . . I had the performance. At that time . . . he was appearing for the LSAT, too, and the whole atmosphere at home, . . . it was a despondent mood all the time, and I just no longer participate in his activities which as a motherly function . . . I used to do, and that affects him as well as I just, in daily activities I used to discuss my career and everything with him and I just felt that that has affected our relationship.” Id.

She stated, “I feel very guilty and, you know, depressed that I am not able to perform functions which [I used to] because of my present situation.” Id.

369. Bhat’s son testified he had a very close relationship with his mother prior to March, 2003. His motivator and “she was always upbeat . . . she always had a smile on her face anytime [he] saw her.” Tr. 818. He stated “I could just call her and she’d be there for me. If I had a question about school, about like advice for work or anything . . . .” Tr. 819; 865. After March 2003, Bhat’s interactions with her son changed because she was always “down” and “emotional.” Tr. 819. Adityn testified, “She cries very easily.” Tr. 818, 825. Before her

termination, Bhat would talk to her son on the phone for a long time. Tr. 820. This changed after March 2003, since Bhat would talk for a minute and then pass the phone to her husband. Id. Her son stated that she “doesn’t like to interact as much as she would before.” Tr. 820, 826, 865. Her son testified that “[s]he is very snappy now and she’ll cry very easily.” This has had a negative impact on her relationship with her son and husband. Tr. 453.

370. Sudhakar also testified that his interactions with his wife changed after she was terminated from WASA. See, e.g., Tr. 870. He formerly had a great relationship with her. Tr. 866. He stated that they “enjoyed life together,” and she “was really joyful.” Id. After her termination, however, he claims she does not pay attention to him like before; it is like “she’s in a total different world.” Id. In an attempt to help motivate his wife, Sudhakar signed up for a travel club. Tr. 869-870. However, he withdrew his club membership because she was not interested in his plans. Tr. 870.

### Career Impact

371. Bhat took great pride in the fact that she had a promising career in the water quality field. Tr. 84, 446, 1879, 1883-1884; CX1; CX123 at 752. She received awards for her technical abilities, and had strong contacts with the EPA, the Department of Health and other industry professionals. Tr. 446. Prior to her termination from WASA, Bhat had never been terminated from any employment. Id. She testified, “I loved the field very much. I was very much involved in water quality program.” Tr. 456.

372. Bhat testified that after being discharged it was difficult for her to network and to attain a comparable position in the water quality field because it is a limited area. Tr. 446. She felt humiliated and embarrassed to talk to former colleagues during her job search:

I just felt that there was -- at this stage I had to change my career to get a job and it was -- my entire career that I had worked and took pride in, WASA had destroyed. Tr. 446-447.

373. Bhat has been unable to obtain a comparable position within the field. Tr. 432; CX116 at 886-888; Tr. 432. She applied unsuccessfully for approximately 40 jobs. CX116 at 886-888; Tr. 432. Bhat claims she lost her self-confidence due to her termination and, thus, panicked anytime she applied for jobs. Tr. 863-64.

374. Sudhakar testified that Seema “took her job to her heart. She poured her heart into it, really. That’s why she was working late sometimes at night.” Tr. 864. After her termination, she “was devastated, and [she] just felt like [her] career was lost.” Tr. 446. He recalled that she cried about the adverse impact her termination had on her health insurance and her ability to find a job. Tr. 863. Sudhakar testified that “she was more panicky and she was crying regarding the health insurance and everything . . .” Id.

According to Mr. Bhat, Ms. Bhat cried and panicked when she applied for new positions because she thought “all these efforts are not going to go anywhere . . . I’m not going to get this job.” Tr. 863-864.

375. Bhat testified, “this career was a whole life to me . . .” Tr. 456. Regarding her feelings after her termination in March 2003, she said “I felt that I –I just could not go on.” Id.; Tr. 457. In a meeting with her psychiatrist, Bhat stated, “Only my will power keeps me going. Otherwise, I would feel no use in living.” CX130 at 15.

376. Bhat has previously suffered from depression. Tr. 866. She suffered with depression when her parents died in 1988 and 1996, but she claims these episodes did not affect her life substantially on a long-term basis and did not interfere with her ability to work. Tr. 454-455. Comparing the present situation with her depression over her parents’ deaths, Mr. Bhat said, “[I]t was not to this extent. I can see it, feel it, but it just lasted maybe a couple of months or maybe less . . . and after consoling her, [her depression] slowly filtered away.” Tr. 866. Her son stated, “[T]he only time I remember her really being sad was after her parents’ deaths . . . .” Tr. 830.

377. In early 1999, Bhat suffered depression related to her non-selection for the Lab Chief position at WA. She took several days off of work at that time, but she claims this depression lifted when she began working at WASA in March 1999. Tr. 454-455; RX125. She also experienced depression around the time of her 2001 performance appraisal, the depression, according to Bhat, was not as severe as after her termination, Tr. 448, and did not require her to be on medication. See, e.g., CX122 at 804. In her assessment notes dated December 17, 2001, Dr. Bensinger noted that Bhat was off Prozac and did not feel that she needed to go back on that medication. CX122 at 804

378. Bhat also experienced emotional distress in January of 2003, when her husband underwent open heart surgery. Tr. 827, 840. She asserted she was concerned, “but that did not affect [me] because he was recovering.” Tr. 455. However, while Sudhakar was successfully recuperating, Seema’s situation at WASA was worsening, and her depression was not improving. Tr. 829.

#### Expert Evaluations

379. After her termination from WASA in March 2003, Bhat experienced severe depression, which required her to receive frequent psychotherapy and medication. Tr. 448-449. Three physicians addressed Bhat’s post-termination physical and mental health.

380. Dr. Irma Bensinger, an osteopath, treated Bhat from August 16, 2000, to November 17, 2003. Bhat suffered embarrassment when she first attempted to discuss her termination with Dr. Bensinger, her primary care physician. Tr. 449; CX128 at 12. Dr. Bensinger reviewed Claimant’s medical history, noted a bout of depression in July of 1999, evaluated an X-ray indicating premature diffuse atrophic degeneration of the brain, but deferred with respect to whether the atrophy could cause psychological problems. In a letter dated February 10, 2003, Dr. Bensinger commented that Bhat has a history of depression. Dr. Bensinger also attention deficit disorder on an ongoing basis throughout the 1990’s. CX 122.

381. On April 30, 2003, Dr. Bensinger observed: “[R]ecently, [Ms. Bhat’s] depression has worsened, and she has recently sought the care of a psychiatrist by the name of Dr. Elhole

(sic). The patient just saw her recently, and Dr. Elhole (sic) increased her Prozac.” CX122 at 790. In a letter dated May 10, 2003, Dr. Bensinger explained, “Although, Ms. Bhat had been on Prozac in 1988, after her mother’s death, she had since stopped it. I had prescribed fluoxetine 20 mg. (Prozac) for the patient in January 2003, when she related increasing stress issues. The patient now informs me that her psychiatrist has doubled the dose of fluoxetine from 20 mg. to 40 mg. daily.” Dr. Bensinger reported that Bhat “relates feeling very depressed due to the fact that her termination she feels has affected her integrity.” CX 122, 787.

382. Dr. Bensinger referred Bhat to Dr. El-Kholy, a psychiatrist. Dr. El-Kholy first saw Bhat on April 29, 2003. CX128 at 12. She took a history which included Bhat’s use of Prozac in 1987 when her mother passed away, and her 20 milligrams daily dose of Prozac at time of the visit. Dr. El-Kholy also noted that Bhat was taking Metformin for high blood sugar, Lisinopril for high blood pressure, and Lipitor for high cholesterol.

383. During her sessions with Dr. El-Kholy, Bhat complained about her lack of energy to engage in several activities, especially gardening and writing, as a result of her depression. CX128 at 24, 26. Dr. El-Kholy’s diagnosis of Bhat was “major depression recurrent this year.” CX128 at 18, citing CX123 at 751. She recommended weekly psychotherapy and increased the Prozac to 40 milligram in the morning, because the previous dose was not enough to treat her depression. CX128 at 22. Dr. El-Kholy described Bhat’s symptoms as follows:

She was anxious and restless. She was sad. She cried in the interview, complained of pressure she’s having at her job. That she was working very hard and she ... didn’t get any negative remarks before in her life. She feels very ashamed for being terminated.

She was worried. And she said her mood is very depressed. Her affect, she was anxious, preoccupied with her stressors, in the job situation again. She said she has no energy to keep going. CX128 at 39-40, citing CX123 at 752-753.

384. In her notes from their session of June 3, 2003, Dr. El-Kholy stated that Bhat “still sleeps more than normal. She’s worried about going to job interviews. Mood improved on the 40 milligrams a day [of Prozac].” CX128 at 27-28, citing CX123 at 754. Based on her history, Dr. El-Kholy stated that if Bhat stopped taking the Prozac, she assumed Bhat would revert to her most depressed state. CX128 at 29. Dr. El-Kholy testified that she checked Bhat for other stressors besides the termination, but identified no other stressors in her life. CX128 at 19-20. Based on the symptoms, Dr. El-Kholy believed that her termination and her resultant unemployment was the cause of Bhat’s depression. CX128 at 41.

385. The record does not establish that the emotional distress of the termination caused symptoms of diabetes and high blood pressure. While Dr. El-Kholy’s diagnostic impressions included major depression, high cholesterol, and diabetes mellitus, and while she stated that Bhat was on “Megamorphin, 500 mg. p.o.b.i.d. for increase sugar in blood and Lisinopril, 10.0 mg.

p.o.q.d. for high blood pressure,” CX122, p. 791; CX128 at 18, the record shows that Dr. El-Kholy did not establish the etiology of the conditions other than the depression. CX 128.

386. Reviewing Bhat’s symptoms including disturbed sleep, fatigue, lack of motivation, obsession with her job and shame, anxiousness, restlessness, and sadness, Dr. El-Kholy diagnosed “major depression recurrent this year, but which started about a year and half before the visit.” Dr. El-Kholy acknowledged that the open-heart surgery Bhat’s husband underwent could have been a contributing factor, but Bhat did not mention it, and Dr. El-Kholy opined that work-related stresses were the cause of Bhat’s depression.

387. Dr. El-Kholy increased Bhat’s Prozac dosage to 40 milligrams once a day, and scheduled Bhat to return weekly. Due to her loss of medical insurance, however, Bhat could only continue these meetings on a monthly basis, and she met with El-Kholy on May 6, June 3, and July 17, 2003. Dr. El-Kholy’s notes show that Bhat was depressed and preoccupied with her termination, unable to garden and write papers, unhappy attending a wedding ceremony, and worried about job interviews. By June, her mood had improved, and Dr. El-Kholy continued her on 40 milligrams of Prozac. Dr. El-Kholy noted that, during her May visit, Bhat advised that she was taking only 20 milligrams and was still feeling depressed so Dr. El-Kholy advised her to take the full 40 milligram dose. She still had pills left when she returned in July, and it was Dr. El-Kohly’s impression that Bhat did not take her medication consistently, because “maybe she didn’t feel like she needed the full dose.” Bhat reported she remained depressed, however, and Dr. El-Kholy recommended another antidepressant which Bhat refused it. Dr. El-Kholy confirmed that sleep disturbance can be associated with depression, but she reiterated that Bhat was not taking her medication.

388. On May 9, 2003, Dr. El-Kholy signed a letter which Bhat drafted for her signature. CX123 at 755. Dr. El-Kholy did not know what Bhat intended to do with the letter, and testified that at the time she signed it, she thought it accurately reflected her views, but she did not read it carefully. In general, she thought the letter simply requested some time off work, and Dr. El-Kholy testified that “...if she wants to present it to somebody, I can say, yes, you know she has depression, she can use some time off.” The letter, however, went further and contained statements which Dr. El-Kholy later recanted because she had no direct knowledge of the matters mentioned. She singled out, for example, certain references to Bhat’s health-related problems after “January 3,” the discussion about Bhat’s diabetes and hypertension and whether they were work-related problems, and the reference to doubling the dose of flouxetine which Bhat actually did not take. On reflection, Dr. El-Kholy did not retract her diagnosis of depression, but she did testify at her deposition that the letter addressed these other matters and she should not have signed the letter. CX 128.

389. While there is no record of any treatment for emotional distress between June, 2003, and November, 2003, Dr. Lawrence Hyman, a psychiatrist, saw Bhat on November 13, 2003, and he treated her through January, 2004. He reported that Bhat experienced mood swings, and he was impressed that she was partially responsive to the 40 milligram dose of Prozac. Dr. Hyman changed her prescription to 75 milligrams of Effexor with increases to 150 milligrams as needed.

390. By December, 2003, Bhat's symptoms were returning. Dr. Hyman reported that Bhat had trouble finding a job, and was sad, tearful, embarrassed she was terminated, and felt hopeless about finding another job. He did not think she had ADHD although he noted that another physician she had placed her on a trial of Ritalin. Dr. Hyman described Bhat as depressed and changed her medication to Lexapro 20 milligrams a day. Thereafter, On January 19, 2004, he saw Bhat again, shortly after her return from an extended vacation to India. CX130 at 17, citing CX123, p. 762. He opined: "My sense was at the time of the visit she was currently in remission. My plan was for her to continue the Lexapro at 20 milligrams a day and to return in a month or as needed." Dr. Hyman explained, "[W]hether or not going to India was helpful and the antidepressant was helpful we'll certainly find out the next time..." On February 16, 2004, Dr. Hyman's notes show that Bhat was again "dwelling on issues of job loss again" and he decided to renew her medication. Dr. Hyman acknowledged that a prior head injury is a possible cause of depression, but he opined that Bhat had been depressed and lost her job, and explained: "...a person who has got a recurrent depressive disorder is going to be more susceptible to major life stressors; and, so, I certainly had no reason to question that the loss of her job probably had something to do with precipitating that exacerbation or a worsening of her depressive symptoms." Cx 130 at 21-22.

391. Lawrence R. Hyman, M.D., a psychiatrist, began treating Bhat on or about November 13, 2003. CX130 at 9. On that date, Dr. Hyman changed Bhat's medication to Effexor, starting at 75 milligrams and increasing to 150. CX130 at 11, citing CX123, p. 756. Dr. Hyman's impression during this meeting was that Bhat had not adjusted to the loss of her job because she was still depressed. CX130 at 22. Dr. Hyman testified that his knowledge of Bhat's prior emotional condition and prior treatment for emotional distress is based upon the notes of his colleague, Dr. El-Kholy, who had left his practice. CX 130, p. 9-10.

392. Dr. Hyman rejected an alternative theory Bhat's depression originated from a head injury in the early 1990's. CX130 at 26-27. He agreed that a car accident, which resulted in a concussion, could possibly cause an onset of depressive episodes in a "susceptible person . . . it would depend on the conditions of the accident, the consequences of it, the cause, the amount of stress." CX130 at 28. However, based on the medical reports of the brain scan describing the injury, Dr. Hyman rejected the notion that Bhat's depression was caused by her 1993 car accident. Id. Though a head injury in some cases could cause dementia or other mental impairments, Dr. Hyman stated that in Bhat's case, "I wasn't struck with a personality disorder type of situation.... I base that on the fact that she certainly had a stable marriage for a number of years, describes the marriage as stable. I didn't pick up anything histrionic or borderline or sociopathic that jumped out at me." Id.

393. In his treatment notes of December 17, 2003, Dr. Hyman stated that Bhat "complains of feeling sleepy since on the Effexor. [She] felt better on the 150 milligrams Effexor but legal issues, depositions and stress have increased her to become more sad (*sic*), fearful, not as bad as she was but the symptoms are starting to return. [She] complaints of not being able to find a job. [She] believed she had an outstanding career policing water safety and then was terminated." CX130 at 14, citing CX123 at 760. During this meeting, Bhat stated, "Only my will power keeps me going. Otherwise I would feel no use in living." Id.

394. Dr. Hyman observed that legal issues can exacerbate a person's depression or mood changes as "it tends to bring up issues again." CX130 at 21.

395. On January 19, 2004, Dr. Hyman saw Bhat again, shortly after her return from an extended vacation to India. CX130 at 17, citing CX123, p. 762. He opined: "My sense was at the time of the visit she was currently in remission. My plan was for her to continue the Lexapro at 20 milligrams a day and to return in a month or as needed." CX130 at 18. Dr. Hyman explained, "[W]hether or not going to India was helpful and the antidepressant was helpful we'll certainly find out the next time..." CX130 at 22.

396. As of February 16, 2004, Bhat was again "dwelling on issues of job loss again" and being out of work and felt her job situation was worse, CX123 at 878, and her medications were continued. Id.

#### Other evidence

397. The record shows that Bhat sought damages for employment related stress from her prior employer. At or around the time of her departure from her former employer, WA, Bhat's physician, Dr. DiGeralamo, submitted a letter to her superiors dated March 17, 1999, stating that she was unable to report to work due to depression caused by work-related stress. RX 125. Bhat filed discrimination charges against USACE in connection with the denial of her request for promotion to laboratory director, a post she had held temporarily on an acting basis. She began her employment with WASA on March 29, 1999, while she was still prosecuting her discrimination claim against WA. In May 1999, Bhat wrote that she was unable to return to work at WA due to work-related stress and that she desired a transfer to another position. Bhat testified that the May correspondence to WA was for the purpose of negotiating a favorable settlement of her discrimination complaint.

398. Bhat continued to experience symptoms of emotional illness during the 2001-2002 LCR monitoring period. She experienced dizzy spells and loss of focus in November 2001, and she resumed treatment for depression and attention deficit disorder on or about December 1, 2001. RX 110 (C0000858). Bhat contends that she only took the depression and attention deficit medication on an as-needed basis after December, 2001, and did not seek ongoing medical treatment. Tr. 640-641.

399. From April, 2003, forward, Bhat was personally involved with the investigation and prosecution of her whistleblower complaint. She attended every deposition that was taken in the case, gave media interviews, and testified before the District of Columbia Council concerning the lead monitoring program at WASA. Tr. 880-887.

#### Exemplary Damages

400. In 2000, the D.C. Inspector General found that WASA employees were reluctant to discuss safety and health issues for fear of retaliation and concerns that any effort to bring such issues to management's attention would be futile. CX124, OIG No. 00-2-03LA Final Report, November 7, 2000, Executive Digest at p. 1.

401. In 2002, the IG observed: “[T]he communication channels at WASA are for the most part one way – downward. For example, we could not identify any instance in which managers appreciated candor or negative information or were open to discussion or criticism...” CX, 124, OIG No. 01-2-15KA Final Report, January 7, 2002, Executive Digest at p. 40.

The IG also commented:

During the audit process WASA would not provide us with accurate, complete, and timely information relating to aspects of its general operations, personnel, or its safety program....It is important to note that it was unusual for the OIG not to receive cooperation from an agency in obtaining and reviewing records that are clearly identified in the law as being under our purview....[A]uditors met with WASA management many times to request the documentation. Additionally, in some instances, we noted that when WASA did provide requested data, it was initially incomplete or lacked attachments...CX124, OIG No. 00-2-03LA Final Report, November 7, 2000, Executive Digest at p. 6.

402. WASA was recently found in violation of the whistleblower provisions of the Clean Air Act and the SDWA in a case involving another employee. *See, Bobreski v. D.C. Water and Sewer Authority* 2001 CAA 6 (ALJ July 11, 2005).