



**Issue Date: 09 September 2013**

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In the Matter of  
**BRUCE A. MINTHORNE**  
Complainant

Case Nos.: 2009 CAA 4  
2009 CAA 6

**v.**

**COMMONWEALTH OF VIRGINIA**  
Respondent

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Appearances: Mr. Bruce A. Minthorne  
(Representing himself)

Mr. Thomas W. Nesbitt, Asst. Attorney General  
Mr. Steven P. Jack, Asst. Attorney General  
For the Respondent

Before: Richard T. Stansell-Gamm  
Administrative Law Judge

**DECISION AND ORDER ON REMAND –  
DISMISSAL OF COMPLAINTS**

These two complaints arise under the whistleblower provision of Section 322(a) of the Clean Air Act ("Act" and "CAA"), 42 U.S.C. § 7622. This statutory provision, as interpreted by the Secretary, U.S. Department of Labor ("Secretary" and "Sec'y") and implemented by 29 C.F.R. Part 24,<sup>1</sup> prohibits an employer from: a) discharging or otherwise retaliating against an employee with respect to compensation, terms, conditions, or privileges of his employment, and b) intimidating, threatening, coercing, blacklisting, disciplining, or retaliating in any other manner against an employee because the employee commenced or caused to be commenced a proceeding under the Act, testified or is about to testify in such a proceeding, or assisted/participated or is about to assist/participate in such a proceeding. 29 C.F.R. §§ 24.102(a), (b)(1)-(3).

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<sup>1</sup>Implementing regulations, 76 Fed. Reg. 2808-2826 (Jan. 18, 2011).

## **Procedural History**

### **2009 CAA 4**

In a December 5, 2008 letter to the Secretary, care of the Regional Administrator, Occupational Safety and Health Administration ("OSHA"), which was received on December 8, 2008, Mr. Minthorne alleged that several named state officials/employees, acting as employers, violated the employee protection provisions of the Act by discharging him on November 9, 2008 from his position as a Compliance/Safety Officer IV in the Virginia Department of Agriculture and Consumer Services ("VDACS"), Office of Product and Industry Standards ("OPIS"), in retaliation for protected activities under the Act.

On February 3, 2009, upon investigation of Mr. Minthorne's complaint, the Regional Administrator dismissed his complaint as untimely since it was not filed within 30 days of the adverse personnel action which consisted of an October 15, 2008 layoff notice that became effective November 9, 2008.

### **2009 CAA 6**

In a January 24, 2009 letter to the Secretary, care of the Regional Administrator, OSHA, Mr. Minthorne alleged that several named state officials/employees, acting as employers, violated the employee protection provisions of the Act by denying him compensation for his accrued annual leave in December 2008 without due process and then subsequently reporting the annual leave as dissolved to another agency in retaliation for a protected activity under the Act – his December 2008 filing of a discriminatory discharge complaint (2009 CAA 4).

On February 26, 2009, upon investigation of Mr. Minthorne's complaint, the Regional Administrator dismissed his complaint on the basis that he had been made whole and any adverse action had been abated because Mr. Minthorne subsequently received payment for his annual leave.

### **Initial Decision and Order**

On May 19, 2009, I issued an Initial Decision and Order which principally dismissed both complaints for failure to state a cause of action because the Commonwealth of Virginia ("Virginia") was not a proper respondent since its sovereign immunity had been neither waived nor abrogated. I also denied Mr. Minthorne's motion for summary judgment due to the Secretary's failure to issue an order regarding his complaints within 90 days. Finally, I dismissed all the individuals who had been named as respondents in his two complaints because they were not his "employer."<sup>2</sup>

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<sup>2</sup>I also specifically deferred a determination on whether Mr. Minthorne's 2009 CAA 4 complaint was timely under the Act.

## **Administrative Review Board Remand**

On July 19, 2011, upon setting aside its own precedent and concluding that Congress "unequivocally" intended the CAA's employee whistleblower protection provision to apply to the states, the ARB reversed my decision to dismiss both complaints on the basis that Virginia was not a proper respondent. At the same time, the ARB affirmed my dismissal of the named state officials/employees as respondents and my denial of Mr. Minthorne's motion for summary judgment.

### **Present Proceedings**

Pursuant to a Notice of Hearing, dated July 29, 2011, ALJ V,<sup>3</sup> I conducted a hearing in Washington, D.C. on December 5, 2011, with Mr. Minthorne and Mr. Jack. My decision in this case is based on the hearing testimony and the following documents admitted into evidence: CX 1 to CX 50, and RX 1 to RX 19.

### **Parties' Positions**

#### **Complainant<sup>4</sup>**

As background for his first whistleblower complaint, 2009 CAA 4, Mr. Minthorne noted that he has been an employee of Virginia for over 19 years. After working as a state inspector for several years, he became a regional supervisor for northern Virginia. Due to consumer complaints, Mr. Minthorne was selected in 2006 to lead an investigation into substandard motor fuels provided by a major supplier and a smaller fuel distributor. During the course of his investigation, Mr. Minthorne experienced several obstructions which he reported in December 2006 to the state fraud, waste, and abuse hotline and the division director, Mr. Alvarez.

In January 2007, Mr. Minthorne also informed Mr. Alvarez and other members of management about substandard motor fuels that failed to meet CAA standards. In August 2007, Mr. Minthorne also made a complaint to the FBI regarding CAA violations and possible agency corruption. Eventually, although Mr. Minthorne was a regional supervisor, Mr. Alvarez gave him a special project assignment that was planned to last 120 days. However, the assignment continued beyond that time and Mr. Minthorne was not permitted to return to his regional supervisor office. In December 2007, Mr. Minthorne filed a grievance due to the absence of a required employee work profile ("EWP"). As an outcome of subsequent mediation, Mr. Minthorne agreed to take a special projects position which Mr. Alvarez asserted was a necessary and critical position. However, in actuality, the job was only a make-work assignment that involved preparation of extensive documentation that was never reviewed. In November 2008, Mr. Minthorne was laid off from his job. A short time later, he found employment with the Virginia Employment Commission ("VEC").

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<sup>3</sup>The following notations appear in this decision to identify exhibits: CX – Complainant exhibit; RX – Respondent exhibit; ALJ – Administrative Law Judge exhibit; and TR – Transcript.

<sup>4</sup>Opening statement/summary decision motion responses, TR, pp. 26-35, and 126-27, and closing statement, TR, pp. 214-19.

Meanwhile, by August 2007, Virginia was aware of pending budget reductions, and that awareness continued into 2008. In light of that additional consideration, and based on evidence of pretext, Mr. Minthorne believes that he suffered retaliation for his protected activities because his special projects position was targeted for layoff in order to eliminate him. As a remedy, Mr. Minthorne seeks reinstatement as a VDACS special projects officer, and back pay based on an annual pay differential of \$3,500.00.

The internal inconsistencies in the Respondent's documentation, the destruction of relevant documentation, and the agency's failure to follow its own procedures in regards to his position being selected for layoff, adversely reflect on the credibility of the Respondent and its assertion that Mr. Minthorne's separation was due to legitimate business purposes, and provides circumstantial evidence that his protected activities were a motivating factor because the individuals making the layoff decision, or influencing that decision, such as Mr. Delorme and Mr. Bailey, considered his protected activities and took their actions based on that consideration.

Concerning his second whistleblower complaint, 2009 CAA 6, prior to his November 2008 separation, individuals in the VDACS Payroll and Human Resources ("HR") offices told Mr. Minthorne that he would be paid for his accrued leave. Subsequently, Mr. Minthorne filed his first whistleblower complaint, 2009 CAA 4. Then, in January 2009, Mr. Minthorne discovered that his annual leave worth nearly \$7,200.00 had actually been dissolved. Although he eventually received payment for his annual leave in February 2009, and he has not since suffered any other adverse action in terms of pay, Mr. Minthorne seeks an order directing Virginia to abate its retaliation.

### **Respondent<sup>5</sup>**

Mr. Minthorne's complaints should be dismissed because he has failed to prove that his layoff and the brief non-payment of annual leave were acts of retaliation for protected activities under the Act.

Specifically, Mr. Minthorne has failed to show by the preponderance of the evidence that the decision to lay him off from his position as a special projects coordinator within VDACS was caused, or motivated by, retaliation for reporting possible violations of the Act. To the contrary, in response to continuing economic uncertainty beginning in 2007, Virginia implemented statewide budgets cuts that included Mr. Minthorne's layoff. Through an orderly process from each office, division, and agency, the budget program cuts were forwarded to the governor's office which made the final decisions. Several witnesses credibly testified that VDACS followed the governor's general directive in preparing and reviewing all budget cut proposals. And, over the course of the next four years, an additional 62 positions have been eliminated in VDACS due to budget reductions. Consequently, no direct evidence of causation exists.

In terms of circumstantial evidence associated with temporal proximity between Mr. Minthorne's protected activity and layoff, although some of the individuals involved in the

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<sup>5</sup>Opening statement/summary decision motion, TR, pp. 125-26, and 129-31, and December 14, 2011 closing brief.

budget process were aware of his protected activities, they concurred with Mr. Minthorne's reports of violation, advocated corrective action, and were not interested in retaliation. Additionally, Mr. Minthorne's other activities involving grievances by him or other employees and his investigation of a gasoline franchise were not protected activities under the Act. And, his VDACS supervisors were unaware of his CAA complaints to other state agencies and government officials. Finally, none of the individuals involved in the budget process considered Mr. Minthorne's protected activities, and the first proposal was even developed before Mr. Minthorne's first protected activity.

Similarly, the delay in the payment of his annual leave upon his layoff was an administrative oversight that was made by VDACS accounting personnel, who were unaware of his protected activities and eventually corrected the deficiency upon notification. Consequently, since he has been paid for his annual leave, Mr. Minthorne has not suffered any retaliation.

Regarding any requested relief, the Virginia HR staff helped Mr. Minthorne find another job with the state within one month of his layoff, and during that one month unemployment period, he received his full pay as part of his severance benefits. And, Mr. Minthorne was eventually fully paid for his annual leave.

## **ISSUES**

1. Timeliness of first CAA complaint.
2. Whether Mr. Minthorne engaged in a protected activity under the Act.
3. Whether Respondent took any adverse action against Mr. Minthorne.
4. If Mr. Minthorne engaged in a protected activity, whether a protected activity caused, or was a motivating factor in, Respondent taking any adverse action against him.
5. If a protected activity by Mr. Minthorne caused, or was a motivating factor in, Respondent taking any adverse action against him, whether Respondent has established by a preponderance of the evidence that it would have taken the same adverse action(s) in the absence of the protected activity.
6. Reinstatement, damages, and abatement.

## SUMMARY OF TESTIMONY AND DOCUMENTARY EVIDENCE

### Sworn Testimony

**Mr. Thomas Edward Tatum, Jr.**

December 5, 2011 Hearing  
(TR, pp. 37-55)

[Direct examination] In a July 2008 e-mail to Mr. Alvarez, the program director, CX 4, Mr. Tatum reported that Mr. Bailey had stated that Mr. Tatum had instigated a fraud, waste, and abuse investigation against another worker. However, Mr. Tatum knew nothing about it. That individual then told everyone that Mr. Tatum was responsible. Mr. Bailey had also told Mr. Tatum that he wasn't going anywhere, so Mr. Tatum asked Mr. Alvarez that he be allowed to retire.

Mr. Tatum had filed a grievance about a pattern of discrimination.

Mr. Tatum knew Mr. Minthorne from his work at the agency in special projects. Mr. Tatum's office was also near the motor fuels laboratory and he was aware that the agency was not taking any action at times when the motor fuel samples failed.

In September 2009, Mr. Tatum was laid off from his position as a metrologist, as well as another metrologist. However, about two weeks later, Ms. Karen Jackson in VDACS HR called him and advised that he should not have been laid off. Yet, to enable a younger person with medical problems to remain employed with the agency, Mr. Tatum decided to accept the layoff action and retire.

[Cross examination] His grievance occurred in 2007 or 2008.

Ms. Jackson told him that the layoff mistake was due to seniority and the fact that the lab wasn't actually going to close. So, they wanted to bring him back to work.

Mr. Tatum worked as a district director prior to 2000.

Steve in the lab told him that he found violations where the motor fuel quality was bad but no one was taking action. The discrepancies were posted on the local area network, or LAN, and the LAN would indicate whether there had been a fine. Neither he nor Steve were responsible for leveling civil penalties.

[Redirect examination] Page three of CX 10 summarizes what Mr. Tatum told Mr. Minthorne.

One of the reasons they may have wanted Mr. Tatum back was because he was the only person accredited to run the lab. After he retired, the lab lost its accreditation for six to eight months.

Mr. Tatum could check because the violations would be listed on the LAN.

November 12, 2009 Department of Employment Dispute Resolution ("EDR") Hearing<sup>6</sup>  
(RX 1, pp. 23-77)

Mr. Tatum started working for the state in 1992 as a liquid propane inspector.

Sometime in September or October 2008, Mr. Tatum heard Mr. Minthorne tell Mr. Dale Saunders about a stack of motor fuel violations about which no one was doing anything.

**Mr. Bruce A. Minthorne**

December 5, 2011 Hearing  
(TR, pp. 60-125)

[ALJ examination] In 1989, Mr. Minthorne started working for Virginia as a regional inspector in the VDACS. His place of work was Prince William county. In 2000, Mr. Minthorne was promoted to the position of regional supervisor with a 9% increase in salary. In that capacity, he oversaw inspection activities related to motor fuel. Specifically, his office was responsible for ensuring the accuracy and correct operation of weighing and measuring devices in the state. The devices included fuel pumps and weight scales. They also inspected motor fuel quality by taking samples and transporting the samples to the laboratory for evaluation of various state and CAA requirements associated with oxygenated fuel, such as volatile organic compound (VOC) emissions, Reid vapor pressure,<sup>7</sup> and ethanol levels.

Depending on budget levels, Mr. Minthorne supervised six to 10 individuals who conducted the physical inspections. Part of the inspection process involved monitoring the product fuel trucks were putting into tanks. Mr. Minthorne stayed in a supervisor position until January 10, 2008.

In August 2006, Mr. Don Delorme, OPIS program manager, indicated that Mr. Minthorne would lead an investigation involving Noblett Oil Company ("Noblett") and ExxonMobil concerning allegations of pumping substandard fuel into storage tanks, which is fuel with a lower octane level than posted. Mr. Minthorne sent his inspectors to storage tank locations serviced by Noblett, which delivered fuel supplied by ExxonMobil. He also went to the Noblett offices to review delivery tickets.

During the course of his investigation, Mr. Minthorne discovered two issues. First, Noblett was intentionally putting substandard octane product into storage tanks. And, second, Noblett had an issue with ExxonMobil supplying them with product that did not meet octane requirements.

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<sup>6</sup>I've only summarized relevant testimony that was not duplicative of the December 5, 2011 hearing testimony.

<sup>7</sup>The Reid vapor pressure is a common measure of the volatility of gasoline.

Upon completion of the investigation in November 2006, Mr. Minthorne provided Mr. Delorme the investigative file, which identified multiple alleged violations of the CAA, including multiple Reid vapor pressure violations.

Subsequently, through Mr. Delorme, Mr. Minthorne learned that in a December 2006 meeting with Mr. Andes Alvarez, Consumer Protection Division director, and Mr. Wes Diggs, ExxonMobil admitted to willfully and knowingly selling substandard octane fuel that did not meet requirements for six months. After the meeting, based on Mr. Minthorne's review of the LAN information, Mr. Diggs did not take any enforcement action. Additionally, the central office in Richmond did not send Mr. Minthorne any reports about his discoveries for follow-up. In contrast to his expectations since no enforcement action was taken, no motor fuel reports were sent to him for follow-up and resampling to ensure the product was in compliance. Although he sent inspectors to ExxonMobil, he never got any motor fuel reports from the central office after the lab analysis. And, when Mr. Minthorne asked the central office about the motor fuel tests, "they hung up on me."

So, in December 2006, Mr. Minthorne met with Mr. Alvarez to discuss the situation. Mr. Alvarez was aware of issues in the compliance office and that Mr. Diggs was only in an acting position. But nothing really happened.

After the Christmas holiday, Mr. Minthorne learned that BP Amoco stated they had a valve problem at their terminal which had caused too much ethanol to be placed in the fuel that was being distributed throughout the metropolitan area. So he sent one inspector to the terminal to stop distribution until his department had tested it. However, Mr. Diggs, who was the compliance director for weights and measures, and also the acting OPIS program manger, called the inspector directly and told him to leave the terminal. Mr. Diggs also told the inspector to tell Mr. Minthorne to stop taking samples at the terminal and to cease the investigation.

So, Mr. Minthorne stopped the rest of the inspectors from taking samples. Although Mr. Diggs was responsible for compliance, the investigation operation belonged to Mr. Minthorne. Mr. Minthorne also sent an e-mail report about what they discovered at the terminals to Mr. Diggs with a copy to Mr. Alvarez. In the report, Mr. Minthorne expressed his concerns about what had happened. In particular, he was concerned that Mr. Diggs did not talk to him directly about the situation. He was also concerned that the BP Amoco representative had been inaccurate in his description about what was happening.

Three days later, about mid-January 2007, Mr. Alvarez called Mr. Minthorne and asked if he would be willing to accept working from home doing policy procedure writing. When Mr. Minthorne asked why, Mr. Alvarez said the agency had a critical need since Mr. Diggs was only in an acting position and a new OPIS program manager would not have much knowledge regarding the office's function. The situation was aggravated because the office did not have policy procedures in place. Mr. Minthorne agreed that there was a legitimate need for written policy procedures. However, he didn't understand why he needed to work at home since he already had an office. He wanted to continue to supervise and was willing to also do the policy writing without any change in salary.

Nevertheless, Mr. Minthorne did not refuse Mr. Alvarez's offer. Career-wise, based on the recent circumstances, he felt it was not in his best interest to say no. Additionally, his EWP profile indicated that he could be tasked with special projects without being asked. Mr. Minthorne agreed to consider the offer, but wanted to wait until the new program manager was assigned to ensure there would be no conflicts.

In the meantime, Mr. Minthorne continued his work as a regional supervisor through March 1, 2007, after the new program manager, Mr. Robert Bailey, arrived. He met with Mr. Bailey and asked him if the written policy procedure was something that he wanted. Mr. Bailey said he would get back to Mr. Minthorne. However, on March 3, 2007, Mr. Minthorne received an e-mail, indicating that Mr. Minthorne should have started the assignment on March 1, 2007.

At that time, Mr. Minthorne started working at home and through June 2007, he produced 15 to 16 policy procedure documents. Since he believed the detail was only going to last 90 to 120 days, Mr. Minthorne sent an e-mail saying that he had completed the project. Mr. Bailey responded in a July 2007 e-mail that Mr. Minthorne was to continue the project. Mr. Minthorne objected, indicating that none of his work had been reviewed, and thus did not actually seem necessary. He asked to go back to his position as regional supervisor. But, he received no response. Consequently, Mr. Minthorne continued to revise documents and then began another one to make work. And, in August 2007, he filed a retaliation complaint with EDR due to the absence of a telework agreement, and his make-work assignment. He alleged Mr. Alvarez and Mr. Bailey were engaged in retaliation. That office did not initiate an investigation for a year and a half.

During his October 2007 appraisal review, which was fine with "contributing" ratings for all areas, Mr. Minthorne noted that he did not have a telework agreement as required by HR and Mr. Bailey did not have a current EWP for him. He also expressed his opinion that he was not doing real projects since no one was reviewing his work. Mr. Bailey responded that Mr. Minthorne would have to continue what he was doing until he was told otherwise.

Near the end of November 2007, Mr. Minthorne filed a grievance alleging retaliation, the absence of a telework agreement, and a make-work assignment. About a week later, Mr. Bailey came up with a new EWP for Mr. Minthorne as a "special projects officer" and wanted to meet with him. However, Mr. Minthorne indicated that he had filed a grievance and that stopped the meeting.

In a subsequent January 2008 meeting with Mr. Alvarez, Mr. Minthorne was offered an opportunity to see his new EWP, permanently transferring him as a special projects officer. He was also told that he could go back to his old position if he wanted to. In a subsequent meeting with OPIS supervisors, Mr. Minthorne asked if they really needed him to do that type of work, but they didn't know what he was supposed to be doing. Since he wanted the assignment to be real, he again met with Mr. Alvarez who told Mr. Minthorne that he was needed in that position because he was the most knowledgeable person in the office regarding programs. He also indicated that Mr. Minthorne was well qualified to start working on trend analysis which the office also needed. Based on Mr. Alvarez's assurances, he signed the new EWP.

For the next few months, Mr. Minthorne worked on motor fuel and ethanol regulations, bringing them up to EPA standards. During this period, the work was viable and he felt like he was contributing. However, by May 2008, Mr. Minthorne was back to trying to drum up policies on his own. He continued to have issues with motor fuels in his work with associated policy procedures because the current compliance manager kept asking Mr. Minthorne to redo the policies.

Due to his situation, and because he felt there was collusion between the motor fuels department and fuel distributors, Mr. Minthorne took his concerns to a state delegate and a state senator in June 2008. He believed collusion existed because the office still was not following up on motor fuel violations. He had shared these concerns with Mr. Bailey.

The state delegate asked Mr. Minthorne to visit the terminal to see if he could identify the ethanol suppliers. As requested by the state delegate, Mr. Minthorne went to the terminal without telling his supervisors. The state delegate also showed Mr. Minthorne the documents he received from his FOIA request.

Mr. Minthorne became aware in September 2008 that the state internal auditor had sent a fraud, waste, and abuse report to the commissioner's office based on his 2006 concerns.

On October 8, 2008, Mr. Bailey called Mr. Minthorne and told him that the governor would announce budget reductions the next day and his position may be targeted. When he contacted HR on October 13, 2008, he was advised that a two step process was involved. First, he would receive an initial notification of a potential layoff with a preferential hiring card, which would allow him to seek employment in another state agency if he met the minimal requirements. Second, if there was no other option in sight for a recall or rehire, a final notice of layoff would be issued.

Mr. Minthorne received the initial notice of layoff on October 17, 2008 with a hiring card. On October 20, 2008, he was told to turn in all his equipment. He then met with Mr. Bailey and Ms. Jackson from HR and turned in his computer and office stuff. They shut down his e-mail and he stopped working while in "pending layoff" status, which meant if a recall occurred, he'd be pulled back to work. Through November 9, 2008, he continued to receive his pay. Then, he was placed on leave without pay-layoff status and began receiving his severance benefits, which would continue his pay for another nine months. At that time, he was earning \$52,300.00 a year.

On December 10, 2008, Mr. Minthorne was hired by the Virginia Election Commission at an annual salary of \$47,500.00, and his severance benefits stopped. Although the effects on his benefits were minimal during his one month gap in employment, he lost the 5% state contribution to his retirement for that period.

In November 2008, since "I didn't have any expectation of getting another job," he requested that he be paid about \$7,200.00 for his leave balance, rather than have the state hold his leave. Ms. Jones informed him that he'd receive payment on December 1, 2008. A subsequent letter said he'd receive payment on December 16th. However, when he finally got

access to his pay records on December 9, 2008, he discovered that his 288 hours of leave had been purged. When he contacted VEC HR about the issue, they told him that VDACS was refusing to provide his records. In response, Mr. Minthorne filed his second CAA complaint. On February 3, 2009, Mr. Minthorne received payment for his annual leave.

For five reasons, Mr. Minthorne believes the initial non-payment was retaliation for his protected activities. First, the state is required to "pay at the time they were suppose to pay." Second, state policy indicates Mr. Minthorne is entitled to be paid for his leave upon election. Third, he has known the person who was in charge of the payments for over 20 years and has never not received his pay when she said she was going to pay; which in this case was December 16, 2008. Fourth, this person refused to comment on why she didn't pay on time. If there had been an administrative oversight, the state could have corrected the issue on January 13, 2009 when they reviewed his record concerning his overpayment of severance pay on January 1, 2009. The state official handling that severance overpayment action had his pay records and would have known whether he had been paid for his leave.

[Cross examination] RX 16 is the string of e-mails regarding the payment for his leave balance. One exchange indicates that the non-payment was partially an oversight. Additionally, having just discovered about his re-employment and the overpayment of severance, they were not sure whether to recoup the overpayment from his leave payment. Eventually, Mr. Minthorne received the correct payment for his annual leave.

When Mr. Minthorne was laid off, neither Mr. Bates, Mr. Rogers, nor Mr. Diggs, who were involved with Mr. Tatum's termination, were still working for VDACS.

Mr. Bailey became his supervisor several months after Mr. Minthorne's investigations into Noblett, ExxonMobil, and BP Amoco, which occurred in late 2006 and January 2007, as well as after Mr. Alvarez's assignment of Mr. Minthorne to special projects. After Mr. Minthorne changed to special projects in March 2007, he was no longer doing a motor fuels investigation and he did not conduct any investigations while Mr. Bailey was his supervisor.

EDR initiated the investigation in April 2009, six months after Mr. Minthorne was laid off.

Mr. Minthorne is not aware whether the state delegate's FOIA request referenced any investigations into CAA violations.

The date of the state fraud, waste, and abuse report from the state internal auditor is September 16, 2008.

November 12, 2009 EDR Hearing<sup>8</sup>  
(RX 1, pp. 77-241)

In filing his late 2007 grievance about the continuance of his special project assignment without an EWP and telework agreement, Mr. Minthorne believed the stated motivation of placing him in the position to rewrite and create policy procedures and manuals was not true. In his grievance, he also presented issues about being denied a spot award and suffering retaliation for participating in Mr. Tatum's grievance proceedings.

One of the allegations about Noblett Oil was that they were knowingly dumping 89 octane fuel into a 93 octane storage tank which would later be distributed as 93 octane fuel. This would represent a major violation since fuel octane is supposed to be certified.

In November 2006, Mr. Alvarez was both the division director and acting program manager.

In a March 2, 2007 e-mail, Mr. Bailey indicated that he would prefer that Mr. Minthorne work at home because the OPIS policy and procedure manual was in dire need of an update.

Previously, in January 2007, Mr. Alvarez had also briefly contacted him and asked if he would be interested in updating the policies and procedures. Mr. Minthorne said yes.

In a March 13, 2007 e-mail, Mr. Bailey asked Mr. Minthorne if he would send an e-mail attachment of his drafts for his review and circulation for staff inputs.

In an April 2, 2007 e-mail, Mr. Bailey thanked Mr. Minthorne for his diligence in providing weekly updates. He complimented Mr. Minthorne on being a prolific writer.

At a May 21, 2007 meeting attended by Mr. Bailey and Ms. Karen Jackson, Mr. Minthorne expressed his concern about the motor fuel violations and other on-going issues. In response, Ms. Jackson indicated that she and Mr. Blankenship cared about him and recommended anger management training. She also suggested that Mr. Minthorne's expectations and standards were too high for OPIS. But, Mr. Bailey indicated that he wanted the best OPIS program.

In a May 30, 2007 e-mail, Mr. Bailey expressed his appreciation for Mr. Minthorne's work and updates.

In a July 9, 2007 e-mail, with a copy to Mr. Alvarez, Mr. Bailey indicated that he would like Mr. Minthorne to continue in his position for another 120 days. However, Mr. Minthorne had already indicated in June 2007 that he had already completed his initial assignment and he had turned to reviewing organizational manuals.

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<sup>8</sup>I've only summarized relevant testimony that was not duplicative of the December 5, 2011 hearing testimony.

During this period, Mr. Minthorne was not receiving any feedback and began to feel isolated. And, when he checked on getting a telework agreement, he was told the agency was revising its policy.

In an October 2007 meeting with Mr. Bailey regarding his appraisal, Mr. Minthorne asked about an EWP but Mr. Bailey did not have any explanation.

In the January 2008 mediation meeting, Mr. Minthorne indicated that he did not want to be put in the special projects assignment permanently if it was not a real position. However, the management staff indicated it was a real position and Mr. Bailey indicated that he wanted the EWP signed that day. Mr. Bailey also stated that Mr. Minthorne was acting like a neighbor who is suing his neighbor. At that point, Mr. Minthorne believed that he had to sign the EWP or it was the end of his career. At the same time, since the other managers had indicated they wanted him in that job, he also thought that if the agency needed him to do this, then he needed to do it. He and Mr. Bailey then went to Mr. Alvarez's office where Mr. Minthorne stated he would sign the EWP if he received two assurances. First, the position was not targeted for layoff. Second, it was a real position. Mr. Alvarez gave him both assurances.

Up until that January 2008 meeting, Mr. Minthorne's working relationship with Mr. Bailey had been somewhat cooperative, congenial, and satisfactory.

During his efforts to obtain documentation from VDACS about its budget reduction process and his layoff in the fall of 2008, VDACS continued to claim in November 2008 that its working papers were confidential, even though the state budget office had indicated that agencies should make their budget plans public.

In his organization, the workforce contained several other compliance/safety officer IV positions. However, in selecting his position, the agency did not consider the respective seniority of the individuals in those positions.

The VDACS fiscal year was July 1 to June 30.

In the initial budget reduction plan, no FTE (full time equivalent)<sup>9</sup> position was identified for the 5% reduction; and for the 10% reduction, his position was ranked 9th in priority. However, in the subsequent 10% reduction plan, the priority ranking was changed to #1. Mr. Bailey submitted the first plan to the division business manager, who compiled the programs' plans and sent the subsequent version to Mr. Alvarez who sent the division plan to the governor's office. According to Mr. Delorme in an April 2, 2009 letter, "The strategy in the budget document submitted by the Office of Product and Industry Standards were the same strategies which appeared in the budget reduction strategies proposed and submitted by the division with the exception of the numbering assigned to each strategy component." Priority #9 was moved to #1, and the former #1 was moved to #9.

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<sup>9</sup>A unit of measurement for the workload of an employee.

Mr. Minthorne's position was the only full-time FTE eliminated. Based on the circumstances which led to his special projects position, Mr. Minthorne believes "the position itself was never a real position. The true motive was the continued isolation and hopeful elimination." At the time Mr. Minthorne accepted the position, he was not aware that layoffs would occur in October 2008. However, the agency was "possibly" aware of the future budget cut layoffs. No one told him about upcoming budget constraints and no one said his position was actually being targeted for layoff.

**Mr. Andres (Andy) Alvarez**

December 5, 2011 Hearing

(TR, pp. 132-162)

Mr. Alvarez is the Director of the Division of Consumer Protection ("DCP") within VDACS. In that position, he indirectly observed Mr. Minthorne's work as a regional supervisor in the OPIS.

In Mr. Alvarez's experience, the number of violations in the motor fuels sampling program runs about one to two percent of the samples. After the fuel sample has been collected by an inspector, the lab evaluates the attributes of the sample. If there's a problem with the product, then an inspector will stop the sale of the product until the violation is corrected. In these situations, the preferred approach is voluntary compliance. Otherwise, an administrative process exists to impose a penalty based on a matrix. Usually issues with a challenged penalty are resolved at the program level by persons who are responsible for compliance.

Lab results and inspection reports are retained in accordance with agency rules. However, there is no automated system in place to scan documents and retain them electronically. Mr. Alvarez is not certain whether enforcement activities are posted on the LAN.

Shortly after he assumed his current position, Mr. Alvarez became aware of a "very dysfunctional atmosphere between management in Richmond and regional offices." After trying to obtain a sense of the issue through conversations with employees, Mr. Alvarez concluded that too much discretion was left to the regions and he decided to establish a harmonized, standardized procedure for reports. He also asked his motor fuel experts to identify any trends that might need special action. Mr. Alvarez's goal was to "install the right management team, the right policy and procedures, and the right standard operating procedures."

As part of his efforts to improve the management structure, Mr. Alvarez identified the "dire need" to have a qualified individual update the organizations policy standards, procedures, and documentation, which led to his consideration of Mr. Minthorne for a special assignment.

Sometime after the 2006 investigation, Mr. Alvarez met with a quality control person from ExxonMobil to discuss quality control issues. At that time, everyone was gearing up for the introduction of ethanol on a larger scale. He asked his experts to monitor the sampling program and alert him of any widespread issues. Mr. Alvarez informed his supervisor, Mr. Don Blankenship, of his intentions.

At the time of the January 2008 mediation about Mr. Minthorne's EWP for the new special projects position, Mr. Alvarez believed the position was necessary. When he asked Mr. Minthorne to go into that position, he did not expect to be able to lay him off. Additionally, the transfer into the position was voluntary. Mr. Alvarez gave Mr. Minthorne an opportunity to turn it down or accept it.

Prior to the layoff action, Mr. Alvarez was not aware of any reports made by Mr. Minthorne to government authorities outside VDACS regarding motor fuels violations of the CAA.

Around October 2008, through either the deputy commissioner, Mr. Don Blankenship, or the director of administrative services, Ms. Sandy Adams, Mr. Alvarez became aware of impending budget cuts that lead to layoffs. He was instructed to develop budget reduction strategies based on various percentages of cuts, and to specifically look at positions that did not provide direct customer service. In turn, Mr. Alvarez passed the instructions on to his program managers, including Mr. Bob Bailey, program manager for the OPIS; Mr. Larry Nichols, program manager for the Office of Plant and Pest Services; Ms. Lisa Grieson, program manger for the Office of Pesticide; and another individual who was the program manager for the Office of Consumer Affairs. Mr. Alvarez allocated the budget reductions by dollar amount. The program manager could arrive at that target amount either by reduction in expenses, such as travel, or the elimination of positions. The program managers had discretion on how they reached their respective goals.

RX 19, is the September 5, 2008 budget reduction exercise request he received from Ms. Sandy Adams, for reductions of 5%, 10%, and 15% in the general funds account. She requested a response by September 17, 2008. The request also contained a guideline for reaching those budget reduction targets. The guidelines were developed by an agency outside of the state department of agriculture, and they applied to everyone. Mr. Alvarez asked his program managers to use the guidelines. Mr. Alvarez did not instruct his program managers to add any specific program for budget cuts.

Mr. Alvarez did not alter any of the budget plans submitted by his program managers which met the budget reduction criteria, and he forwarded the plans as instructed. At this time, Mr. Alvarez was unaware of any reports of CAA violations that Mr. Minthorne had made to anyone outside of VDACS.

Due to his change in the management structure, which included his removal from day to day oversight of the motor fuels program, after the mediation meeting in January 2008, Mr. Alvarez did not have any subsequent conversations or discussions with Mr. Minthorne.

Mr. Bailey prepared the budget cuts for Mr. Minthorne's office. Mr. Bailey never told Mr. Alvarez that Mr. Minthorne had been reporting violations of motor fuels laws, state law, or the CAA to him or anyone else.

One of the strategies Mr. Bailey proposed included the elimination of Mr. Minthorne's position. Mr. Alvarez believes there may have been other position eliminations but he's not sure.

After he became the division director in 2006, he had several discussions with Mr. Minthorne. During those conversations, Mr. Minthorne shared his concerns about motor fuel violations. However, Mr. Alvarez relied on the expert in the program, the person in charge of the fuel inspection program, Mr. Wes Diggs.

[Cross examination] The last time Mr. Alvarez met Mr. Minthorne alone face to face on January 4, 2008. After that date, he had other conversations with Mr. Minthorne but always in a meeting with other people, such as the subsequent meeting with management people where Mr. Alvarez reaffirmed his expectations to the program managers about Mr. Minthorne's role and status. Specifically, Mr. Minthorne was the special projects coordinator who was responsible for updating policies and procedures.

After the January 4, 2008 mediation meeting, Mr. Alvarez had an informal conversation with Mr. Minthorne in a car. He doesn't recall any conversation about reporting motor fuel issues to the FBI and obstruction of Mr. Minthorne's investigations by VDACS staff and Mr. Diggs. Mr. Alvarez does recall that he felt good that he and Mr. Minthorne were resolving their issues.

Between 2006 and 2008, Mr. Alvarez was aware of Mr. Minthorne's CAA concerns. However, after Mr. Minthorne started working in the special projects position, he did not receive any more complaints from Mr. Minthorne.

Mr. Alvarez approved Mr. Bailey's budget reduction recommendation.

[ALJ examination] Mr. Minthorne's program manager had identified the need for a special projects manger to update policies and procedures. Mr. Minthorne was offered the position. Mr. Alvarez did not make that request.

When Mr. Minthorne asked Mr. Alvarez about clarification concerning his job, Mr. Alvarez addressed his concerns. Mr. Alvarez considered Mr. Minthorne's position to be "very critical." However, Mr. Alvarez approved Mr. Bailey's recommendation since the program managers had complete discretion.

Mr. Alvarez did not change any of the program managers' budget recommendations. No other program manager included layoffs in their budget plan. Mr. Bailey was the only one.

[Re-cross examination] In RX 7, the OPIS strategy for a 5% budget reduction, there was no elimination of full time positions. Likewise, DCP only included elimination of full time positions for the budget cuts of 10% and 15%.

After the budget recommendations left his office, Mr. Alvarez had no further impact on the process.

November 12, 2009 EDR Hearing<sup>10</sup>  
(RX 1, pp. 367-396)

One of the deficiencies that Mr. Alvarez noted when he became the DCP director, and as "subsequently pointed out by Mr. Minthorne," was the lack of policies, procedures, and standardized practices. Instead, the regional levels exercised a lot of discretion and latitude, which did not result in standardized practice across the agency. Mr. Alvarez believes the agency now uses SOP 3 which was developed by Mr. Minthorne.

After Mr. Minthorne requested that his duties be placed in an EWP, work was started on its development but the process involved many levels.

Eventually, Mr. Minthorne filed a grievance about the EWP. Following mediation in January 2008, they resolved the dispute. Mr. Alvarez was pleased that they were moving forward. In addition to the EWP, Mr. Minthorne was given the opportunity to either stay in his special projects job, or return to his supervisor position. Mr. Alvarez also considered allowing Mr. Minthorne to retire, but he did not meet the age requirement. Eventually, Mr. Minthorne indicated that he wanted to remain in the special projects position. Later, at a manager meeting, Mr. Alvarez reaffirmed that Mr. Minthorne was in a significant position as special projects manager.

Mr. Alvarez doesn't recall how Mr. Minthorne came into the special projects position in 2007, but he "was the best suited person for the job."

In the fall of 2008, Mr. Alvarez asked his program managers for budget reduction strategies. "I was eventually presented with the aggregated listing of reduction strategies, and without making any changes, I approved them, and then they were submitted to the budget office." The priority rankings were the "exclusive work product" of the program managers, including Mr. Bailey, who was responsible for the OPIS budget reduction submission.

The division business manager, Mr. Fulgham, "had no say in the denial or approval of particular strategies." He collected the various recommendations from the program managers, and placed them in a format for subsequent submission to the budget office.

Part of the budget reduction strategy was to ensure direct services to the agency's clients. However, the loss of any position was "serious."

Based on the investigation of some 500+ ethanol complaints, Mr. Alvarez believes the cause for excessive ethanol was accidental, due to a fuel terminal equipment failure that led to blending at incorrect rates. It was an isolated incident at one facility. No intent to defraud was involved.

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<sup>10</sup>I've only summarized relevant testimony that was not duplicative of the December 5, 2011 hearing testimony.

**Ms. Sandra (Sandy) J. Adams**

December 5, 2011 Hearing  
(TR, pp. 163-180)

[Direct examination] Before Ms. Adams was recently appointed as a deputy commissioner, she worked as the director of administrative financial services for VDACS. In that role, she was responsible for budget, finances, information systems, and procurement.

Since her arrival in 1996, Ms. Adams has been involved in several budget cuts. Mr. Minthorne's layoff occurred during a 10% to 12% budget reduction in October 2008. The governor's office actually sets the amount of the reduction.

To initiate the budget reduction process, Ms. Adams sent out a memorandum and instructions, asking for plans for 5%, 10%, and 15% reduction. Usually, the program managers would put the budget reduction proposals together. The plans are passed on to the division directors who then provide the proposals to the budget office.

During the October 2008 budget reduction, there were four layoffs. The budget office did not make any change to the program manager's budget recommendation that contained the elimination of Mr. Minthorne's position. The position was not identified by name; instead the final budget plan listed the dollar value of the reduction and the services or operations no longer provided. The final plan then listed the recommendations in order of priority, but final selections by the governor's office didn't always reflect the recommendations as submitted.

During this budget reduction process, Ms. Adams did not know Mr. Minthorne and was not aware of any of his concerns about violations of motor fuels laws or the CAA.

No one in the senior management level made any suggestions to the program manager about specific programs when they were preparing their recommendations. She and the budget director prepared the instruction and didn't make any suggestions.

In subsequent budget cuts, there have been additional layoffs. Since 2008, they have lost 62 general fund positions based on similar criteria associated with Mr. Minthorne's position.

[Cross examination] CX 27 is the fiscal year ("FY") 2009 general fund reduction summary. Although the plan contains a description of Mr. Minthorne's position, it does not list his name. CX 26 is a detail reduction worksheet, which contains Mr. Minthorne's name on the backside of the position description in attachment two. Nevertheless, when the budget reductions are considered in the budget office, they know who the people are who will be affected. Ms. Adams was aware Mr. Minthorne would be affected; she just didn't know him personally at the time.

CX 28 is an announcement indicating that 12 positions were eliminated in the reductions in 2009. The higher number Ms. Adams previously stated was the total position eliminations over the course of three years through 2010.

During these budget reductions, the agency has continued to pay monetary spot awards, hire, and promote. However, the spot awards are minimal and while generally under a hiring freeze, the secretary's office has approved some hires to fill critical positions.

[ALJ examination] During the budget process, Mr. Bailey did not talk to Ms. Adams.

November 12, 2009 EDR Hearing<sup>11</sup>  
(RX 1, pp. 342-366)

VDACS has four divisions. At the beginning of the budget reduction process, the divisions were advised of their budget targets based on the respective percentage of reduction in general funds assigned to them. The divisions were then asked to provide a budget reduction strategy, considering impact and the associated dollar amount. The divisions submitted their plans to the VDACS budget office which in turn compiled the strategies and presented the consolidated plan to the VDACS commissioner.

Throughout this process, VDACS "feels strongly that we should get input from all the program managers since they are in a position to know where they can take reductions and lose someone."

In compiling the division strategies, Ms. Adams, the budget director, and the deputy commissioner, "go through list by list . . . we'll go through everything and take those that we think is the least impact, add up the total, and see where we are, and look at some of the other strategies . . . we'll add those in, see where we are, and we'll go back and forth until we get to the bottom line."

The divisions are asked to prioritize, from least to most impact – "what's the easiest to give up and what's the hardest to give up." Usually at the top of list are discretionary costs, travel costs, office supply costs, and transferable money. In regards to impact, they consider "what the impacts are going to be on the agency's clients, on the citizens . . . who is going to lose some service." And, "we've always tried to give up vacant positions first . . . but in some areas we may not be able to."

Of the 46 items in the VDACS budget reduction plan that was sent to the governor, Ms. Adams only recalls one item, "number 45," that was not accepted for reduction. The accepted items included four layoffs.

In subsequent budget reductions, another 10 to 11 positions were eliminated, which involved several layoffs.

When the budget reduction strategy is submitted to the governor's office, it is confidential.

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<sup>11</sup>I've only summarized relevant testimony that was not duplicative of December 5, 2011 hearing testimony.

Since the budget reductions, only critical positions have been filled with new hires.

The first round of reductions amounted to 12.9%.

**Ms. Karen Jackson**

December 5, 2011 Hearing  
(TR, pp. 180-211)

[Direct examination] In 2008, Ms. Jackson was the Director of Human Resources at VDACS. During the budget reduction process, each program area office put together plans for reductions of 5%, 10%, and 15%. The plans were then submitted to the division directors who in turn sent in the proposals to the director of administration financial services. The plans were prioritized before going to the secretary's office. The governor's office then went through the plans and picked what they thought was needed.

The agency made a policy decision to have the immediate supervisors contact the employees who were going to be affected by the budget cuts prior to the governor announcing the cuts. After the announcement, Ms. Jackson prepared layoff paperwork for the impacted individuals. The individuals are notified two weeks prior to the effective date of their layoff. They are also provided a yellow placement form to have preference for other agency jobs prior to layoff. After the effective date of the layoff, they receive a blue card which continues to give them preferential hiring treatment.

Ms. Jackson contacted Mr. Minthorne about updating his job application with any courses he might have taken. She then contacted numerous agencies and employers to advise them about having a laid-off employee. Ms. Jackson also attended a workforce training class so she could help people with networking and obtaining re-employment resources. From her perspective, a layoff was one of the worst things an agency could do morale-wise. No one wins in that situation.

When a person is laid off, he is entitled to his accrued annual leave and may either leave it in place or get paid for the leave. In Mr. Minthorne's case, he wanted to be paid for his accrued leave. As a result, Ms. Jackson sent the information to Ms. Linda Deale in payroll to process the request.

During December 2008, Ms. Jackson attempted to contact Mr. Minthorne several times to see if he needed any assistance and did not receive any response. In mid-January 2009, Ms. Jackson learned that Mr. Minthorne was working at VEC and she called them right away because Mr. Minthorne had been receiving severance benefits from VDACS. After being informed that Mr. Minthorne had been working at VEC since mid-December 2008, she called payroll to make sure they stopped his severance payments. At that time, Ms. Jackson believed Mr. Minthorne had been paid for his leave. However, when she checked with the payroll officer, Ms. Jackson was told that the payment had fallen through the crack and not been accomplished. The payroll officer then contacted Mr. Minthorne who indicated that he wanted to be paid for his leave. So, Ms. Deale processed the action so that Mr. Minthorne would receive it by February 3, 2009.

Ms. Jackson's office maintains the leave balance information but she doesn't have the ability to make payments for leave. Typically, when a person transfers to another agency, her office prints out the leave balance information and sends it to the new agency. The payroll system and the personnel system do not interact. So, she doesn't really know if payroll has taken action on the request to receive payment for the leave balance.

When VEC initially had discussions with Ms. Jackson's office about a leave transfer for Mr. Minthorne, they told VEC that he had been paid for his leave, based on the belief that payroll had acted on his request. But, after Mr. Minthorne indicated that he had not received a check, Ms. Jackson looked into what happened and Ms. Deale indicated that she had made a mistake, which is unusual for her.

A miscommunication may have occurred because VEC said they sent information about Mr. Minthorne's re-employment to Ms. Vicky Jones in her office, but Ms. Jones never received the notice, possibly because there are several persons named Vicky Jones in the state government.

Ms. Jackson is not sure whether she was aware of Mr. Minthorne's concerns about motor fuel violations or CAA violations; however, she didn't recall "any specific time that I knew about that." Ms. Jackson knows Mr. Minthorne filed a complaint with the Department of Labor but she is unable to recall when she learned of the complaint.

No one in her office withheld payment of Mr. Minthorne's leave because he filed a complaint.

[Cross examination] Ms. Jackson believes that she became aware that Mr. Minthorne was working at VEC in mid-January 2009.

When a person leaves VDACS, Ms. Jackson's office informs payroll of the effective date so they can process their actions. They assumed Mr. Minthorne had been paid for his leave and so informed VEC. But, then Ms. Linda Deale checked and discovered that he had not been paid.

In CX 5, the chief of staff stresses the importance concerning payment of the leave balance.

During the budget and layoff sequence, Ms. Jackson did not have any specific discussion with anyone at OPIS concerning how Mr. Minthorne's position was selected. She was on leave during the budget reduction process.

Ms. Jackson is familiar with CX 26. In her office, when that type of document is prepared, they usually name the individual so "our internal people know." That information would be for their internal use only.

[ALJ examination] During the first portion of the layoff process, an attempt may be made to find the person subject to the layoff another position. In Mr. Minthorne's case, the

period lasted until November 9, 2008 when he is no longer working for the agency and instead is placed on a recall list. Up until November 9, 2008, it was possible that Mr. Minthorne could have stayed employed with the agency if another job became available.

Mr. Minthorne's leave was not "purged." According to Ms. Jackson, "We thought he was paid for it. And, then we found out that it wasn't. He carries the leave. He either gets paid for it or transfers it."

After a person departs state employment, he may keep his annual leave in "a bucket" for a year. However, after a year, the person is paid for his accrued leave. Ms. Jackson and HR don't use the word "purge" in regards to accrued leave.

Ms. Jackson knows Mr. Bailey, but he did not talk to her about his decision to identify Mr. Minthorne or his position for layoff.

[Re-cross examination] CX 32, a leave balance printout, dated January 20, 2009, shows leave balances as of January 9, 2009 and indicates 288 hours of annual leave "used," which "would have been when he got paid for it."

November 12, 2009 EDR Hearing<sup>12</sup>  
(RX 1, pp. 280-339)

During the budget process, each program put together a budget reduction plan based on its needs, financial situation, and structure. The programs plans then went to the division director, who with a budget or finance person put them altogether and reprioritized the reductions. The division then sent their plans to the VDACS and the agency also goes through a priority process prior to submission to the governor's office.

If positions involve the same type of work and are in the same program, then seniority can become a factor in selecting a position for elimination.

In the budget reduction process that started in October 2008, 19 positions were eliminated which possibly led to four layoffs. In later budget reductions, another 11 people were laid off.

When Ms. Jackson sent the layoff notification to Mr. Minthorne, she enclosed a yellow inter-agency placement card, which gave him preference in other agencies over external candidates for job placement.

VDACS did not have a vacant position to offer Mr. Minthorne.

After a layoff, a person is given a blue card which gives him preference for up to one year to apply for a similar position or be recalled if his position reopens.

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<sup>12</sup>I've only summarized relevant testimony that was not duplicative of the December 5, 2011 hearing testimony.

After the layoff, Ms. Jackson contacted Mr. Minthorne by phone and email about his education and training, and available education opportunities. She also contacted HR representatives in other agencies trying to place him.

Under the governor's guidelines, in selecting positions for elimination, the agency attempted not to cut direct service positions. Instead, administrative positions were considered.

No one in DCP was doing the same type of work as Mr. Minthorne.

The decision to make a position permanent, full time, is up to the manager/supervisor.

When Ms. Jackson reviewed the draft EWP for Mr. Minthorne's position, she asked his supervisor to ask Mr. Minthorne to provide additional information since he had been doing the work for a while and it was a "different kind of new position." Mr. Minthorne contributed a great deal to the EWP; his "ideas were good."

The state worked on an agency telework agreement for some time; the process took a year and a half. During that period, no one had a telework agreement. At that time, since Mr. Minthorne was working at his home in northern Virginia, he still got the northern Virginia pay differential.

At the time of his separation, Mr. Minthorne asked for payment of his leave. In response, Ms. Jackson's office prepared the necessary paperwork and sent it to the payroll office. Later, Ms. Jackson discovered payroll made a mistake and "overlooked" his request for payment.

Mr. Minthorne's severance pay was supposed to stop when he was re-employed by VEC. Although VEC said they sent VDACS an e-mail asking for Mr. Minthorne's personnel file, they did not find out about his re-employment until January 2009 through the "grapevine."

After Mr. Delorme submitted the OPIS budget reduction plans, "the division took what was there and reprioritized." Then, Mr. Alvarez sent the division plans to the budget office.

At the end of 2008 and beginning of 2009, VDACS advertised some positions for internal hires.

Mr. Minthorne received his layoff notice more than two weeks before the date of the layoff.

**Mr. Robert Bailey**

November 12, 2009 EDR Hearing  
(RX 1, pp. 244-278)

Mr. Bailey is the program manager for OPIS.

He became aware of the state budget reductions when he received a request to prepare several budget reduction scenarios. The process involved Mr. Diggs, Mr. Delorme, the OPIS budget resource person, and Mr. Bailey. Because OPIS was already stressed for "liquid" or operational money, "we began looking at when we were going to have cut positions," and which actions "would have the least impact on field operations," considering OPIS had a number of vacancies in the field where the bulk of OPIS' inspections occurred. Mr. Delorme "crunched" the budget numbers, and Mr. Bailey prepared the budget plans for reductions of 5%, 10%, and 15%. Mr. Bailey then submitted the three proposals to DCP. The proposals from all the programs were merged at the division level. During this process, Mr. Bailey's goal was not to eliminate any field position.

When Mr. Bailey arrived in late February 2007 as the OPIS program manager, the process to move Mr. Minthorne to special projects had already started. Mr. Minthorne had a reputation for being very methodical and knowledgeable about shortcomings and old policies. Mr. Bailey was new to OPIS and tasked with managing its operations under 24 laws and operations. So, Mr. Minthorne's placement in the new position would help Mr. Bailey make improvements.

Initially, the assignment was short-term. However, many policy gaps needed to be filled, and Mr. Minthorne was capable of doing the associated complex policy rewrites. He was very prolific and produced a flood of information. Mr. Bailey put the revised policy products into the review process. However, regional supervisors were slow with their review inputs.

The EWP for the position took longer than expected to get through all the review levels. And, telework agreements were just beginning to be required.

The prior OPIS management did not exercise its authority very well to address violations with civil penalties. Mr. Bailey has attempted to be more consistent with civil penalties. And, even though the maximum penalty per violation is \$1,000.00, OPIS imposed \$80,000.00 in penalties last year.

The EWP went to mediation although Mr. Bailey thought it had been created within the required time frame. He doesn't recall sitting down with Mr. Minthorne to have him sign it.

OPIS is one of four programs in DCP. The other three programs are Pesticide Office, Office of Plant Services, and Office of Consumer Affairs. Mr. Bailey had no knowledge of the budget reduction plans for the other three programs. The ultimate ranking was done at a higher level than the program level. He believes the governor's office exercised his 5% and 10% reduction plan.

Mr. Alvarez called Mr. Bailey about 45 minutes before the governor announced the budget reductions. He told Mr. Bailey that Mr. Minthorne's position had been eliminated and he wanted Mr. Bailey to call Mr. Minthorne about the situation before the governor's announcement. Within ten minutes, Mr. Bailey called Mr. Minthorne.

Mr. Bailey did not have another position in OPIS that he was authorized to fill. The position he identified in his budget reduction was the OPIS FTE position in northern Virginia.

When Mr. Bailey arrived at OPIS, only one penalty case was in progress against a large fuel company. Mr. Bailey hired a compliance officer and looked at improving consistent follow-up for motor fuels violations. Now, they assess a penalty for the first offense. At one time, OPIS was addressing about 500 complaints alleging excessive ethanol.

Mr. Bailey believes Mr. Minthorne had telephonic input concerning the EWP.

Even though there were other compliance/safety officer IVs, they had different duties than Mr. Minthorne's special project position so there was nobody else to consider in terms of seniority. And, Mr. Bailey couldn't afford to get rid of a regional supervisor who directly supervised on a daily basis. The issue was "could I live without a special projects position more than I could live without a regional supervisor?"

### **Documentary Evidence**<sup>13</sup>

#### **Complaint of Discharge (CX 1)**

In his December 5, 2008 complaint of discharge in violation of the CAA, Mr. Minthorne summarizes the events that led to his November 9, 2008 discharge. In August 2006, while working as a VDACS regional supervisor, Mr. Minthorne reported violations of the CAA by VDACS "for permitting, or allowing emissions of, an air contaminate(s) in motor fuels found through sampling not to meet the standards of the CAA and 40 C.F.R 80 by petroleum distributors in Virginia" to persons in his chain of supervision, other state officials, the employee fraud, waste and abuse line, and members of the Virginia Assembly. In August 2007, he also reported these concerns to a special agent of the FBI. His reports continued through October 2008.

The specific omissions by the Commissioner and OPIS included failure to: properly sample motor fuels; maintain proper chain of custody; investigate fuel samples which failed to meet specific CAA requirements, for example, gasoline and gasoline ethanol blends exceeding

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<sup>13</sup>While I have read every exhibit, I have only summarized the potentially relevant documents. Additionally, I have not considered the hearing officer's initial and reconsideration decisions in February and April 2010 regarding Mr. Minthorne's grievance concerning his layoff, RX 8 and RX 11, since I am conducting a *de novo* adjudication of Mr. Minthorne's whistleblower complaints under the CAA and applicable regulations and case law (*see also* the November 28, 2011 Denial of Motion to Dismiss on the basis of *res judicata*).

maximum vapor pressure standards, and E10 gasoline with excessive ethanol adulteration; and take associated enforcement action.

Mr. Minthorne also reported possible obstruction and interference by agency officials in the investigation of non-compliant fuel samples, including a former compliance supervisor who began lobbying for the petroleum industry within four months of his retirement.

Due to his reports, in March 2007, Mr. Minthorne was assigned to work at home on special projects. Then, in January 2008, following a grievance about his removal from the regional supervisor position, Mr. Minthorne was reassigned as the special projects coordinator within OPIS with assurance that it was a "real position." However, Mr. Minthorne was the only OPIS employee to be subsequently targeted for layoff.

### **Commonwealth of Virginia Response** (CX 1)

In a January 9, 2009 response to Mr. Minthorne's first CAA complaint, the assistant attorney general denied the Respondent took any adverse employment action against Mr. Minthorne in retaliation for his reports or concerns under the CAA. Since October 2007, due to the continuing economic uncertainty and associated revenue shortfalls, Virginia engaged in numerous budget reductions to balance its budget. These actions led to a 5% reduction in the VDACS budget for fiscal year 2008, and 1.5% for fiscal year 2009, and contingent budget plans of 5%, 10%, and 15%, totaling a reduction of nearly \$5 million for VDACS. As a consequence, Mr. Minthorne's position was one of 19 positions eliminated through this budget process. "The decision to eliminate Mr. Minthorne's Special Projects Coordinator position was based on prioritization of VDACS' functions and services to the citizens of Virginia," and consistent with the promulgated budget reduction strategies.

Contrary to any demonstrable animus, VDACS HR made an effort to assist Mr. Minthorne in obtaining subsequent employment. And, shortly after he filed his complaint, Mr. Minthorne obtained re-employment with another agency with an annual salary reduction of less than his prior position.

### **Complaint of Discrimination** (CX 1)

In his January 24, 2009 discrimination complaint, Mr. Minthorne asserts that in retaliation for his first CAA complaint, Virginia intentionally denied him compensation for 288 hours of accrued annual leave "without due process and then reporting this unused 288 hours of leave as used to the VA Department of Accounts ("DOA") on January 9, 2009, thereby dissolving it." The amount of the compensation totaled \$7,200.00. Mr. Minthorne based his complaint on his review on January 20, 2009 of his DOA leave balance report which showed the leave had been used and thus removed on January 9, 2009. Earlier, in late November 2008, the VDACS payroll supervisor had indicated that Mr. Minthorne would be paid for his unused leave by December 16, 2008. However, Ms. Jackson as VDACS HR director had authority and control over all VDACS leave transaction, and was aware of his first CAA complaint. As of

January 24, 2009, Mr. Minthorne had not received payment. Under these circumstances, Mr. Minthorne asserts the denial of compensation for his leave without due process and then the report to DOA that his leave had been used were discriminatory acts carried out by "the employer" due to his filing of the first CAA complaint.

**Commonwealth of Virginia Response**  
(CX 1)

In a February 4, 2009 response to Mr. Minthorne's second CAA complaint, the assistant attorney general denied that any individual took an adverse employment action against Mr. Minthorne in retaliation for his first CAA complaint. Following Mr. Minthorne's early November 2008 request to receive payment for his accrued annual leave, a VDACS benefits counselor processed his request on December 1, 2008, forwarded the documentation to VDACS payroll, and purged his leave balance. All of these acts occurred prior to OSHA's December 29, 2008 notification that Mr. Minthorne had filed his first CAA complaint.

On January 30, 2009, Ms. Linda Deale, the VDACS payroll manager, notified Ms. Jackson that due to an administrative oversight Mr. Minthorne had not received payment for his leave balance. Ms. Deale also notified Mr. Minthorne of the oversight, and offered to transfer his leave balance to his new agency or process the payment. Mr. Minthorne elected payment. His request was processed and he received payment on February 3, 2009.

While Ms. Jackson has control and authority over leave transactions, she does not have control over the timing of the payment for unused leave. She neither directly nor indirectly supervises Ms. Deale. Additionally, since VDACS was not notified that Mr. Minthorne had obtained re-employment with VEC, the agency continued his severance pay, which led to an overpayment of \$1,803.35. As a result, on January 13, 2009, VDACS requested repayment. Both the delay in the payment of his annual leave and the overpayment of severance pay were administrative oversights, which were corrected immediately upon discovery.

**Final Notice of Layoff**  
(CX 2 and RX 17)

In a November 4, 2008 letter, Ms. Karen Jackson sends Mr. Minthorne his "final" notice of layoff, effective November 9, 2008 and also encloses five blue preferential hiring cards which are valid during the duration of his "leave without pay-layoff" status. The final notice places Mr. Minthorne in leave without pay-layoff status for 12 months because there is no placement opportunity available for him within the division. At the time, Mr. Minthorne was a compliance/safety officer IV, with a semi-monthly salary of \$2,085.34.

**Statement**  
(CX 3)

In a February 23, 2009 statement, Mr. Minthorne summarizes the events that led to both of his CAA complaints. He also objects to the manner in which OSHA was investigating his complaint.

Mr. Minthorne specifically noted that on November 4, 2008, he advised Ms. Jones, a VDACS benefits counselor, that he would like to receive payment for his accrued annual leave as provided under the state's layoff policy. Ms. Jones replied that he should receive his check by December 1, 2008. However, in a letter postmarked November 26, 2008, Ms. Linda Deale, the VDACS payroll supervisor, indicated that due to her oversight Mr. Minthorne would not receive his annual leave payment until December 16, 2008.

**Employee Work Profile**  
(CX 4)

A September 1, 2007 EWP for Special Projects Coordinator, Compliance/Safety Officer IV, position number – 10068, sets out several responsibilities. The special projects coordinator, who is not a supervisor: a) researches, drafts, and maintains administrative and operational policies and procedures for OPIS, b) provides assistance for accreditation, c) reviews laws and regulations assigned to OPIS for consistency, d) suggests changes as needed, e) ensures compliance with the Administrative Procedures Act, and f) analyzes OPIS and recommends administrative and operational improvements. The evaluation measure for the special assignment as special projects coordinator is "performs assigned duties and tasks in a timely manner with no significant mistakes." On January 10, 2008, the position description was signed by Mr. Minthorne, his supervisor Mr. Robert E. Bailey, Program Manager, Product and Industry Standards program, and the reviewing official, Mr. Andres Alvarez, Director, DCP.

**Office of the Governor FY 2008 Budget Reduction Plan**  
(CX 5 and RX 19)

In a February 12, 2008 memorandum, the Office of the Governor announced the requirement for the development of budget reduction plans for FY 2008, FY 2009, and FY 2010 due to anticipated funding shortfalls of \$339.3 million, \$520.1 million, and \$532.2 million respectively. The anticipated budget reduction would start at 0.5% for FY 2008, and increase to 3.0% for the next two fiscal years. The following guidelines were provided: a) eliminate low priority or underperforming activities, b) avoid one-time savings and focus on long-term reductions, c) consider up-front costs to achieve long-term savings, d) obtain savings against general fund appropriations, e) avoid reductions that increase costs for other agencies, and f) remember layoffs generate costs including severance benefits and leave balance payments.

***Policy 1.30 – Layoff***  
(CX 5)

The state's HR document on Leave Without Pay ("LWOP") and layoff policies, *Policy 1.30 – Layoff*, last revised May 16, 2006, contains numerous definitions and guidelines. Two types of layoff notice exist, initial and final, with an employee provided at least two weeks notice before the date of layoff. During the layoff process, an employee subject to layoff may be placed in another position as an alternative to being laid off. The final layoff notice may be given "as part of the initial notice if the agency has already determined there are no placement options

within the agency, or as a final notice after the agency has reviewed all the placement options and determined there are none available."

"Prior to layoff," an employee scheduled to be placed in LWOP-layoff has preferential employment rights to obtain a position within the agency for which he is minimally qualified without competition. This action is referred to as using a "yellow" card. The day before the effective date of the LWOP-layoff, the employee is given a "blue" card which continues his preferential employment rights after the layoff.

According to the layoff policy, "if no placement options are available within the employee's agency, the employee is give a final layoff notice. Notice can be given either as part of the initial notice if the agency has already determined there can be no placement option within the agency, or as a final notice after the agency has reviewed all placement options and determined there are none available." With the final notice, the employee is given the "blue" hiring card.

The layoff process consists of several steps. First, positions to be eliminated will be identified. Second, the employees affected by the eliminated positions will be identified and placement options will be considered. Third, if no placement options exist, then other employees in substantially similar jobs will be notified to see if any such employee is interested in the layoff. Fourth, an assessment is made of the impact on specific employees. The seniority of the employees in the same role is to be considered in determining which employee will be impacted by the elimination of a position, and eligible for placement, in order of least senior to most senior full time classified employee.

In making the layoff decision, the agency must determine the factors that will guide the layoff process and "identify employees for layoff in a manner consistent with their business needs and the provisions of the policy manual." As part of the layoff sequence, the agency identifies the work that is no longer needed and selects employees for layoff within the same role, "who are performing substantially the same work" in the following sequence: wage employees, part-time restricted employees, part-time classified employees, and least senior through the most senior full time classified employees. In defining "substantially the same work," the policy manual indicates that in addition to role title, work title and the EWP may be considered.

### **EDR Investigation Report** (CX 6, RX 13, and RX 14)

On August 18, 2009, the EDR issued its report of investigation into Mr. Minthorne's allegations, initially filed in August 2007, including assertions that he had been denied a spot award due to his internal reports, assigned to the special assignments position, and denied a leave payout due to his participation in the grievance process and use of the Fraud, Waste, and Abuse Hotline.<sup>14</sup>

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<sup>14</sup>Although the investigation covered numerous allegations which were not substantiated as retaliation, I have only summarized the three relevant principal allegations.

As background, EDR noted that while serving as a regional supervisor, Mr. Minthorne raised various work-related issues internally with the agency in 2006. On March 1, 2007, he was removed from his supervisor position and assigned to a special assignments position to work at home. In late March 2007, he participated in a grievance proceeding for another employee and in April 2007 he used the Hotline to report concerns. When the initially-temporary job continued into December 2007, Mr. Minthorne filed a grievance concerning its continuation without an updated EWP and telework agreement. Following mediation, Mr. Minthorne was permanently assigned to the special assignment position. Finally, in October 2008, Mr. Minthorne's special assignment position was identified for layoff.

Concerning the spot award, EDR summarized that over the holidays in December 2006, Mr. Minthorne and four other individuals worked overtime on a pesticide contamination issue. All five individuals were recommended for spot awards. However, the Program Manager (Mr. Bailey) only signed off for the approval of spot awards for the four other individuals in June 2007. Although he recalled seeing the recommendation for Mr. Minthorne's spot award, he could not recall whether he approved it. Since no explanation was provided on why Mr. Minthorne should not have received a similar sport award, and given the temporal proximity between Mr. Minthorne's activities in March and April 2007, and the June 2007 spot awards to the other four workers, EDR concluded that it was more probable than not that the denial was retaliatory. As a result, EDR recommended Mr. Minthorne receive a spot award if now permissible.

In regards to the special assignment, EDR essentially highlighted that while Mr. Minthorne was certainly well qualified for the special assignment task of developing policies, the decision to transfer him out of his supervisory position "was made . . . prior to any suggestion to have him assigned" the policy tasks. Additionally, while the policy task was deemed to be very important, none of the policies Mr. Minthorne produced were implemented. Under these circumstances, EDR opined that an "apparent desire" existed to remove Mr. Minthorne from his supervisory position for some unexplained reason, either retaliatory or legitimate, other than having him write or re-work policy. However, because the transfer occurred before Mr. Minthorne's involvement in the grievance process or use of the Hotline, EDR found retaliation for those two actions was not a factor in his reassignment.

Finally, the EDR concluded the delayed payment to Mr. Minthorne for his leave balance was an administrative oversight.

**State Internal Auditor Report – VDACS**  
(CX 22)

On September 16, 2008, the state internal auditor, Office of the Comptroller, published the report of his investigation into a Hotline complaint against VDACS containing 14 allegations, including numerous derelictions by employees, misuse of state property, failure to provide employees sufficient work, misuse and inappropriate transfer of state funds, and inadequate follow-up of motor fuels violations. Based on an investigation conducted from July

1, 2006 to June 20, 2008, the state internal auditor determined most of the allegations were unsubstantiated.

In regards to the one allegation involving Mr. Minthorne's position, the report noted that from September to December 2007, Mr. Minthorne completed six operational procedures and 12 standard administrative procedure documents. Then, from January to March 2008, he completed additional drafts and assisted with the accreditation of the laboratory. An updated EWP was signed January 10, 2008 and a telecommuting agreement was approved February 4, 2008. In his appraisal for October 2006 to October 2007, Mr. Minthorne received a "contributor" rating. Concluding Mr. Minthorne's assignment was adequate for a full-time employee, and while noting the EWP had not been completed within 30 days of his assignment, the report determined the allegation associated with Mr. Minthorne's position was unsubstantiated.

Regarding the allegation concerning inadequate follow-up, the investigators reviewed motor fuel violations from April 2007 to February 2008. Although OPIS adequately conducted follow-up of motor fuel violations, the agency did not have in place a process to conduct state-wide analysis. Consequently, the allegation was partially substantiated and the report recommended that OPIS develop trend analysis methodology in order to better assess fuel violations.

As to OPIS' lack of investigative policy and procedures, the report concluded that allegation was partially substantiated. However, OPIS had a draft standard operation procedure, SOP 3, containing procedures for investigating suspected violations. SOP 3 was scheduled to be approved in August 2008.

VDACS provided several responses to the state internal auditor's report. First, the EWP was not signed promptly due to several factors, including excessive discussions by the parties regarding its content, personnel leave, and an employee grievance which was resolved through mediation in January 2008 when the parties signed the EWP. Next, a monthly meeting will be conducted to review reported motor fuel violations; and, a new software program will enable OPIS to capture, handle, and analyze inspection data. Third, SOP 3 has been distributed with instructions to observe its guidance in conducting an investigation.

#### **Summary of Governor's 12.9% Reduction for VDACS – FY 2009** (CX 24 and RX 19)

An October 21, 2008 summary indicated that the 12.9% general fund budget reduction by the governor's office for VDACS amounted to a total of \$3,554,878.00. The reduction included 2.3 FTEs which involved supplanting general funds with non-general funds, 10 FTEs associated with eliminating vacant positions, 2 FTEs based on layoffs, and 3 FTEs associated with supplanting general funds with fees for personal services (non-general funds).

## **VDACS 2009 Executive Budget Document** (CX 25)

The Virginia budget website document reflects the reductions approved by the governor in October and December 2008 for VDACS. For FY 2009, the general fund budget included the reduction of 12 positions. Most of the eliminated positions were vacant. However, an occupied administrative position in marketing and an occupied administrative position in product and industry standards (Mr. Minthorne) were eliminated. In 2010, the general fund budget decrease included an additional reduction of several positions, three vacant and three occupied.

### **DCP Budget Reduction Working Papers** (CX 26 and RX 19)<sup>15</sup>

A September 28, 2008 DCP working paper sets out targeted line items for 5%, 10%, and 15% reductions in the FY 2009 general fund budget. At 5%, in the number one position out of seven priorities (least impact on function), one OPIS position (Mr. Minthorne) is designated for elimination. The number two priority is one position changed from the general fund to the non-general fund. The number six and seven items are reductions in training and travel costs. At 10%, another position is changed from the general fund to the non-general fund, one OPIS wage position is eliminated, and restrictions are imposed for travel, training, and equipment expenses. Finally, at 15%, two more positions are changed from the general fund to the non-general fund, and additional reductions are planned for travel and equipment funding.

Attachment Two contains more detail regarding the reductions. Concerning the elimination of the one OPIS position, its category is designated as "reduce or eliminate current services." Its priority as "#1" means the elimination of the position will have the least impact.<sup>16</sup> Upon consideration of the payout costs, the net savings, or budget reduction, for this action in FY 2009 is \$214.00; while the net savings in FY 2010 is \$54,329.00. Additionally, elimination of this position is the "#1" priority in all three budget plans. The other three line items that are not marked out in black in the 5% reduction plan, which include nearly \$80,000.00 in travel and training costs, designated priorities "#6" and "#7," yield a total saving of \$138,234.00 in both FY 2009 and FY 2010. In the 10% reduction plan, a reduction of \$14,905.00 for equipment replacement funding is added. The agency also generates a savings of \$73,647.00 in FY 2009 and FY 2010 by "supplant[ing] OPIS GF (general fund) Personnel/Operational Costs with NGF (non-general fund)" as priority "#11." And, in the priority "#27" position in the 15% reduction plan is replacing two OPIS general fund FTEs with NGF, for savings of \$117,310.00 in each of the next two fiscal years. Attachment Two, page 2" also contains the following comments:

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<sup>15</sup>Previously designated confidential working papers. Despite the subsequent public release, nearly half of reductions on this document are blacked out, but upon comparison with CX 27, the marked out line items may involve reductions outside of OPIS.

<sup>16</sup>Under the space to designate the priority number, Attachment Two states "Number 1 causes the least impact."

Eliminate one OPIS FTE Pos# 01247 (Minthorne) that [sic] lives in Northern Virginia and works out of his home conduction special administrative projects. Impact: Elimination of this position is anticipated to affect the ongoing development of the program administratively, but is not anticipated to significantly impact current program field operations.

**OPIS Budget Reduction Working Papers<sup>17</sup>**  
(CX 27 and RX 7)

The OPIS working papers set out targeted items for 5%, 10%, and 15% reductions in the FY 2009 general fund. For the 5% reduction the following four priorities (least to most impact on function) are listed, with the associated savings for each of the next two fiscal years: #1 – supplant general fund personnel/operational costs with the non-general fund, \$58,360.00; #2 – restrict travel, \$39,874.00; #3 – restrict training costs, \$40,000.00; and #4 – reduce equipment replacement funding, \$14,905.00. The plan for 10% reduction includes eight more line item reductions, including an additional funding of personnel/operations costs with the non-general fund at priority #5, \$73,647.00; additional travel and training reductions in the next two priority positions, #6 and #7, a total of \$16,676.00; the elimination of a wage position at #8, \$21,840.00; and elimination of one OPIS FTE (Mr. Minthorne) at priority #9, for a savings of \$214.00 in FY 2009 and \$54,329.00 in FY 2010. The final three priorities in the 10% plan (#10 to #12) relate to savings in sampling costs, additional supplanting of general fund personnel costs with the non-general fund, and further reduction in travel costs. The 15% reduction strategy adds five more reductions in sampling costs, overnight travel, equipment funding, as well as additional funding of personnel/operations costs with the non-general fund, and supplanting OPIS general fund FTE with the non-general fund.

Attachment Two contains the same comments regarding the elimination of Mr. Minthorne's position as DCP's working paper, CX 26/RX19, with the exception that his name is not included.

**May 2009 Employ-E-News**  
(CX 28)

In the budget update, VDACS reports that the budget reduction for FY 2010 will be \$3,179,652.00 or a 10.2% reduction. Due to the budget cut, VDACS eliminated 12 positions, including two layoffs, five vacant positions, and five positions funded by non-general funds (fee, licenses, permit revenue) rather than the general fund. Additionally, the \$3,575,087.00 reduction in FY 2009, or 12.9%, led to two layoffs, the loss of 10 vacant positions, and the conversion of five positions from the general to non-general fund. And, through two budget reductions in FY 2008, VDACS lost 11 general fund positions. In total, VDACS lost 40 general fund positions during these series of budget cuts.

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<sup>17</sup>Previously designated confidential working papers. This document contains no blacked out line items. However, the first page of the 15% reduction plan, which is essentially identical to the first page of the 10% reduction plan, is not contained in the admitted exhibit. Additionally, although this copy is dated June 8, 2009, it was produced prior to DCP's budget reduction plan sometime in September 2008, CX 26.

**Payroll Letter**  
(CX 30)

On November 12, 2008, Ms. Linda E. Deale advises Mr. Minthorne that under the Workforce Transition Act, he will receive a severance payout equal to 36 weeks of his current pay, beginning November 10 – 24, 2008, and running through 2009. The state will also continue to contribute to his health care insurance through November 30, 2009. Due to her administrative oversight, Ms. Deale indicates that his requested payment for annual leave will be processed during the next leave period, December 16, 2008.

**Leave Balances**  
(CX 32)

As of January 9, 2009, the Virginia DOA report for Mr. Minthorne shows a "used current" of 288.0 hours in annual leave, with an ending balance of 37.8 hours. His accrued sick leave is 80 hours.

**Employee Work Plan**  
(CX 35)

On October 17, 2008, Mr. Alvarez approved an employee work plan for a Business Manager position in VDACS.

**Employment Offer**  
(CX 36)

On December 15, 2008, Ms. Karen E. Jackson, VDACS HR Director, offered the position of Scientist I, seed purity testing coordinator, at a semi-monthly salary of \$1,953.14, to an individual, who accepted the employment offer the next day.

**VDACS Position Announcements**  
(CX 37 and CX 38)

VDACS posted a position announcement for a statistical analyst to administer surveys and conduct data analysis. The minimum hiring salary was \$31,352.00 and the application deadline was January 23, 2009.

VDACS posted a position announcement for an agricultural specialist to sample, grade, and certify the quality of processed fruit and vegetables. The minimum hiring salary was \$31,352.00 and the application deadline was February 13, 2009.

**VDACS Commissioner Response**  
(CX 41)

On October 28, 2008, VDACS Commissioner Haymore responded to Mr. Minthorne's complaint that documentation concerning his layoff grievance had not been provided as requested. The budget reduction plans by OPIS and the Division of Consumer Protection were considered to be confidential working papers, and thus not subject to discovery. No minutes were taken during the late 2006 meeting with the ExxonMobil official. Otherwise, Commissioner Haymore provided the FY 2009 budget and documentation relating to agency vacancies. Finally, Commissioner Haymore indicated that VDACS' layoff process was conducted in accordance with the Layoff Policy 1.30.

**Ms. Jackson's Response to Documentation Request**  
(CX 44)

On October 31, 2008, Ms. Jackson responded to specific portions of Mr. Minthorne's multiple documentation request. She advised that while the budget strategies for 5%, 10%, and 15% are publically available, the OPIS and DCP budget strategies were confidential working papers that could not be released. She also indicated that no documents exist regarding the late 2006 ExxonMobil meeting.

**VDACS Commissioner's Response**  
(CX 45)

On November 3, 2008, VDACS Commissioner Haymore responded to Mr. Minthorne's renewed non-compliance complaint and request for additional documentation. Several documents are attached. Mr. Minthorne is also informed that many of the requested documents do not exist.

**VDACS Commissioner's Response**  
(CX 47)

On January 30, 2009, VDACS Commissioner Haymore responds to a complaint from Mr. Minthorne's attorney that VDACS was not providing Mr. Minthorne employment opportunities within the agency. According to Commissioner Haymore, VDACS was diligent in working with Mr. Minthorne with his job search. However, no opportunities for him were available within the agency. In particular, Mr. Minthorne did not meet the minimal requirements for the seed analyst position, which was eventually filled by an agency employee with no impact on the agency's budget. Additionally, Ms. Karen Jackson, VDACS HR director, looked for job opportunities for Mr. Minthorne in other state offices which were recruiting, including Northern Virginia Community College, George Mason University, VEC, state police, Social Services, and the Department of Alcoholic Beverage Control. She also sent Mr. Minthorne's qualifications to the respective HR department. And, on December 10, 2008, Mr. Minthorne was hired by the VEC based on his preferential hiring right due to his layoff. These actions reflect VDACS' diligence in assisting Mr. Minthorne in securing employment.

**EDR Director Compliance Ruling**  
(CX 48)

On February 19, 2009, the EDR Director addressed Mr. Minthorne's various requests for documentation from VDACS relating to his October 9, 2008 grievance challenging his layoff as retaliatory and a misapplication of policy. To support his case, Mr. Minthorne made several document requests on October 14, 28, and 29, 2008. Although the agency responded with some documentation on October 28, November 3, and November 13, 2008, the EDR Director required the agency to provide Mr. Minthorne additional documentation concerning the agency's decision to identify his position for elimination and which led to the layoff action.

**EDR Director Compliance Ruling**  
(CX 49)

On March 23, 2009, while noting that the agency attempted to comply with her February 19, 2009 order, the EDR Director concluded the agency had not completely complied. As a result, the Director ordered the agency to provide all relevant, non-privileged documents concerning Mr. Minthorne's layoff.

**VDACS Response to EDR Ruling**  
(CX 50)

On April 2, 2009, Ms. Jackson advised that VDACS had provided additional documentation. She also attached additional explanation concerning the budget reduction process.

In an attached letter, dated April 1, 2009, Mr. Frank M. Fulgham, Business Manager for the DCP, indicated that during the budget reduction process he combined the three budget reduction strategies submitted by its three individual program areas (which includes OPIS), into one plan for DCP for each of the three budget reduction goals, 5%, 10%, and 15%. The program line items were ranked by DCP according to potential program impact with the number one priority having the least impact. Mr. Fulgham further explained:

I developed the Division budget reduction strategies by merging each of the individual program Detail Reduction Worksheets, beginning with those having the least impact and marked #1. As the documents merged, the priority rankings were realigned to meet the assigned DCP 5%, 10%, and 15% target reduction amounts. The Detail Reduction Worksheets submitted by the Office of Product and Industry Standards and the other program areas were the exact same Worksheets that appeared in the DCP Budget Reduction Strategy with the exception of the realigned priority numbering 1-29.

**Eliminated Positions – Employee Work Profiles**  
(RX 7)

The three other positions which involved a layoff in the budget reduction included an agriculture inspector, a review and compliance manager for dairy and food inspection activities, and a program manager in farming, fishing, and forestry.

**Severance Overpayment Letter**  
(RX 16)

On January 13, 2009, the VDACS finance director advised Mr. Minthorne that he had been overpaid for his severance benefit in the amount of \$1,803.35 for the second week of December 2008 because he had actually been re-employed by VEC on December 10, 2008. Accordingly, the finance requested repayment.

**Employment Notification**  
(RX 16)

On January 13, 2009, VEC advised VDACS that Mr. Minthorne transferred to VEC from VDACS on December 10, 2008. Accordingly, VEC requested that VDACS forward his personnel records.

**First Notification of Layoff**  
(RX 17)

In an October 10, 2008 letter, Ms. Karen Jackson advised Mr. Minthorne that due to the state's severe budget crisis his division had determined that his position will be affected by a layoff. As official notice, she attached a "first" notice of layoff which indicated that Mr. Minthorne is being placed on layoff for 12 months, effective November 9, 2008, because no placement opportunity is available to him. Ms. Jackson further states, "At the present time, we do not have a placement option available to you. If a placement option becomes available prior to November 9, 2008, I will notify you. If not, you will be placed on layoff for up to twelve months and entitled to severance benefits." Also attached to the letter was an inter-agency placement screening form (yellow card) which gave Mr. Minthorne preference over all other applicants except internal candidates and employees with blue preferential hiring cards.

**Mediation Agreement**  
(RX 17)

On January 4, 2008, Mr. Minthorne and Mr. Alvarez sign a mediation agreement, agreeing to meet by January 31, 2008 to finalize the EWP for the position of Special Projects Coordinator. If they later mutually agreed that Mr. Minthorne can't continue in the position, the parties would meet by the second week of February to discuss two other job options. First, Mr. Minthorne could return to his immediate past position as a regional supervisor. Second, Mr. Minthorne could be reassigned as a regional inspector without a reduction in pay or benefits for

the length of his employment with VDACS. Mr. Minthorne also agreed to drop his grievance without prejudice to the agency.

**Budget Reduction Notification for FY 2007 & DCP Reduction**  
(RX 18 and RX 19)

On August 23, 2007, Ms. Sandy Adams notified the VDACS division directors, including Mr. Alvarez, that in anticipation of a 5% budget reduction for FY 2008, the division must submit a 7% budget reduction plan. The subsequent 5% budget reduction for DCP amounted to \$260,427.00.

**Chief of Staff Memorandum**  
(RX 19)

On February 4, 2008, the governor's chief of staff issued a memorandum regarding agency cost savings. Noting that the worsening national economy had adversely affected Virginia's revenue collection, and although the actual downward adjustment was not yet known, the chief of staff directed the following immediate actions: with few exceptions, all new hires required cabinet secretary approval; agencies must refrain from applying for staff adjustment/consulting contracts; agencies will stop making commitments for discretionary travel and training; and agencies will stop discretionary spending on equipment, software, and furniture.

**Budget Exercise Memorandum**  
(RX 19)

On September 5, 2008, Ms. Sandy Adams sent instructions to the division directors, including Mr. Alvarez, to prepare budget reduction strategies for 5%, 10%, and 15% general fund reductions for FY 2009 and FY 2010, with the specific reductions prioritized with "Number 1 causing the least impact." Ms. Adams indicated that FY 2009 covered July 1, 2008 to June 30, 2009 and FY 2010 spanned July 1, 2009 to June 30, 2010. The attached budget reduction plan strategies contained several guidelines, including: a) consider eliminating low priorities with a focus on underperforming programs and services, b) look for efficiencies through technology, c) focus on on-going savings rather than one-time savings, d) do not curtail core services or programs, e) focus on overall state savings and avoid reductions that increase costs in other agencies, and f) remember savings from layoffs also generate costs.

**DCP General Fund Reductions – FY 2009**  
(RX 19)

Out of its targeted appropriation funding of \$5,336,996.00, the three reduction plans for DCP represented reductions of \$266,850.00 (5%), \$533,700.00 (10%), and \$800,550.00 (15%).

**VDACS 15% Budget Reduction Summary – FY 2009**  
(RX 19)

In its 15% budget reduction summary, VDACS listed 46 line item reductions in order of priority. Within the first 38 line item reductions, 15 vacant positions were eliminated – priorities #28 to #32, #34, and #36 to #38. Within the remaining 8 line items, an additional 53 occupied positions were identified for elimination: supervisor in market news office – priority #39; administrative position in OPIS (Mr. Minthorne) – priority #40; administrative position in marketing – priority #41; administrative position in animal food industry service ("AFIS") – priority #42; wage employee position in OPIS – priority #43; wage employee position in Onley office – priority #44; and 47 inspector positions in the state meat and poultry inspection program due to transfer of responsibility to the federal government – priority #45. No equipment funding reductions were listed.

The VDACS budget reduction plan also included the following specific OPIS reductions: a) restrict and defer OPIS travel – priority #6; b) reduce training costs – priority #9; c) supplant OPIS general fund personnel costs with non-general fund – priorities #18 and #21; d) eliminate one OPIS FTE (Mr. Minthorne) – priority #40; and e) eliminate a wage position – priority #43.

**VDACS Proposed FY 2009 Line Item Reductions Not Included in Governor's Plan**  
(RX 19)

The following three non-personnel reductions were not included in the governor's final budget reduction for FY 2009: reduction in food sample testing – priority #10; elimination of funding for farmland preservation – priority #14; and reduction in specialty agriculture – priority #15. The following personnel reductions also were not in the final plan approved by the governor: supervisor in market news office – priority #39; administrative position in animal food industry service ("AFIS") – priority #42; and 47 inspector positions in the state meat and poultry inspection program – priority #45.

**VDACS 15% Budget Reduction Summary – FY 2010**  
(RX 19)

In its 15% budget reduction summary for FY 2010, VDACS included another 29.3 FTEs for elimination. Seven of those reductions were in DCP.

## E-Mail Correspondence<sup>18</sup>

September 20, 2006: Mr. Donald Delorme thanks Mr. Minthorne for his update on the Noblett Oil Company investigation. He advises Mr. Minthorne that as the lead investigator Mr. Minthorne should take whatever measures are necessary to document possible violations for a final and complete report. CX 7

November 30, 2006: Mr. Minthorne objects to Mr. Alvarez concerning Mr. Diggs' actions in granting an exemption to ExxonMobil from Virginia motor fuels requirements, which related to an octane issue case to which Mr. Minthorne had been assigned as lead investigator in June 2006. In June 2006, Mr. Minthorne had requested that Mr. Diggs not be involved in, or permitted to interfere with, his investigation. However, Mr. Minthorne alleges Mr. Diggs has contacted fuel company officials and provided exemptions. CX 8

December 4, 2006: Mr. Minthorne objects to Mr. Alvarez that Mr. Diggs' requested transfer of an individual will interfere with Mr. Minthorne's investigation of multiple motor fuel octane violations. CX 9

January 4, 2008: Mr. Alvarez thanks Mr. Minthorne for their frank discussion earlier in the day and expresses his pleasure that they came up with a plan of action that addressed both their concerns. Based on their discussion, Mr. Alvarez presumes Mr. Minthorne is no longer interested in the southwest Virginia regional supervisor position. If his understanding is correct, Mr. Alvarez asks Mr. Minthorne to advise Ms. Linda Cole in HR so he won't be set up for an interview for that position. RX 18

January 7, 2008: Mr. Minthorne provides an FBI agent with his recollection of his January 4, 2008 mediation meeting with Mr. Alvarez which addressed multiple issues. Mr. Minthorne informed Mr. Alvarez that that he had contacted the FBI. During the meeting, they also discussed Mr. Minthorne's employment opportunities, including retirement. CX 10 and RX 2

January 11, 2008: Mr. Minthorne informs an FBI agent that at a January 10, 2008 mediation meeting he was permanently assigned to work at home as a special projects coordinator. At the meeting, Mr. Minthorne also had a conversation with Mr. Bailey about motor fuel irregularities. In particular, based on concerns raised by Mr. Bailey, Mr. Minthorne noted an asserted effort by VDACS upper management to increase the use of ethanol fuel in the state by not having "Reid Vapor Pressure" tests conducted on ethanol blended motor fuels because the fuel would not meet state and CAA standards. CX 11 and RX 3

January 21, 2008: Mr. Alvarez addresses several issues raised by VDACS Deputy Commissioner, Mr. Don Blankenship, concerning the annual motor fuel issues report. In late 2005 and early 2006, ethanol blended fuels became part of the VDACS' fuel quality inspection program. Results throughout the state revealed octane deficiencies ranging from minor to significant. Mr. Alvarez assigned Mr. Wes Diggs to look into the issue. However, Mr. Diggs

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<sup>18</sup>While I have read all the e-mails, I have only summarized the potentially relevant exchanges.

did not discover any widespread effort to defraud the public. Instead, after conversations with laboratory personnel, Mr. Alvarez came to the conclusion that the issue was due to new production challenges associated with the increased use of ethanol. Additionally, in a late 2006 meeting, an ExxonMobil representative acknowledged the problem was a quality control issue and then described their efforts to correct the situation. Since the issue appeared to be production-related, Mr. Diggs recommended against conducting a formal investigation. In February 2007, Mr. Bailey took over OPIS. Although Mr. Diggs helped with the transition, Mr. Alvarez was unaware that the problem persisted. Mr. Alvarez then committed to a renewed effort to look at the issue again. CX 21

February 12, 2008: Mr. Don Blankenship emphasizes to the strategic management team that the chief of staff's memorandum on a pending shortfall in state revenue contains required cost savings in hiring, travel, staff augmentation/consulting, and purchases. Consequently, approvals will be based on maintaining essential services and business necessity. RX 19

March 26, 2008: Mr. Blankenship advises the strategic management team that due to additional funding provided to the governor, their previously submitted plans for a 3% reduction in upcoming fiscal years would be adjusted downward to 1.5%. RX 19

June 12, 2008: Mr. Minthorne presents numerous allegations to a state senator, in part alleging that the diversion of special funds is detrimental to effective investigations by OPIS. Specifically, he alleges that as of April 2008, OPIS has identified hundreds of violations of state motor fuel laws, some of which concerning ethanol blended fuels also violate "the Federal Clean Air Act and 40 C.F.R. Part 80," but there have been no criminal proceedings and "very few civil penalties" imposed. Mr. Minthorne further claims a lack of diligent investigations and even interference with state investigations into the failure of motor fuels to meet requisite standards, which included a meeting with officials from ExxonMobil by Mr. Alvarez, without Mr. Minthorne's knowledge, concerning a case Mr. Minthorne had been assigned to investigate. Mr. Minthorne also provides examples of alleged actual and potential conflict of interest issues among present and past state officials, including Mr. Alvarez, and presents several claims of retaliation against himself and other state employees by the state agency. CX 13 and RX 4.

June 23, 2008: Mr. Minthorne is informed by a legislative aide to a state senator that a state auditor is looking into his allegations that the diversion of special funds is detrimental to effective investigations by OPIS. In his letter to the senator, Mr. Minthorne highlighted multiple conflict of interest issues and presented numerous claims of retaliation from the state agency. CX 13 and RX 4

July 14, 2008: Mr. Minthorne advises a state legislative delegate of numerous issues with VDACS/OPIS, including the failure to investigate over 300 identified violations of motor fuel laws. He also points out numerous other alleged failures and derelictions by the agency in regards to its duties and obligations, including the failure of OPIS to diligently investigate noted violations and take appropriate enforcement actions. Mr. Minthorne alleges that Mr. Alvarez has deliberately interfered with motor fuel violation investigations by meeting in late 2006 with, and providing information to, officials of ExxonMobil, which was under investigation concerning ethanol blended fuels. Additionally, "many of the ethanol violations . . . are apparent violations

of [state law] and the Clean Air Act and 40 C.F.R. Part 80." Further, Mr. Minthorne notes that due to his activities, he has been stripped of his position and sent home to work special assignments. CX 14 and RX 5

July 15, 2008: The state delegate asks Mr. Minthorne for the names and locations of companies supplying ethanol to Virginia distribution centers. CX 16

July 22, 2008: Due to his perception of a continuing pattern of retaliation in OPIS, Mr. Tatum asks Mr. Alvarez that his position in the Metrology Laboratory be abolished and he be allowed to retire. CX 34

July 24, 2008: Mr. Minthorne complains to the state comptroller about the release of the case file of his Hotline complaint which contained his identification information to the VDACS deputy commissioner. He believes the submission was a breach of confidentiality and requests that the state comptroller retrieve the case file copy. He also asks that further investigation be conducted. CX 19

July 25, 2008: Mr. Bailey informs Mr. Minthorne that he has received a report that Mr. Minthorne visited the Motiva Enterprises terminal a couple days earlier. He asks Mr. Minthorne about the purpose of the visit and requests that Mr. Minthorne keep him informed of his "travels." Mr. Minthorne responds that he was asked by a member of the General Assembly to provide the name and locations of ethanol suppliers to the fuel distribution facilities in Virginia. CX 15

July 28, 2008: Mr. Minthorne sends Mr. Bailey the e-mail request from the state representative requesting ethanol information. Mr. Minthorne also asks that he be included in the internal audit of the Metrology laboratory. CX 16

August 5, 2008: The state comptroller responds to Mr. Minthorne's July 24, 2008 complaint about the release of his Hotline file. His staff is attempting to retrieve the case file. And, the state comptroller notes the subject matter of the Hotline has already been investigated. CX 19

August 8, 2008: Mr. Delorme asks Mr. Minthorne if he attended a meeting about the "swot" analysis since it's supposed to be a team effort. Mr. Minthorne replies that he wasn't involved in the "swot" analysis. Mr. Delorme then expresses his displeasure with the process. CX 17

August 17, 2008: Mr. Minthorne sends Mr. Bailey 29 comments regarding OPIS' strategic plan. He highlights in some detail numerous inadequacies, limitations, and conflicts with regulations. Several of the strategies are also incomplete and demonstrate a lack of effort. CX 18

August 27, 2008: As part of an e-mail in which Mr. Minthorne offers his assistance to the state legislative delegate in obtaining documentation, Mr. Minthorne describes an exchange

with Mr. Bailey, which occurred at an August 5, 2008 meeting in front of OPIS management staff. When Mr. Bailey noted the expenses associated with the sampling of fuel samples, including \$36,000.00 in shipping costs, Mr. Minthorne asked if he could discuss funding with DCLS. Mr. Bailey stated they would not do that. In response, Mr. Minthorne asked what his role was and why he wasn't given any work. Mr. Bailey did not respond. When Mr. Minthorne asked why they were spending money to ship and test fuel samples but still not enforcing the motor fuel laws, or conducting sampling at the terminal, Mr. Bailey again did not respond. CX 20

October 14, 2008: Having filed a grievance, Mr. Minthorne requests that Mr. Alvarez provide, in accordance with the grievance procedures manual, the budget reduction plans for OPIS and DCP that have been provided to the Governor's office since June 2008. He also seeks any documents concerning open positions in the agency; the final budget for FY 2009; notes from Mr. Alvarez's meeting with an ExxonMobil official in late 2006 that were mentioned in a January 21, 2008 e-mail; and all public records relating to the criteria the agency used to determine the employees to be impacted by layoff actions, factors used in selection of employees for layoff, and the process VDACS used in determining to layoff employees. CX 39

October 22, 2008: Mr. Minthorne notifies VDACS Commissioner Todd Haymore of the failure by VDACS and Mr. Alvarez to provide the grievance documentation that he requested. CX 40

October 24, 2008: The VDACS commissioner informs the members of his strategic management team that the governor's office has released the previously confidential agency budget reduction plans for 5%, 10%, and 15% reductions to the public. Due to the public disclosure, individuals will become aware of the positions identified for elimination by VDACS that were not in the final plan approved by the governor, especially under the 15% reduction plan, which may cause sensitive personnel and morale issues. However, the position eliminations represented "hard choices" and did not mean the positions weren't valued by the agency. CX 23 and RX 19

October 29, 2008: In addition to renewing his requests for grievance documentation, Mr. Minthorne seeks from Mr. Alvarez additional documentation relating to previous correspondence from Mr. Alvarez. He also seeks the position description for the Business Manager vacancy; documents concerning the OPIS Program Manager's evaluation of OPIS' core services and the compilation of different budget strategies; the DCP business manager's "complied reduction strategies" submitted by OPIS; the Division Director's approval of the aggregated budget reduction strategy submitted by the agency's budget director; and other miscellaneous documentation. CX 42

October 31, 2008: Mr. Minthorne advises Commissioner Haymore of VDACS' continued non-compliance with his document requests. Although Mr. Minthorne had been provided some documentation, not all of his requests were satisfied. Mr. Minthorne identifies numerous requested documents that he had not yet received. CX 43

November 4, 2008: Mr. Minthorne requests Ms. Jones that he receive payment of his accrued annual leave at the time of his layoff on November 9, 2008. Two days later, Ms. Jones indicates that he will receive his leave payout by paper check issued on December 1, 2008. CX 29

December 18, 2008: Since Mr. Minthorne, an unemployment tax representative with VEC, did not receive payment for his annual leave, he asks Ms. Turner in VEC HR to check to see if his annual and sick leave balances have transferred from VDACS. CX 31

January 13, 2009: Ms. Linda Cole advises Mr. Alvarez that she has just discovered that Mr. Minthorne was rehired by VEC on December 10, 2008. Due to VEC's failure to notify VDACS of his re-employment, Mr. Minthorne was overpaid in severance benefits, which she will attempt to collect. RX 16

January 26, 2009: VEC acknowledges receipt of Mr. Minthorne's personnel file. RX 16

January 28, 2009, 5:28 p.m.: Ms. Linda Cole tells Ms. Linda Deale that she has received notification that Mr. Minthorne has filed another complaint with the U.S. Department of Labor ("DOL") concerning the payout for his annual leave. Ms. Cole is uncertain of the specific allegations but nevertheless asks Ms. Deale to send her copies of any e-mails and notes involving his annual leave request. RX 16

January 29, 2009, 9:58 a.m.: Ms. Linda Deale advises Ms. Linda Cole that she is probably part of Mr. Minthorne's DOL complaint because Mr. Minthorne had not yet been paid for his annual leave. His request "was overlooked." She believes this may be a good situation since she can address the severance overpayment issue by deducting it from the leave payout. RX 16

January 29, 2009, 10:10 a.m.: Ms. Linda Cole tells Ms. Linda Deale that Mr. Minthorne should be paid for his 288.0 hours because that is what he requested. However, she would let Ms. Karen Jackson make the decision. Ms. Cole sends a copy of the e-mail to Ms. Jackson. RX 16

January 29, 2009, 10:21 a.m.: Ms. Karen Jackson responds to Mr. Linda Cole, "This is so frustrating, I can't believe that his leave payment was overlooked. It makes us look like a bunch of idiots." RX 16

January 29, 2009, 10:35 a.m.: Ms. Linda Cole replies to Ms. Karen Jackson, "Yes it does." RX 16

January 29, 2009, 10:39 a.m.: Ms. Karen Jackson tells Ms. Linda Cole to contact Mr. Minthorne and ask if he still wants the payout or whether he'd like the leave transferred to VEC. RX 16

January 29, 2009, 2:28 p.m.: Ms. Linda Cole informs Ms. Linda Deale about her phone call with Mr. Minthorne. He wanted payment of his 288.0 hours of leave and wanted to know

why his personnel records hadn't been transferred yet. He alleged VDACS was refusing to send them to VEC. Ms. Cole told Mr. Minthorne that the record transfer was an HR function. Since Mr. Minthorne requested payment, Ms. Cole agreed to send the check overnight. Mr. Minthorne also indicated that once he received the leave check, he would reimburse the overpaid severance pay. RX 16

January 30, 2009: In response to an inquiry from Ms. Karen Jackson, Ms. Linda Cole advises that VDACS didn't receive a request from VEC for Mr. Minthorne's file until January 13, 2009 and that it was forwarded as requested on January 22, 2009. RX 16

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Testimonial and Evidence Conflicts**

To the extent that a conflict in testimony, or other inconsistency, requires a detailed assessment and resolution, I will render a discussion of the issue in *italics*.

#### **Specific Findings**

**1989**

Mr. Minthorne starts working for Virginia as a regional inspector in VDACS.

**2000**

Mr. Minthorne is promoted to regional supervisor and becomes responsible for overseeing various inspection activities conducted by six to 10 inspectors. These activities included monitoring motor fuel distribution, evaluating the accuracy of motor fuel pumps, and assessing the quality of motor fuels by obtaining samples for subsequent laboratory analysis. The laboratory tests of motor fuel samples evaluate fuel octane rating, and compliance with CAA requirements associated with oxygenated fuels, specifically VOC emissions, Reid vapor pressure, and ethanol levels. Generally, only about one to two percent of the samples are in violation of the applicable standards. If a violation is found, an inspector will stop the sale of the product until the problem is corrected, which usually occurs through voluntary compliance. An administrative process also exists to impose a penalty.

**2006**

Mr. Andres Alvarez becomes the DCP director and finds a dysfunctional atmosphere between the management in Richmond, Virginia and the regional offices. Concluding that the regional offices have too much discretion and latitude in their procedures, Mr. Alvarez establishes standardized practices and procedures. He also asks his motor fuels experts to identify any trends that need special attention.

During the course of making improvements, Mr. Alvarez identifies a significant need for having a qualified person update organizational policies, standards, procedures, and documents. Eventually, he considers Mr. Minthorne for that special assignment.

**August 2006**

Mr. Donald Delorme, OPIS program manager, assigns Mr. Minthorne to investigate allegations involving Noblett and ExxonMobil, concerning the distribution and storage of motor fuel with lower octane levels than posted. During the course of his investigation, Mr. Minthorne discovers two issues. First, Noblett is intentionally putting substandard octane product into storage tanks. In particular, the company is putting 89 octane fuel in a 93 octane storage tank, knowing the stored fuel would later be distributed as 93 octane motor fuel. And, second, Noblett

has an issue with ExxonMobil supplying fuel product to them that did not meet octane requirements.

### **September 2006**

On September 20, 2006, Mr. Delorme thanks Mr. Minthorne for his update on the Noblett investigation. He advises Mr. Minthorne that as the lead investigator Mr. Minthorne should take whatever measures are necessary to document possible violations for a final and complete report.

### **November 2006**

Upon completion of his investigation, Mr. Minthorne submits his report to Mr. Delorme, which identifies multiple alleged violations of the CAA, including multiple motor fuel Reid vapor pressure violations and excessive ethanol adulteration. Mr. Minthorne has conversations with Mr. Alvarez about the noted violations. Mr. Alvarez decides to rely on his motor fuels compliance expert, Mr. Wes Diggs, who is the compliance director for weights and measures, for any subsequent response.

Mr. Alvarez and Mr. Diggs meet with ExxonMobil officials about substandard octane fuel that did not meet applicable requirements for the past six months. They discuss the company's quality control issues associated with the recent introduction of ethanol into motor fuels on a larger scale.<sup>19</sup>

On November 30, 2006, Mr. Minthorne objects to Mr. Alvarez about Mr. Diggs granting an exemption to ExxonMobil from Virginia motor fuels requirements, which relates to the octane issues Mr. Minthorne identified in his August to October 2006 investigation. Noting that after his assignment as lead investigator he had requested that Mr. Diggs not be involved in, or permitted to interfere with, his investigation, Mr. Minthorne alleges that Mr. Diggs nevertheless contacted fuel company officials and subsequently provided exemptions.

### **December 2006**

On December 4, 2006, Mr. Minthorne objects to Mr. Alvarez that Mr. Diggs' requested transfer of an individual will interfere with his investigation into multiple motor fuel octane violations.

Upon subsequent review of the LAN, Mr. Minthorne determines that Mr. Diggs did not take any enforcement action regarding the motor fuel violations that Mr. Minthorne discovered during his investigation. Additionally, the central office in Richmond did not send Mr. Minthorne any reports about the laboratory-confirmed motor fuel violations for follow-up. He also did not receive any reports for resampling to ensure the motor fuel product was in compliance.

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<sup>19</sup>After an investigation of multiple ethanol motor fuel complaints, Mr. Alvarez attributed the excessive ethanol levels to a terminal equipment failure that caused ethanol blending at incorrect rates. However, due to the lack of specificity, I am unable to determine when Mr. Alvarez reached that conclusion.

Mr. Minthorne meets with Mr. Alvarez to discuss his concerns about the motor fuel compliance issues. In particular, he objects to the failure of OPIS/VDACS to further investigate, and take enforcement action related to, the motor fuel violations of the CAA requirements identified in the motor fuel samples obtained during his investigation.

After the Christmas holiday, Mr. Minthorne learns that BP Amoco had a valve problem at its terminal which had caused too much ethanol to be placed in the fuel that was being distributed throughout the metropolitan area. In response, Mr. Minthorne sends an inspector to the terminal to stop distribution until his department has tested it. However, Mr. Diggs calls the inspector directly and tells him to leave the terminal. He also advises the inspector to inform Mr. Minthorne to stop taking samples at the terminal and to cease the investigation. Although Mr. Minthorne stops the inspections, he sends an e-mail report about what they discovered at the terminals to Mr. Diggs with a copy to Mr. Alvarez. He also expresses his concerns that Mr. Diggs did not talk to him directly about the situation and that the BP Amoco representative had been inaccurate in his description about what was happening.

### **January 2007**

*[[At the December 2011 hearing, Mr. Alvarez testified that Mr. Minthorne's program manager identified the need for a special projects manager to update OPIS policies and procedures and Mr. Minthorne was offered the job. It was not Mr. Alvarez's request. However, at the earlier November 2009 EDR hearing, Mr. Alvarez stated that he couldn't recall how Mr. Minthorne came into the special projects position. Due to this inconsistency, I am unable to determine who came up with the idea to offer Mr. Minthorne the special projects position. Nevertheless, Mr. Alvarez was clearly the official who initially offered the special projects position to Mr. Minthorne.]]*

In mid-January, Mr. Alvarez calls Mr. Minthorne and asks if he would be willing to work at home and write policy procedures. Mr. Alvarez indicates the agency has a critical need for written policies because Mr. Diggs is only in an acting position, and the new OPIS program manager will not have much knowledge regarding the office's function, and OPIS did not have any policy procedures in place. Understanding that OPIS has a legitimate need for written policy procedures, recognizing that under his EWP he could be detailed to that task, and considering his career, Mr. Minthorne agrees to consider the proposal but wants to wait until the new program manager is assigned to ensure there will be no conflicts.

### **March 2007**

On March 1, 2007, Mr. Robert Bailey becomes the OPIS program manager. Mr. Minthorne meets with Mr. Bailey and asks if written policies are what he wants. Mr. Bailey indicates that he will get back to Mr. Minthorne.

On March 2, 2007, Mr. Bailey sends Mr. Minthorne an e-mail indicating that he would prefer Mr. Minthorne work at home because OPIS was in dire need of an update for its policy and procedure manual.

On March 3, 2007, Mr. Minthorne receives an e-mail indicating that he should have started his special projects assignment as of March 1, 2007.

On March 13, 2007, in an e-mail, Mr. Bailey asks Mr. Minthorne to send him drafts of his work for review by the staff.

In late March 2007, Mr. Minthorne participates in a grievance proceeding for another employee.

#### **April 2007**

Mr. Bailey thanks Mr. Minthorne for his diligent updates and compliments him on his prolific production.

Mr. Minthorne places a call to the State Employee Fraud, Waste, and Abuse Hotline ("Hotline") and presents multiple allegations against VDACS regarding personnel issues and practices, misuse of state property, and an inappropriate relationship with a non-state entity. Mr. Minthorne also includes an allegation that OPIS does not have an adequate policy and procedures manual and does not perform adequate follow-up on motor fuel violations.

#### **May 2007**

*[[A slight conflict arises between Mr. Minthorne and Ms. Jackson about the contents of their meeting in May 2007. Mr. Minthorne testified that he told both Mr. Bailey and Ms. Jackson about his concerns regarding the motor fuel violations. Ms. Jackson testified that she was not sure whether she had been aware of Mr. Minthorne's motor fuel concerns. Since both Mr. Minthorne and Ms. Jackson appeared to be credible witnesses, I will rely on Mr. Minthorne's more certain recollection that he told Ms. Jackson about the motor fuel issues, rather than Ms. Jackson's less-than-certain recollection on this issue.]]*

In a meeting with Mr. Bailey and Ms. Jackson, Mr. Minthorne expresses his concerns about the previously identified motor fuel violations. In an effort to provide support, Ms. Jackson suggests that Mr. Minthorne's expectations and standards for OPIS are too high and he might benefit from an anger management class. However, Mr. Bailey indicates that he wants the best OPIS program possible.

In an e-mail, Mr. Bailey again expresses his appreciation for Mr. Minthorne's work and updates.

#### **June 2007**

Through June, Mr. Minthorne produces 15 to 16 policy and procedure documents.

Mr. Bailey does not approve a spot award for Mr. Minthorne while four other similarly situated employees receive a spot award.

## **July 2007**

Believing his detailed assignment was only supposed to last up to 120 days, Mr. Minthorne sends an e-mail to Mr. Bailey, advising that he has completed the projects. In response, Mr. Bailey indicates to Mr. Minthorne and Mr. Alvarez that he would like Mr. Minthorne to continue in his special projects position for another 120 days. Objecting that none of his work has been reviewed and thus didn't seem necessary, Mr. Minthorne asks to go back to his position as regional supervisor. Mr. Bailey does not respond. Mr. Minthorne continues to revise documents.

## **August 2007**

*[[Although Mr. Minthorne did not testify about his contacts with the FBI, he indicated in his December 5, 2008 whistleblower complaint that he had contacted the FBI in August 2007 in part due to his CAA violation concerns. His August 2007 contact with the FBI is also partially corroborated by his January 2009 e-mail correspondence with an FBI agent.]]*

Mr. Minthorne contacts the FBI with several concerns about VDACS, including CAA violations related to continuing non-compliant motor fuels.

Mr. Minthorne files a complaint against Mr. Bailey and Mr. Alvarez with EDR, alleging retaliation due to his participation in another employee's grievance process in March 2007. Specifically, he asserts that as a result of his participation he was assigned to a special projects position and denied a spot award.

On August 23, 2007, Ms. Sandy Adams notifies the VDACS division directors, including Mr. Alvarez, that in anticipation of a 5% budget reduction for FY 2008, the division must submit a 7% budget reduction plan. The subsequent 5% budget reduction for DCP amounted to \$260,427.00.

## **October 2007**

In his annual appraisal, Mr. Minthorne receives "contributing" ratings for all areas. Mr. Minthorne informs Mr. Bailey that he does not have a current EWP. He expresses his belief that he is not doing real projects since no one was reviewing his work. Mr. Bailey responds that Mr. Minthorne would have to continue what he was doing until he was told otherwise.

## **November 2007**

Near the end of the month, Mr. Minthorne files a grievance alleging that in retaliation for participating in another employee's grievance he has been placed in a continuing, make-work special projects position without an EWP and telework agreement. He also presents issues about the denial of his spot award.

Ms. Jackson in VDACS HR reviews a draft EWP for Mr. Minthorne's special projects position. She asks Mr. Bailey to get some input from Mr. Minthorne since it's a new position

and he has been working in it for a while. Mr. Bailey sends Mr. Minthorne a new EWP for "special projects officer" and asks to meet with him. When Mr. Minthorne responds that he has filed a grievance regarding his position, the meeting is cancelled.

Around this time, telework agreements are starting to be required by Virginia. As a result, VDACS goes through an 18 month process in developing its telework program and associated agreements.

### **December 2007**

By the end of the month, Mr. Minthorne has completed six operational procedure manuals and 12 administrative manuals in his special projects assignment.

### **January 2008**

Up until the beginning of this month, Mr. Minthorne's working relationship with Mr. Bailey has been somewhat cooperative, congenial, and satisfactory.

In an initial meeting with Mr. Alvarez, Mr. Minthorne is offered an opportunity to review the new EWP, permanently transferring him as a special projects coordinator. Mr. Alvarez indicates the position is necessary. At the same time, Mr. Alvarez tells Mr. Minthorne that he can turn down the special projects coordinator position and return to his old supervisor position.

*[[In a January 7, 2008 e-mail, Mr. Minthorne provides his recollection of a January 4, 2008 meeting with Mr. Alvarez and indicates that during the course of that conversation he told Mr. Alvarez that he had contacted the FBI about his CAA concerns. During the December 2011 hearing, Mr. Alvarez didn't recall any conversation with Mr. Minthorne regarding his reporting motor fuel violation concerns to the FBI. To resolve this dispute, I consider Mr. Minthorne's e-mail written three days after the January 4, 2008 meeting to be more probative about what they discussed than Mr. Alvarez's inability to recall nearly four years later whether they had such a conversation.]]*

On January 4, 2008, Mr. Minthorne and Mr. Alvarez sign a mediation agreement, agreeing to meet by January 31, 2008 to finalize the EWP for the position of Special Projects Coordinator. If they later mutually agreed that Mr. Minthorne can't continue in that position, the parties will meet by the second week of February to discuss two other job options. Mr. Minthorne may return to his immediate past position as a regional supervisor. Or, Mr. Minthorne may be reassigned as a regional inspector without a reduction in pay or benefits for the length of his employment with VDACS. Mr. Minthorne also agrees to drop his grievance without prejudice to the agency. Mr. Minthorne advises Mr. Alvarez that he has contacted the FBI about his motor fuel non-compliance concerns. In a subsequent e-mail, Mr. Alvarez thanks Mr. Minthorne for their frank discussion earlier in the day and expresses his pleasure that they came up with a plan of action that addressed both their concerns. Based on their discussion, Mr. Alvarez presumes Mr. Minthorne is no longer interested in the southwest Virginia regional supervisor position. If his understanding is correct, Mr. Alvarez asks Mr. Minthorne to advise Ms. Linda Cole in HR so he won't be set up for an interview for the regional supervisor position.

On January 7, 2008, Mr. Minthorne provides an FBI agent his recollection of his January 4, 2008 mediation meeting with Mr. Alvarez which addressed multiple issues and also involved a discussion about Mr. Minthorne's employment opportunities, including retirement. Mr. Minthorne states that he informed Mr. Alvarez about contacting the FBI.

During the beginning of the month, Mr. Bailey wants Mr. Minthorne to sign the special projects coordinator EWP promptly and indicates that Mr. Minthorne is behaving like a person suing his neighbor. Mr. Minthorne then meets with OPIS supervisors. He asks if they really need him to do that type of work, but they didn't know what he was supposed to be doing. Other managers indicate that they want him in that job, which leads Mr. Minthorne to consider staying in the position.

In another meeting, Mr. Alvarez tells Mr. Minthorne that he is needed in the special projects position because he is the most knowledgeable person in OPIS regarding its programs. He indicates that Mr. Minthorne is also well qualified to start working on trend analysis which the office also needs. Mr. Minthorne requests two assurances: a) the position is not targeted for layoff, and b) it is a real position. Mr. Alvarez provides both assurances.

On January 10, 2008, Mr. Minthorne, Mr. Bailey, and Mr. Alvarez sign the EWP for the work title - Special Projects Coordinator, dated September 1, 2007. In that capacity, Mr. Minthorne is responsible for researching, drafting, and maintaining administrative and operational policies and procedures for OPIS. He also provides assistance for accreditation, reviews laws and regulations assigned to OPIS for consistency, suggests changes as needed, ensures compliance with the Administrative Procedures Act, and upon analysis of OPIS procedures, recommends administrative and operational improvements. His performance measure is "performs assigned duties and tasks in a timely manner with no significant mistakes."

On January 11, 2008, Mr. Minthorne informs an FBI agent that at a January 10, 2008 mediation meeting he was permanently assigned to work at home as a special projects coordinator. At the meeting, Mr. Minthorne also had a conversation with Mr. Bailey about motor fuel irregularities.

On January 21, 2008, Mr. Alvarez responds to several issues raised by VDACS Deputy Commissioner, Mr. Don Blankenship, concerning the annual motor fuel issues report. In late 2005 and early 2006, ethanol blended fuels became part of VDACS' fuel quality inspection program. Results throughout the state revealed octane deficiencies ranging from minor to significant. Mr. Alvarez assigned Mr. Diggs to look into the issue. However, Mr. Diggs did not discover any widespread effort to defraud the public. Instead, after conversations with laboratory personnel, Mr. Alvarez came to the conclusion that the issue was due to new production challenges associated with the increased use of ethanol. Additionally, in a late 2006 meeting, an ExxonMobil representative acknowledged the problem was a quality control issue and then described their efforts to correct the situation. Since the issue appeared to be production-related, Mr. Diggs recommended against conducting a formal investigation. Mr. Alvarez commits to a renewed effort to look at the issue again.

## February 2008

On February 4, 2008, a telecommuting agreement for Mr. Minthorne is approved.

On February 4, 2008, the governor's chief of staff also issues a memorandum regarding agency cost savings. Noting that the worsening national economy had adversely affected Virginia's revenue collection, and although the actual downward adjustment was not yet known, the chief of staff directs the following immediate actions: with few exceptions, all new hires required cabinet secretary approval; agencies must refrain from applying for staff adjustment/consulting contracts; agencies will stop making commitments for discretionary travel and training; and agencies will stop discretionary spending on equipment, software, and furniture.

On February 12, 2008, the governor's chief of staff advises cabinet secretaries and the heads of executive branch agencies that the revised revenue forecast required the preparation of a budget plan that reflects a 0.5% reduction in general funds for FY 2008, with a 3.0% reduction for the next two fiscal years. During the development of agency reduction plans, the following guidelines are applicable: a) eliminate low priority or underperforming activities, b) avoid one-time savings and focus on long-term reductions, c) consider up-front costs to achieve long-term savings, d) do not curtail or eliminate core services or programs, e) obtain savings from general fund appropriations, f) avoid reductions that increase costs for other agencies, and g) remember lay-offs generate costs including severance benefits and leave balance payments. The chief of staff also informs the agencies of the state personnel policies applicable to layoffs, including *Policy 1.30 – Layoff*.

According to *Policy 1.30 – Layoff*, in making the lay off decision, the agency must determine the factors that will guide the layoff process and "identify employees for layoff in a manner consistent with their business needs and the provisions of the policy manual." As part of the layoff sequence, the agency identifies the work that is no longer needed and selects employees for layoff within the same role, "who are performing substantially the same work" in the following sequence: wage employees, part-time restricted employees, part-time classified employees, and least senior through the most senior full-time classified employees. In defining "substantially the same work," the policy manual indicates that in addition to role title, work title and the EWP may be considered.

On February 12, 2008, Mr. Blankenship also emphasizes to the VDACS strategic management team that the chief of staff's memorandum on a pending shortfall in state revenue contains required cost savings in hiring, travel, staff augmentation/consulting, and purchases. Consequently, approvals will be based on maintaining essential services and business necessity.

### **Through March 2008**

Mr. Minthorne works on motor fuel and ethanol regulations, bringing them up to EPA standards. He believes that his work is viable and he feels that he is contributing to the agency.

On March 26, 2008, Mr. Blankenship advises the VDACS strategic management team that due to additional funding provided to the governor, their previously submitted plans for a 3% reduction in upcoming fiscal years would be adjusted downward to 1.5%.

### **May 2008**

Mr. Minthorne tries to drum up policies to be addressed on his own. He continues to believe issues exist between the motor fuels department and fuel distributors.

### **June 2008**

On June 12, 2008, Mr. Minthorne presents numerous allegations to a state senator, in part alleging that the diversion of special funds is detrimental OPIS' ability to conduct effective investigations. Specifically, he alleges that as of April 2008, OPIS has identified hundreds of violations of state motor fuel laws, some of which concern ethanol blended fuels that also violate "the Federal Clean Air Act and 40 C.F.R. Part 80," but there have been no criminal proceedings and "very few civil penalties" imposed. In addition to the lack of diligent investigations, Mr. Minthorne further claims interference with state investigations into the failure of motor fuels to meet requisite standards. As an example, Mr. Minthorne notes a meeting with officials from ExxonMobil by Mr. Alvarez, without Mr. Minthorne's knowledge, concerning a case Mr. Minthorne had been assigned to investigate. Mr. Minthorne also provides examples of alleged actual and potential conflict of interest among present and past state officials, including Mr. Alvarez, and presents several claims of retaliation against himself and other state employees by the state agency.

On June 23, 2008, a legislative aide to the state senator informs Mr. Minthorne that a state auditor is looking into his allegations.

### **July 2008**

On July 14, 2008, Mr. Minthorne advises a state legislative delegate of numerous issues with VDACS/OPIS, including the failure to investigate over 300 identified violations of motor fuel laws. He also points out numerous other alleged failures and derelictions by the agency in regards to its duties and obligations, including the failure of OPIS to diligently investigate noted violations and take appropriate enforcement actions. Mr. Minthorne alleges that Mr. Alvarez has deliberately interfered with motor fuel violation investigations by meeting in late 2006 with, and providing information to, officials of ExxonMobil, which was under investigation concerning ethanol blended fuels. Additionally, "many of the ethanol violations . . . are apparent violations of [state law] and the Clean Air Act and 40 C.F.R. Part 80." Further, Mr. Minthorne notes that due to his activities, he has been stripped of his position and sent home to work special assignments.

On July 15, 2008, the state delegate asks Mr. Minthorne for the names and locations of companies supplying ethanol to Virginia distribution centers. In response, Mr. Minthorne goes to the fuel terminal without telling his supervisors.

On July 24, 2008, Mr. Minthorne complains to the state comptroller about the release of his Hotline complaint case file which contained his identification information to the VDACS deputy commissioner, Mr. Blankenship. He believes the submission was a breach of confidentiality and requests that the state comptroller retrieve the case file copy. He also asks that further investigation be conducted.

On July 25, 2008, Mr. Bailey informs Mr. Minthorne that he has learned that Mr. Minthorne visited the Motiva Enterprises terminal a couple days earlier. He asks Mr. Minthorne about the purpose of the visit and requests that Mr. Minthorne keep him informed of his "travels." Mr. Minthorne responds that he was asked by a member of the General Assembly to provide the name and locations of ethanol suppliers to the fuel distribution facilities in Virginia.

On July 28, 2008, Mr. Minthorne sends Mr. Bailey the e-mail request from the state representative requesting ethanol information. Mr. Minthorne also asks that he be included in the internal audit of the Metrology Laboratory.

### **August 2008**

On August 5, 2008, the state comptroller responds to Mr. Minthorne's July 24, 2008 complaint about the release of his Hotline file and indicates that his staff is attempting to retrieve the case file. And, the state comptroller notes the subject matter of the Hotline has already been investigated.

Also on August 5, 2008, in a meeting with OPIS management staff, Mr. Bailey notes the expenses associated with the sampling of fuel samples, including \$36,000.00 in shipping costs. Mr. Minthorne asks if he could discuss funding with DCLS. Mr. Bailey responds that they would not do that. In response, Mr. Minthorne asks what his role is and why he wasn't given any work. Mr. Bailey does not respond. When Mr. Minthorne asks why they were spending money to ship and test fuel samples but still not enforcing the motor fuel laws, or conducting sampling at the terminal, Mr. Bailey again does not respond.

On August 17, 2008, Mr. Minthorne sends Mr. Bailey 29 comments regarding OPIS' strategic plan and highlights in some detail numerous inadequacies, limitations, and conflicts with regulations. Several of the OPIS strategies are also incomplete and demonstrate a lack of effort. CX 18

### **September 2008**

On September 5, 2008, Ms. Sandy Adams in VDACS finance sends Mr. Alvarez a budget reduction request for three plans associated with reductions in the general funds of 5%, 10%, and 15% for FY 2009 (July 1, 2008 to June 30, 2009) and FY 2010 (July 1, 2009 to June 30, 2010) with specific reductions prioritized with "Number 1 causing the least impact." She attaches

budget reduction guidelines and requests a submission by September 17, 2008. The attached budget reduction guidelines, include: a) consider eliminating low priorities with a focus on underperforming programs and services, b) look for efficiencies through technology, c) focus on on-going savings rather than one-time savings, d) do not curtail core services or programs, e) focus on overall state savings and avoid reductions that increase costs in other agencies, and f) remember savings from layoffs also generate costs.

In response, Mr. Alvarez determines the dollar amount of reductions for DCP's programs for each of the three possible levels of general fund reductions and then directs the program managers, including Mr. Bailey, to develop three respective strategies through reductions in expenses or elimination of positions, in accordance with the guidelines. Under these guidelines, in ranking reductions from having the least impact to the most impact in the program's function and services, discretionary funds for travel, office costs, as well as fund transfer usually are ranked first as having the least impact. Then, the elimination of vacant positions are considered before occupied positions. Seniority becomes a consideration if individuals are in the same program and doing the same type of work. And, administrative positions are considered before direct service positions. Mr. Alvarez gives the program managers "complete" discretion on how they reach their budget goals. Mr. Alvarez does not direct any specific item in any program for a budget cut.

#### OPIS Budget Reduction Plans

Sometime prior to September 28, 2008, Mr. Bailey develops his budget reduction strategies for FY 2009. Since OPIS is already stressed in terms of liquid or operational money, he has to look at cutting positions, while at the same time trying to find items that have the least impact on field operations, which conducted most of OPIS' inspections and already had several vacancies. In particular, his goal is not to eliminate any field positions. At the time, besides Mr. Minthorne, OPIS has several compliances/safety officer IVs, but they all have different duties than Mr. Minthorne, so Mr. Bailey does not consider seniority.

At the end of his process, Mr. Bailey presents his budget reduction plan to DCP with prioritized line items for 5%, 10%, and 15% reductions in the FY 2009 general fund. For the 5% reduction the following four priorities (least to most impact on function) are listed, with the associated savings for each of the next two fiscal years: #1 – supplant general fund personnel/operational costs with the non-general fund, \$58,360.00; #2 – restrict travel, \$39,874.00; #3 – restrict training costs, \$40,000.00; and, #4 – reduce equipment replacement funding, \$14,905.00. No positions are identified for elimination.

The plan for 10% reduction includes eight more line item reductions, including an additional funding of personnel/operations costs with non-general funds at priority #5, \$73,647.00; additional travel and training reductions in the next two priorities, #6 and #7, a total of \$16,676.00; the elimination of a wage position at #8, \$21,840.00; and the elimination of one OPIS FTE (Mr. Minthorne) at priority #9, for a savings of \$214.00 in FY 2009 and \$54,329.00 in FY 2010. The final three priorities in the 10% reduction plan (#10 to #12) relate to savings in sampling costs, additional supplanting of general fund personnel costs with the non-general funds, and further reductions in travel costs.

The 15% reduction strategy adds five more reductions in sampling costs, overnight travel, equipment funding, as well as additional funding of personnel/operations costs with non-general funds, and supplanting an OPIS general fund FTE with non-general funds.

### DCP Budget Reduction Plans

Mr. Frank M. Fulgham, DCP Business Manager, combines the three budget reduction strategies submitted by the four individual program areas in DCP, including OPIS, into one plan for DCP for each of the three budget reduction levels of 5%, 10%, and 15%. The program line items are ranked according to potential program impact on DCP with the number one priority indicating the least impact. Specifically, Mr. Fulgham merges each of three program budget reduction worksheets, beginning with those having the least impact and marked #1. He then realigns the priority rankings to meet the assigned DCP 5%, 10%, and 15% target reduction amounts.

On September 28, 2008, DCP completes its three budget plans for 5%, 10%, and 15% reduction in the general fund for FY 2009. In the DCP 5% reduction plan, the elimination of one OPIS position (Mr. Minthorne), with a net savings of \$214.00 in FY 2009 and \$54,329.00 in FY 2010 is designated as #1 out of seven DCP line item reductions (least impact to most impact on function). As the #2 priority, one OPIS position is changed from general funds to non-general funds. Reductions in OPIS training and travel costs are listed as #6 and #7.<sup>20</sup>

The DCP 10% reduction plan adds 10 more line items, including the following OPIS line items with the associated DCP priority ranking numbers: reduction in equipment replacement, #8; transfer of one position from general funds to non-general funds, #11; deference of OPIS sampling costs, #12, additional travel restrictions, #13; a change in personnel costs to non-general funds, #14; and elimination of one wage position, #15.<sup>21</sup>

Finally, the 12 additional line items contained in the DCP 15% reduction plan include reduction in OPIS equipment funding, #18, reduction in OPIS FY 2010 sampling costs, #20, additional reductions in OPIS travel costs and equipment funding, #21 to #23, change of OPIS personnel costs to non-general funds, #23, and replacing two OPIS general fund FTEs with non-general funds, #27.<sup>22</sup>

Mr. Alvarez approves the DCP budget reduction strategies and forwards them to VDACS. Once the budget plans leave DCP, Mr. Alvarez has no additional input on the subsequent budget cuts established by VDACS and the governor's office.

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<sup>20</sup>As previously noted, the line items associated with priorities #3 to #5 are blacked out in the DCP budget reduction working papers in the evidentiary record.

<sup>21</sup>The following DCP priorities line items are blacked out: #9, #10, #13, and #17.

<sup>22</sup>Again, the following DCP priority line items are blacked out: #19, #25, #26, #28, and #29.

## VDACS Budget Reduction Plans

When VDACS receives the reduction plans from its divisions, including DCP, the deputy commissioner, and Ms. Sandy Adams, the VDACS budget director, go through the strategies line by line and identify 46 items in priority from the least difficult item to cut or eliminate to the most difficult.

In its 15% budget reduction plan, VDACS lists 46 line item reductions in order of priority. Within the first 38 line item reductions, 15 vacant positions are eliminated – priorities #28 to #32, #34, and #36 to #38. Within the remaining eight line item reductions, an additional 53 occupied positions are identified for elimination: supervisor in market news office – #39; administrative position in OPIS (Mr. Minthorne) – #40; administrative position in marketing – #41; administrative position in animal food industry service ("AFIS") – #42; wage employee position in OPIS – #43; wage employee position in Onley office – #44; and 47 inspector positions in the state meat and poultry inspection program due to transfer of full responsibility for inspections to the federal government – #45. No equipment funding reductions are listed.

The VDACS 15% budget reduction plan includes the following specific reductions for OPIS: a) restrict and defer OPIS travel – #6; b) reduce training costs – #9; c) supplant OPIS general fund personnel costs with non-general funds – #18 and #21; d) eliminate one OPIS FTE (Mr. Minthorne) – #40; and e) eliminate a wage position – #43.

In its 15% budget reduction summary for FY 2010, VDACS includes another 29.3 FTEs for elimination. Seven of those reductions are in DCP.

Upon completion, VDACS sends its three budget strategies for 5%, 10%, and 15% general fund reductions to the governor's office.

## Governor's Budget Reduction

For FY 2009, the governor's budget includes a 12.9% reduction in general funds. The following three non-personnel line items reductions in the VDACS 15% budget reduction plan are not included in the governor's final budget reduction for FY 2009: reduction in food sample testing – #10; elimination of funding for farmland preservation – #14; and reduction in specialty agriculture – #15. The following personnel reductions also are not in the final plan approved by the governor: supervisor in market news office – #39; administrative position in animal food industry service ("AFIS") – #42; and 47 inspector positions in the state meat and poultry inspection program – #45.

All of the remaining line item reductions submitted by VDACS are accepted by the governor's office and contained in the final governor's FY 2009 budget. In regards to personnel positions, the VDACS line item reductions include: 15 vacant positions – #28 to #32, #34, and #36 to #38; occupied administrative position in OPIS (Mr. Minthorne) – #40; occupied administrative position in marketing – #41; occupied wage employee position in OPIS – #43; and wage employee position in Onley office – #44.

## October 2008

On October 8, 2008, Mr. Bailey calls Mr. Minthorne and tells him the governor will announce budget cuts the next day and his position may be targeted.

On October 9, 2008, Mr. Minthorne files a grievance challenging his layoff as retaliatory and a misapplication of policy.

On October 10, 2008, Ms. Jackson signs a letter to Mr. Minthorne informing him that due to the state's severe budget crisis his division had determined that his position will be effected by a layoff. As official notice, she attaches a "first" notice of layoff which indicates that Mr. Minthorne is being placed on layoff for 12 months, effective November 9, 2008, because no placement opportunity is available to him. Ms. Jackson further states, "At the present time, we do not have a placement option available to you. If a placement option becomes available prior to November 9, 2008, I will notify you. If not, you will be placed on layoff for up to twelve months and entitled to severance benefits." She also attaches an inter-agency placement screening form (yellow card) which gives Mr. Minthorne preference over all other applicants except internal candidates and employees with blue preferential hiring cards.

On October 13, 2008 Mr. Minthorne contacts OPIS HR about the layoff. He learns that the layoff involves two steps. First, he will receive an initial notification of the layoff with a preferential hiring card, which will allow him to seek employment in another state agency if he meets the minimal requirements. Second, if there is no other option in sight for a recall or rehire, a final notice of layoff will be issued.

On October 14, 2008, having filed a grievance concerning his layoff, Mr. Minthorne requests that Mr. Alvarez provide in accordance with the grievance procedures manual the budget reduction plans for OPIS and DCP that have been provided to the governor's office since June 2008. He also seeks any documents concerning open positions in the agency, the final budget for FY 2009; notes from Mr. Alvarez's meeting with an ExxonMobil official in late 2006 that were mentioned in a January 21, 2008 e-mail; and all public records relating to the criteria the agency used to determine the employees to be impacted by layoff actions, factors used in selection of employees for layoff, and the process VDACS used in determining to layoff employees.

On October 17, 2008, Mr. Minthorne receives the first notice of layoff letter from Ms. Jackson with a yellow preferential hiring card.

On October 20, 2008, Mr. Minthorne is told to turn in all his OPIS equipment. He later meets with Mr. Bailey and Ms. Jackson and turns in his computer and office equipment. His OPIS e-mail is shut down and he stops working while in "pending layoff" status, which means if a recall occurs, he'll be pulled back to work. At the same time, through November 9, 2008, Mr. Minthorne continues to receive his regular pay, which is \$52,300.00 a year.

On October 22, 2008, Mr. Minthorne notifies VDACS Commissioner, Mr. Todd Haymore, of the failure by VDACS and Mr. Alvarez to provide the grievance documentation that he requested.

On October 24, 2008, Mr. Haymore informs the members of his strategic management team that the governor's office has recently released the previously confidential agency 5%, 10%, and 15% budget reduction plans to the public. Due to the public disclosure, individuals will become aware of the positions identified for elimination by VDACS that were not in the final plan approved by the governor, especially under the 15% reduction plan, which may cause sensitive personnel and morale issues. However, the position eliminations represented "hard choices" and did not mean the positions weren't valued by the agency.

On October 28, 2008, the agency provides Mr. Minthorne some of the requested documentation.

On October 28 and 29, 2008, in addition to renewing his requests for grievance documentation, Mr. Minthorne seeks from Mr. Alvarez additional documentation relating to previous correspondence from Mr. Alvarez, including the position description for the business manager vacancy; documents concerning the OPIS Program Manager's evaluation of OPIS' core services and the compilation of different budget strategies; the DCP business manager's compiled reduction strategies submitted by OPIS; the division director's approval of the aggregated budget reduction strategy submitted by the agency's budget director; and other miscellaneous documentation.

On October 31, 2008, Ms. Jackson responds to specific portions of Mr. Minthorne's multiple documentation requests and indicates that while the budget strategies for 5%, 10%, and 15% are publically available, the OPIS and DCP budget strategies are confidential working papers that can not be released. She also indicates that no documents exist regarding the late 2006 ExxonMobil meeting.

On October 31, 2008, Mr. Minthorne advises Mr. Haymore of VDACS' continued non-compliance with his document requests. Although Mr. Minthorne had been provided some documentation, not all of his requests have been satisfied.

### **November 2008**

On November 3, 2008, VDACS Commissioner Haymore responds to Mr. Minthorne's renewed non-compliance complaint and provides several requested documents.

On November 4, 2008, Ms. Jackson signs the final notice of layoff for Mr. Minthorne, effective November 9, 2008. The final notice places Mr. Minthorne in leave without pay-layoff status for 12 months because there is no placement opportunity available for him in the division. Ms. Jackson also encloses five blue preferential hiring cards which are valid during the duration of his "leave without pay-layoff" status.

Also, on November 4, 2008, Mr. Minthorne advises Ms. Jones, a VDACS benefits counselor, that he would like to receive payment for his accrued annual leave in the amount of about \$7,200.00 at the time of his layoff on November 9, 2008, as provided under the state's layoff policy. Ms. Jones replies that he should receive his check by December 1, 2008.

On November 9, 2008 because "there is no placement opportunity available to you under the stated layoff policy," VDACS places Mr. Minthorne in leave without pay-layoff status. At the time of his layoff, Mr. Minthorne's role is a "Compliance/Safety Officer IV." The state stops making its 5% contribution to his retirement.

At the time of his separation, VDACS HR prepares the necessary paperwork for the payment of Mr. Minthorne's annual leave and sends the documentation to Ms. Linda Deale, the VDACS payroll supervisor. Ms. Deale then "overlooks" the documentation and does not take any action on Mr. Minthorne's leave payout request.

In a letter postmarked November 26, 2008, but dated November 12, 2008, Ms. Linda Deale advises Mr. Minthorne that under the Workforce Transition Act, he will receive a severance payout equal to 36 weeks of his current pay, beginning the week of November 10 – 24, 2008, and running through 2009. The state will also continue to contribute to his health care insurance through November 30, 2009. Due to her administrative oversight, Ms. Deale indicates that his payment for annual leave will be processed during the next leave period, December 16, 2008.

### **December 2008**

On December 5, 2008, Mr. Minthorne files his first employee protection CAA complaint, 2009 CAA 4.

On December 10, 2008, Mr. Minthorne is hired by VEC as an unemployment tax representative with an annual salary of \$47,500.00. Due to the rehire by another state agency, Mr. Minthorne is no longer eligible for severance pay.

On December 15, 2008, Ms. Jackson offers the position of Scientist I, seed purity testing coordinator, at a semi-monthly salary of \$1,953.14, to an individual who accepts the employment offer the next day. Mr. Minthorne does not meet the minimum qualifications for this job.

On December 18, 2008, since he has not received payment for his annual leave, Mr. Minthorne asks Ms. Turner in VEC HR to check to see if his annual and sick leave balances have been transferred from VDACS.

On December 29, 2008, OSHA notifies Virginia of Mr. Minthorne's first CAA complaint, 2009 CAA 4.

## January 2009

On January 13, 2009, VEC notifies VDACS that Mr. Minthorne transferred to VEC on December 10, 2008. VEC also requests that VDACS forward Mr. Minthorne's personnel records.

Ms. Jackson confirms Mr. Minthorne's employment with VEC and directs Ms. Linda Deale to stop his severance payment. VDACS finance then notifies Mr. Minthorne that he has been overpaid \$1,803.35 in severance benefits for the second week of December 2008 due to his re-employment with VEC. Consequently, he must repay the severance overpayment.

Ms. Linda Cole advises Mr. Alvarez that she has just discovered that Mr. Minthorne was rehired by VEC on December 10, 2008. Due to VEC's failure to notify VDACS of his re-employment, Mr. Minthorne was overpaid in severance benefits, which she will attempt to collect.

Later, when Mr. Minthorne contacts VEC HR about the missing leave payment, they inform him that VDACS is refusing to provide his personnel records.

On January 20, 2008, Mr. Minthorne reviews his leave balance report from the Virginia DOA which indicates that as of January 9, 2009, his 288 hours of annual leave have been "used."

On January 23, 2008, a VDACS position announcement for a statistical analyst to administer surveys and conduct data analysis, with a minimum hiring salary of \$31,352.00, closes.

On January 24, 2008, Mr. Minthorne files his second whistleblower CAA complaint, 2009 CAA 6.

On January 26, 2009, VEC acknowledges receipt of Mr. Minthorne's personnel file.

On January 28, 2009, 5:28 p.m., Ms. Linda Cole tells Ms. Linda Deale that she has received notification that Mr. Minthorne has filed another complaint with DOL concerning the payout for his annual leave. Ms. Cole is uncertain of the specific allegations but nevertheless asks Ms. Deale to send her copies of any e-mails and notes involving his annual leave request.

On January 29, 2009, 9:58 a.m., Ms. Deale advises Ms. Cole that she is probably part of Mr. Minthorne's DOL complaint because Mr. Minthorne had not yet been paid for his annual leave. His request "was overlooked." She believes this may be a good situation since she can address the severance overpayment issue by deducting it from the leave payout.

On January 29, 2009, 10:10 a.m., Ms. Cole tells Ms. Deale that Mr. Minthorne should be paid for his 288 hours of annual leave because that is what he requested. However, she would let Ms. Karen Jackson make the decision. Ms. Cole sends a copy of the e-mail to Ms. Jackson.

On January 29, 2009, 10:21 a.m., Ms. Jackson responds to Ms. Cole, "This is so frustrating, I can't believe that his leave payment was overlooked. It makes us look like a bunch of idiots."

On January 29, 2009, 10:35 a.m., Ms. Cole replies to Ms. Jackson, "Yes it does."

On January 29, 2009, 10:39 a.m., Ms. Jackson tells Ms. Cole to contact Mr. Minthorne and ask if he still wants the payout or whether he'd like the leave transferred to VEC.

On January 29, 2009, 2:28 p.m., Ms. Cole informs Ms. Deale about her phone call with Mr. Minthorne. He wanted payment of his 288 hours of leave and wanted to know why his personnel records hadn't been transferred yet. He alleged VDACS was refusing to send them to VEC. Ms. Cole told Mr. Minthorne that the record transfer was an HR function. Since Mr. Minthorne requested payment, Ms. Cole agreed to send the check overnight. Mr. Minthorne also indicated that once he received the leave check, he would reimburse Virginia for the overpaid severance pay.

On January 30, 2009, in response to an inquiry from Ms. Jackson, Ms. Cole advises that VDACS didn't receive a request from VEC for Mr. Minthorne's personnel file until January 13, 2009 and that it was forwarded as requested on January 22, 2009.

### **February 2009**

On February 3, 2009, Mr. Minthorne receives payment for his annual leave.

On February 13, 2009, a VDACS position announcement for an agricultural specialist to sample, grade, and certify the quality of processed fruit and vegetables, with a minimum hiring salary of \$31,352.00, closes.

On February 19, 2009, while noting partial compliance with Mr. Minthorne's document requests on October 14, 28, and 29, 2008, the EDR Director requires the agency to provide additional documentation as to the agency's decision to identify his position for elimination and which led to the layoff action.

### **March 2009**

On March 23, 2009, while noting the agency attempted to comply with her February 19, 2009 order, the EDR Director concludes the agency has not completely complied. As a result, the Director orders the agency to provide all relevant, non-privileged documents concerning Mr. Minthorne's layoff.

### **2008 to 2010**

During the course of several budget cuts for three fiscal years by the governor's office, Virginia eliminates over 60 general fund positions, which leads to several layoffs, under criteria similar to the criteria used in Mr. Minthorne's case.

## Issue # 1 – Timeliness of First Complaint

In my May 14, 2009 Dismissal of Mr. Minthorne's CAA complaints, I deferred a decision regarding the timeliness of Mr. Minthorne's first CAA complaint absent an evidentiary hearing. Consequently, as I advised the parties at the hearing, TR, p. 14, I now return to consider whether Mr. Minthorne's first complaint, 2009 CAA 4, was timely filed on December 8, 2008.

Under 42 U.S.C. § 7622(b)(1) and 29 C.F.R. § 24.193(d)(1), a complainant alleging discrimination in violation of the CAA employee protection provision must file his complaint within 30 days after the violation occurs. Absent equitable relief, failure to meet the statutory filing deadline precludes consideration of the CAA complaint. *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, ALJ No. 1995 CAA 015, slip op. at 8 (ARB Nov. 27, 1996).<sup>23</sup>

Generally, in determining timeliness, the relevant date is the date when the employer communicates to the employee its intent to take an adverse employment action, rather than the date on which the employee experiences the adverse consequences of the employer's action. *Udofot v. NASA/Goddard Space Ctr.*, ARB No. 10-027, ALJ Case No. 2009 CAA 07, slip op. at 4 (ARB Dec. 20, 2011). The statute of limitations runs from the date the employee receives "final, definitive, and unequivocal notice" of an adverse action. *See, e.g., Rollins, v. Am. Airlines*, ARB No. 04-140, ALJ No. 2004 AIR 009, slip op. at 2-3 (ARB Apr. 3, 2007 (re-issued)); *Halpern v. XL Capital, Ltd.*, ARB No. 04-120, ALJ No. 2004 SOX 054, slip op. at 3 (ARB Aug. 31, 2005). "Final" and "definitive" notice is a communication that is decisive or conclusive, i.e., leaving no further chance for action, discussion, or change. "Unequivocal" notice means communication that is not ambiguous, i.e., free of misleading possibilities. *Larry v. The Detroit Edison Co.*, 1986 ERA 032, slip op. at 8 (Sec'y June 28, 1991). Consequently, when the adverse action involves a reduction in force, the discriminatory act which triggers the statute of limitations is the employer's notifying the employee of the reduction in force, rather than the last day of employment. *Belt v. United States Enrichment Corp.*, ARB No. 02-117, ALJ No. 2001 ERA 19 (ARB Feb. 26, 2004). Likewise, the filing limitation period begins to run when the employee is notified of his layoff, rather than its effective date. *See Devine v. Blue Star Enterprises, Inc.*, ARB No. 04-109, ALJ No. 2004 ERA 10 (ARB Aug. 31, 2006).

In applying these principles to Mr. Minthorne's case, I first note that although Mr. Bailey informed Mr. Minthorne on October 8, 2008 that his special projects coordinator position was targeted in the governor's upcoming budget reductions, and Mr. Minthorne informally obtained information about the associated layoff process on October 13, 2008, he did not receive the first notice of layoff until October 17, 2008. At that time, he was officially advised that he would be laid off effective on November 9, 2008. At first pass, in light of the *Devine* case cited above, the October 17, 2008 layoff notice would appear to be the trigger date for starting the 30-day time

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<sup>23</sup>Citing *School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981), the ARB observed that the 30-day statutory limitations period for filing of environmental employee protection complaints is extremely brief, but that the filing period was the mandate of Congress. The equitable tolling doctrine does not permit an agency to disregard a limitations period merely because it bars what may otherwise be a meritorious cause; restrictions on equitable tolling must be scrupulously observed.

filing requirement which would render Mr. Minthorne's December 5, 2008 CAA complaint, 2009 CAA 4, untimely.

However, in this particular case, based on an option under the state's *Policy 1.30 – Layoff*, VDACS elected to provide Mr. Minthorne with a "first" initial notice of layoff on October 17, 2009, and yellow pre-separation preferential hiring cards, rather than give him a "final" notice with an effective date of November 9, 2008, and blue post-separation preferential hiring cards. This distinction is significant because as Ms. Jackson's October 10, 2009 cover letter to the first notice of layoff makes clear, although VDACS did not have another position for him as of October 17, 2008, he would be placed in layoff status only if another position within VDACS did not become available by November 9, 2008.<sup>24</sup> Additionally, if through the use of the yellow preferential hiring cards Mr. Minthorne found another state job, he would not be laid off.<sup>25</sup> In other words, the finality of VDACS' decision to layoff Mr. Minthorne would be predicated on a determination to be made as of November 9, 2008 that no employment opportunity existed for him within VDACS. Until then, the layoff decision was conditional due to the possibility of continued employment.

While the real-world likelihood that such a position would be found before November 9, 2008 was exceptionally slight given the budget reduction context within which the notice arose, the October 17, 2009 first notice of layoff nevertheless held out the possibility through November 9, 2008 that Mr. Minthorne would not actually be laid off. Consequently, because the October 17, 2008 first initial notice did not reflect a final and definitive determination that Mr. Minthorne would be laid off, the notice did not trigger the 30-day timing filing requirement. Instead, November 9, 2008 started the 30-day statute of limitations for filing a CAA complaint. And, since Mr. Minthorne submitted his CAA complaint on December 5, 2008 and OSHA received it on December 8, 2008, Mr. Minthorne's first complaint, 2009 CAA 4, alleging a retaliatory layoff action is timely.

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<sup>24</sup>"If a placement option becomes available prior to November 9, 2008, I will notify you. If not, you will be placed on layoff for up to twelve months . . ."

<sup>25</sup>According to Ms. Jackson, up till the effective date of the layoff it was possible that Mr. Minthorne could have stayed employed with the state if another job had become available.

### Adjudication principles

Under the CAA's whistleblower provision, 42 U.S.C. § 7622(a), an employer may not discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee commenced or caused to be commenced a proceeding under the Act, testified or is about to testify in such a proceeding, or assisted/participated or is about to assist/participate in such a proceeding. In other words, the CAA's whistleblower provision prohibits an employer from discharging or discriminating against an employee for instituting proceedings for enforcement of the Act or carrying out the purposes of the Act, 29 C.F.R. §§ 24.102(a) and (b).<sup>26</sup>

To obtain protection under this provision a complainant must demonstrate by a preponderance of the evidence that his protected activity caused, or was a motivating factor in, an adverse action that he suffered. 29 C.F.R. § 24.109(b)(2); *Valenti v. Shintech, Inc.*, ARB No. 11-038, ALJ No. 2013 CAA 008, slip op. at 2 (ARB Sept. 19, 2012).<sup>27</sup> Consequently, to prevail on his whistleblower complaint, Mr. Minthorne must prove by a preponderance of the evidence that (1) he engaged in protected activity, (2) he suffered an adverse personnel action, and (3) his protected activity caused, or was a motivating factor in, the adverse action. The failure to prove any one of these elements necessarily requires dismissal of a whistleblower claim.<sup>28</sup>

In turn, an employer may avoid liability by demonstrating by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity. 29 C.F.R. § 24.109(b)(2); *Morris*, ARB No. 05-047, slip op. at 33; *Valenti*, ARB No. 11-038, slip op. at 2.

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<sup>26</sup>See also *Knox v. United States Dep't of Labor*, 434 F.3d 721 (4th Cir. 2006).

<sup>27</sup>See also *Morris v. LG&E Power Servs. LLC*, ARB No. 05-047, ALJ No. 2004 CAA 014, slip op. at 31 (ARB Feb. 28, 2007) (citation omitted).

<sup>28</sup>“A failure of proof on any one element of [a complainant's] claim means that his entire case must fail . . . .” *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Nos. 07-021, 07-022; ALJ No. 2004 SOX 011, slip op. at 3 (ARB Jan. 13, 2010), citing *Davis v. Rock Hard Aggregate, LLC*, ARB No. 07-041, ALJ No. 2007 STA 041 (ARB Mar. 27, 2009).

## **Issue # 2 – Protected Activity**

The CAA was enacted to preserve and protect the nation's air and public health. *Tomlinson v. E G & G Defense Materials, Inc.*, ARB Nos. 11-024,11-027, ALJ No. 2009 CAA 08, slip op. at 15 (ARB January 31, 2013). Congress determined the Act was necessary in part to “protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” 42 U.S.C. §§ 7401(b)(1); *see Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984) (purpose of the CAA is to protect the public health by controlling air pollution). Although the specific language of the CAA protects an individual who commences a “proceeding,” the ARB has construed the term “proceeding” broadly such that it encompasses all phases of a proceeding that relate to public health or the environment, “including the initial statement of the employee that points out a violation, whether or not it generates a formal or informal ‘proceeding.’” *Sasse v. USDOJ*, ARB Nos. 02-077, 02-078, 03-044, ALJ No. 98 CAA 007, slip op. at 7 (ARB Jan. 30, 2004), *aff’d sub. nom Sasse v. USDOL*, 409 F.3d 773 (6th Cir. 2005).

As a result, an employee engages in a CAA protected activity if he provides information “grounded in conditions constituting reasonably perceived violations,” of the Act, which may include the release of unsafe substances or toxins into the ambient air. *Carpenter v. Bishop Well Servs. Corp.*, ARB 07-060, ALJ No. 2006 ERA 035, slip op. at 6 (ARB Sept. 16, 2009), citing *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000 CAA 020, 2001 CAA 009, 011; slip op. at 9-11 (ARB June 30, 2004). Further, an “air pollutant” is defined as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into, or otherwise enters, the ambient air.” 42 U.S.C. § 7602(g). EPA regulations implementing the CAA define “ambient air” as “that portion of the atmosphere, external to buildings, to which the general public has access.” 40 C.F.R. § 50.1(e). Consequently, to constitute a protected activity, an employee’s complaint must be based upon a reasonable belief that the released hazard violates EPA regulations or poses a risk of fouling the outdoor air. *Kemp v. Volunteers of Am. of Pa., Inc.*, ARB No. 00-069, ALJ No. 2000 CAA 006, slip op. at 4 (ARB Dec. 18, 2000).

The protected activity cannot be based on “assumptions and speculation.” *McKoy v. N. Fork Servs. Joint Venture*, ARB No. 04-176, ALJ No. 2004 CAA 002, slip op. at 6 (ARB Apr. 30, 2007). Instead, the protected activity must be “grounded in conditions constituting reasonably perceived violations of the environmental acts,” *Evans v. EPA*, ARB No. 08-059, ALJ No. 2008 CAA 003, slip at 6 (ARB Apr. 30, 2010). That reasonable belief must be evaluated under subjective and objective standards. That is, the complainant “must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in [the complainant’s] circumstances having his training and experience.” *Melendez v. Exxon Chems. Ams.*, ARB No. 96-051, ALJ No. 1993 ERA 6, slip op. at 28, (ARB July 14, 2000). At the same time, the complainant need not prove that the hazard he perceived actually violated the environmental act. *McKoy*, ARB No. 04-176, slip op. at 6.

Regarding the nature of the protected activity, the Secretary and ARB, “have consistently held that the raising of internal concerns to an employer,<sup>29</sup> as well as the filing of formal complaints with external entities, are protected under the employee protection provisions.” *Melendez*, ARB No. 96-051, slip op. at 16.<sup>30</sup> An employee’s safety and health complaints, including complaints with OSHA, are considered protected activity “when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes.” *Melendez*, ARB No. 96-051, slip op. at 17.<sup>31</sup> Reports to legislative representatives, local authorities, and state agencies may also be protected under the Act. *Gutierrez v. Regents of the Univ. of California*, ARB No. 99-116, ALJ No. 1998 ERA 019 (ARB Nov. 13, 2002); *Helmstetter v. Pacific Gas & Electric Co.*, 91 TSC 001 (Sec’y Jan. 13, 1993); *Conley v. McClellan Air Force Base*, 84 WPC 001 (Sec’y Sept. 7, 1993).

With these principles in mind, I now turn to several prospective CAA protected activities in which Mr. Minthorne engaged during the fall of 2006, spring and early summer of 2007, and 2008.

## **Fall 2006**

### Activities

Following his September 2006 assignment as the lead investigator concerning allegations of motor fuel adulterations, Mr. Minthorne and his regional inspectors obtain multiple motor fuel samples to determine compliance with state and CAA requirements. Subsequent laboratory testing reveals several violations of the CAA requirements related to Reid vapor pressure, VOC (volatile organic compound) emissions, and excessive ethanol adulteration. The failure of these samples to meet the requisite standards indicates that the distribution and use of motor fuels in Virginia will cause emissions into the ambient air in violation of the CAA.

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<sup>29</sup>In *Sasse*, ARB Nos. 02-077, 02-078, 03-044, slip op. at 8, the ARB concluded that internal complaints presented during the course of a person's duties were also protected in light of the broad interpretation given to the CAA. The appellate court subsequently rejected that finding on the basis that because the complainant as an assistant United States attorney already had a fiduciary duty to enforce environmental laws, his report of a violation while performing his assigned duties was not protected under CAA. *Sasse*, 409 F.3d at 6. Considering the specific facts in *Sasse* upon which the appellate court relied, I will follow the ARB's general observation regarding the breadth of the CAA in protecting employees who raise environmental concerns even during the execution of their duties. See also *Robinson v. Morgan Stanley*, ARB No. 07-070, ALJ No. 2005 SOX 44, slip op. 13 (ARB Jan. 10, 2010) (the SOX whistleblower protection provision "does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties."). Even if the appellate court's determination in *Sasse* that action taken during the course of an individual's duties are not protected activities under the CAA was determined to be applicable in Mr. Minthorne's case, only his initial report in November 2006 to Mr. Delorme and Mr. Alvarez would not be protected. All the remaining actions taken by Mr. Minthorne went well beyond his duties as a regional supervisor in December 2006 and early 2007 and were clearly outside the scope of his employment in the special projects assignment after March 2007.

<sup>30</sup>See also *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86 CAA 1 (Sec’y Apr. 27, 1987) (order of remand) (the CAA's language is broad enough to protect internal employee complaints, and to prohibit employer discrimination because of such complaints).

<sup>31</sup>See also *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001 SWD 003, slip op. at 13 (ARB Mar. 31, 2005).

In November 2006, upon completion of his investigation, Mr. Minthorne presents his report and findings concerning the non-compliant motor fuel samples to Mr. Delorme, the OPIS program manager. Mr. Minthorne also reports his findings and concerns about the non-compliant motor fuel samples to Mr. Alvarez, the DCP director. At the end of November 2006, Mr. Minthorne also objects to Mr. Alvarez about Mr. Diggs' grant of an exemption to a major fuel distributor of the state motor fuel requirements regarding octane levels.

In December 2006, Mr. Minthorne raises his objection to Mr. Alvarez about the failure of OPIS and VDACS to further investigate the multiple motor fuel violations of the CAA that he discovered through his investigation and subsequent laboratory tests, and take enforcement action or conduct follow-up assessments to ensure compliance by the motor fuel distributors. Such inaction permits the petroleum distributors in Virginia to distribute non-compliant motor fuel which will allow the continued emission of air containment(s) that exceed CAA standards.

### Discussion

Based on Mr. Minthorne's credible testimony, as well as supportive documentation, and in the absence of probative contrary evidence, I find Mr. Minthorne's report of motor fuel samples that failed to comply with CAA standards to Mr. Delorme and Mr. Alvarez represented reasonably perceived violations of the Act that involved the release of unsafe substances or toxins into the ambient air. Additionally, Mr. Minthorne's complaint to Mr. Alvarez about insufficient investigation, enforcement, compliance follow-up, and exemptions was subjectively held and represented an objectively reasonable concern about continued release of unsafe substances and toxins into the ambient air due to the alleged inaction. Consequently, I find that these actions by Mr. Minthorne in November and December 2006 were protected activities under the CAA.

## **Spring/Summer 2007**

### Activities

In April 2007, Mr. Minthorne calls the State Employee Fraud, Waste, and Abuse Hotline ("Hotline"). Among his diverse complaints, Mr. Minthorne alleges that OPIS is not performing adequate follow-up on motor fuel violations. Although his identity is confidential at the time of his call, the case file associated with his hotline call, which includes his identity, is later released to VDACS.

In May 2007, during a meeting with Mr. Bailey, the new OPIS program manager, and Ms. Jackson, from VDACS HR, Mr. Minthorne again expresses his continuing concern about the discovered motor fuels violations, which leads Ms. Jackson to respond that Mr. Minthorne's standards for OPIS are too high.

In August 2007, Mr. Minthorne presents various allegations to the FBI, including his concerns about continuing violations of CAA requirements attributable to non-compliant motor fuel.

## Discussion

In regards to the hotline complaint, although an audit report subsequently determined that Mr. Minthorne's insufficient follow-up allegation was only partially substantiated because OPIS had adequately conducted follow-up of motor fuels violations from April 2007 to February 2008, Mr. Minthorne's perception at the time of his April 2007 hotline call was based on his experiences in the fall of 2006 and remained objectively reasonable a few months later. As a result, Mr. Minthorne's hotline complaint was a protected activity.

Similarly, for the reasons previously discussed, Mr. Minthorne's complaint to Mr. Bailey and Ms. Jackson in May 2007 about the unresolved motor fuel violations, as well as his August 2007 contact with the FBI about non-compliant motor fuel, were protected activities.

## **2008**

### Activities

On January 11, 2008, Mr. Minthorne contacts the FBI and alleges that VDACS upper management is making an effort not to have Reid vapor pressure tests conducted on ethanol blended fuels because they want to increase the use of ethanol fuel in Virginia and the tested ethanol fuel would not meet CAA standards.

On June 12, 2008, Mr. Minthorne presents numerous allegations to a state senator, in part alleging that the diversion of special funds is detrimental to effective investigations by OPIS. He also alleges that as of April 2008, OPIS has identified hundreds of violations of state motor fuel laws, some of which concerning ethanol blended fuels also violate "the Federal Clean Air Act and 40 C.F.R. Part 80," but there have been no criminal proceedings and "very few civil penalties" imposed. Mr. Minthorne further claims a lack of diligent investigations and even interference with state investigations into the failure of motor fuels to meet requisite standards. As an example, he references a meeting with officials from ExxonMobil by Mr. Alvarez, without Mr. Minthorne's knowledge, concerning a case Mr. Minthorne had been assigned to investigate.

On July 14, 2008, Mr. Minthorne advises a state legislative delegate of numerous issues with VDACS/OPIS, including the failure to investigate over 300 identified violations of motor fuel laws. He also claims that OPIS has failed to diligently investigate noted violations and take appropriate enforcement actions. Mr. Minthorne alleges that Mr. Alvarez has deliberately interfered with motor fuel violation investigations by meeting in late 2006 with, and providing information to, officials of ExxonMobil, which was under investigation concerning ethanol blended fuels. Additionally, "many of the ethanol violations . . . are apparent violations of [state law] and the Clean Air Act and 40 C.F.R. Part 80."

On August 5, 2008, in a meeting with OPIS management staff and Mr. Bailey, Mr. Minthorne asks why OPIS is spending money to ship and test fuel samples but still not enforcing the motor fuel laws, or conducting sampling at the terminal.

On December 5, 2008, Mr. Minthorne files his first CAA whistleblower complaint.

## Discussion

Considering the subject matter of the various CAA violation issues that Mr. Minthorne raised, including the failure to investigate noted violations to ensure compliance of motor fuel with CAA standards, I find Mr. Minthorne engaged in protected activities on January 11, June 12, and July 14, 2008 during his contacts with external authorities. Mr. Minthorne's internal complaint to Mr. Bailey on August 5, 2008 is also protected under the CAA. And, clearly by filing a CAA whistleblower complaint on December 5, 2008, Mr. Minthorne engaged in a protected activity.

### **Issue #3 – Adverse Action**

Another significant element in a CAA whistleblower complaint is that the complainant has suffered an adverse personnel action.

According to the ARB in *Melton v. Yellow Transportation, Inc.*, ARB No. 06-052, ALJ No. 2005 STA 2, slip op. at 24 (ARB Sept. 30, 2008), the applicable standard for a CAA adverse personnel action is the "materially adverse" standard established by the U.S. Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). An employer's action is considered to be materially adverse if it would dissuade a reasonable worker in the complainant's position from engaging in a protected activity. *Melton*, ARB No. 06-052, slip op. at 19-20. Under this standard, actions which cause an employee only temporary unhappiness that do not have an adverse effect on compensation, terms, conditions, or privileges of employment, and only represent petty, minor workplace tribulations, are not considered to be materially adverse. *Melton*, ARB No. 06-052, slip op. at 23.

In regards to the delayed payment for his annual leave, Mr. Minthorne suffered only a minimal financial loss of interest on the \$7,200.00 for his annual leave due to the six to eight week delay<sup>32</sup> in receiving his requested payment. And, under the particular circumstances in Mr. Minthorne's case, including his receipt of severance pay for the one month after being laid off, his subsequent re-employment with the state on December 10, 2008, and the administrative disconnects that apparently occurred between VDACS and VEC following his re-employment,<sup>33</sup> I do not consider VDACS' failure to promptly pay Mr. Minthorne for his annual leave as requested to be sufficiently materially adverse to dissuade a reasonable worker in the same situation from engaging in a protected activity under the CAA.<sup>34</sup>

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<sup>32</sup>December 1 or 15, 2008 to February 3, 2009.

<sup>33</sup>For example – VEC's delay in officially notifying VDACS until mid-January 2009 that Mr. Minthorne had been rehired on December 10, 2008.

<sup>34</sup>At the same time, Ms. Jackson's characterization about how the delayed payment made VDACS look does not seem inappropriate, RX 16.

On the other hand, in light of the materially adverse standard, I find that on November 9, 2008, when his layoff became effective, Mr. Minthorne suffered a very significant, and materially adverse, personnel action.<sup>35</sup>

#### **Issue # 4 – Causation**

Having established that he engaged in protected activities and suffered an adverse personnel action by being laid off, Mr. Minthorne's ability to obtain relief under the CAA whistleblower protection provision is predicated upon proving by a preponderance of the evidence that his protected activity(ies) either caused, or was a motivating factor in, his November 9, 2008 loss of employment by being laid off. 29 C.F.R. § 24.109(b)(2).

A motivating factor is conduct that is a "substantial factor" in causing an adverse action. *Onysko v. State of Utah, Dept. of Environmental Quality*, ARB No. 11-023, ALJ No. 2009 SDW 004, slip op. at 10 (ARB Jan. 23, 2013), citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977);<sup>36</sup> *Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). Additionally, a complainant may satisfy the causation element even if he is only able to establish that his protected activity was just one of several factors that motivated the respondent to take the adverse action. *Kanji v. Viejas Band of Kumeyaay Indians*, ARB No. 12-002, ALJ No. 2006 WPC 001, slip op at 6, fn. 4 (ARB Aug. 29, 2012). In other words, the standard is not whether the respondent had good, or legitimate, reasons to discriminate against the complainant; instead, the applicable inquiry is whether the discrimination was also motivated in any way by the protected activity. *Id.*

An implicit component of this element of proof, motivating factor, is knowledge of the protected activity. That is, preliminarily, the employer must have been aware of the protected activity in order that the protected activity could have been a motivating factor in the decision to take the adverse personnel action. At the same time, knowledge of a protected activity may be either actual or imputed. Regarding the latter category, relying on the "cat's paw" legal concept of liability recognized in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), the ARB concluded a complainant need not prove that the decision maker responsible for the adverse action actually knew of the protected activity if he can establish that any person advising the decision maker on the adverse action was aware of the protected activity. *Rudolph v. National Railroad Passenger Corp.*, ARB No. 11-037, ALJ No. 2009 FRS 015, slip op. at 17 (ARB Mar. 29, 2013).

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<sup>35</sup>I have also considered whether the various intermediate management decisions at OPIS, DCP, and VDACS that occurred during the budget reduction process might represent adverse actions standing alone. However, at the time the actions by OPIS, DCP, and VDACS were taken, their recommendations were confidential and not final. Thus those actions would not have had a direct deterrent effect on potential whistleblowers. Further, Mr. Minthorne's complaint of an impermissible, discriminatory layoff implicitly includes an allegation that his protected activities either caused, or were a contributing factor in, the various intermediate management recommendations that led to his being laid off on November 9, 2008. Consequently, I will still examine in detail during the causation analysis the intermediate management actions that produced the VDACS 15% budget reduction strategy upon which the governor finally acted.

<sup>36</sup>The ARB also noted that a complainant must prove more when showing that a protected activity was a "motivating" factor than when showing that such activity was a "contributing" factor under other statutes' whistleblower provisions.

The complainant may satisfy his burden of proof regarding causation through the use of direct evidence which conclusively links the protected activity and adverse personnel action and does not rely on inference. *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 06-041, 2005 ERA 006, slip op. at 9 (ARB Sept. 24, 2009); *see also Sievers v. Alaska Airlines, Inc.*, ARB No. 05-109, ALJ No. 2004 AIR 028, slip op. at 4-5 (ARB Jan. 20, 2008). Animus, or anger, towards the employee for engaging in a protected activity may constitute such direct evidence of discriminatory motive. *Speegle*, ARB No. 06-041, slip op. at 9; *see also Sievers*, ARB No. 05-109, slip op. at 4-5.

In the absence of direct evidence of causation, motivating factor may also be proven indirectly through circumstantial evidence. *Bechtel v. Competitive Technologies, Inc.*, ARB No. 09-952, ALJ No. 2005 SOX 033, slip op. at 13 (ARB Sept. 30, 2011), *aff'd sub. nom. Bechtel v. U.S. Dep't of Labor, Admin. Rev. Bd.*, 2d Cir. No. 11-4918 (2d Cir. Mar. 15, 2013); *Speegle*, ARB No. 06-041, slip op. at 9. Such circumstantial evidence may consist of temporal proximity between the protected activity and adverse personnel action. *Speegle*, ARB No. 06-041, slip op. at 9; *see also Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997). On the other hand, "when the protected activity and the adverse action are separated by an intervening event that independently could have caused the adverse action, the inference of causation becomes less likely because the intervening event also could have caused the adverse action." *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004 CAA 5, slip op. at 8 (ARB Nov. 29, 2006).

Inconsistent application of an employer's policies and disparate treatment between complainant and similarly situated employees who did not engage in protected activity may also provide circumstantial evidence of impermissible discrimination. *Bechtel*, ARB No. 09-952, slip op. at 13; *Speegle*, ARB No. 06-041, slip op. at 13. According to the ARB, to satisfy the "similarly situated" requirement, a complainant must establish that the complainant and other employees are similarly situated in all relevant aspects. *Bechtel*, ARB No. 09-952, slip op. at 13.

And, finally, circumstantial evidence of causation may be established if the employer's stated reason for the action is determined to be pretext. *Id.*; *see also Zinn v. University of Missouri*, 1993 ERA 034 and 036 (Sec'y Jan. 18, 1996); *Shusterman v. Ebasco Servs., Inc.*, 1987 ERA 027 (Sec'y Jan. 6, 1992); *Larry v. Detroit Edison Co.*, 1986 ERA 032 (Sec'y Jun. 28, 1991); *Darty v. Zack Co.*, 1980 ERA 002 (Sec'y Apr. 25, 1983). In other words, it is proper to examine the legitimacy of an employer's reasons for taking adverse personnel action. *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002 AIR 008, slip op. at 14 (ARB Jan. 31, 2006). Proof that an employer's explanation is unworthy of credence is persuasive evidence of retaliation because once the employer's justification has been eliminated, retaliation may be the most likely alternative explanation for an adverse action. *Florek v. Eastern Air Central, Inc.*, ARB No. 07-113, ALJ No. 2006 AIR 009, slip op. at 7-8 (ARB May 21, 2009); *see also McDonnell Douglass Corp. v. Green*, 411 U.S. 792, 804-805 (1973). Such pretext may be shown through an employer's shifting or contradictory explanations for the adverse personnel action. *Negron v. Viegues Air Link, Inc.*, ARB No. 04-021, ALJ No. 2003 AIR 010, slip op. at 8 (ARB Dec. 30, 2004), and *Hobby v. Georgia Power Co.*, 1990 ERA 030, slip op. at 9 (Sec'y Aug. 4, 1995).

Having established the general principles regarding causation, I will now evaluate whether any of Mr. Minthorne's protected activities from the fall of 2006 through the summer of 2008 was a motivating factor in the layoff action taken against him on November 9, 2008.<sup>37</sup> During this analytic process, I will consider the budget reduction strategies developed by Mr. Bailey at OPIS, approved by Mr. Alvarez at DCP, assembled by VDACS, and approved by the governor in terms of knowledge of the protected activities (actual and/or imputed), direct evidence of animosity, and circumstantial evidence of temporal proximity, personnel policy/disparate treatment, and pretext.

### **Mr. Bailey – OPIS**

During September 2008, Mr. Bailey, the OPIS program manager, prepared three strategies for reductions in the general fund budget of 5%, 10%, and 15%. For the 5% reduction, he identified only four line items in priority order of least impact on OPIS functions to most impact: #1 – supplant general fund personnel/operational costs with the non-general funds, #2 – restrict travel, #3 – restrict training, and #4 – reduce equipment replacement funding.

The plan for 10% reduction included eight more line item reductions: #5 – additional funding of personnel/operations costs with non-general funds, #6 and #7 – additional travel and training reductions, #8 – elimination of an occupied wage position, #9 – elimination of one OPIS FTE (Mr. Minthorne), and #10 to #12 – additional savings in sampling costs, supplanting of general fund personnel costs with the non-general funds, and further reductions in travel costs.

Finally, the 15% reduction strategy added five line item reductions, #13 to #17, with additional reductions in sampling costs, overnight travel, and equipment funding, as well as additional funding of personnel/operations costs with non-general funds, and supplanting an OPIS general fund FTE with non-general funds.

### Knowledge

Mr. Bailey did not arrive on the scene as the OPIS program manager until March 2007. However, after his May 2007 meeting with Mr. Minthorne and Ms. Jackson, he was well aware of Mr. Minthorne's previously raised concerns about motor fuel CAA violations. Mr. Bailey was also at least aware by July 2008 that Mr. Minthorne had contact with a state delegate about ethanol fuel issues which led to Mr. Minthorne visiting a fuel distributor in the summer of 2008. Further, by July 2008, since Mr. Minthorne's identity as the person who had submitted the April 2007 hotline complaint about OPIS' failure to perform adequate follow-up on motor fuel violations had been released to VDACS, Mr. Bailey may have also been aware of that protected activity. And, in August 2008, Mr. Minthorne complained to Mr. Bailey that OPIS was not enforcing motor fuel laws. Consequently, at the time Mr. Bailey engaged in preparing the OPIS budget reduction strategies in September 2008, he had actual knowledge of several of Mr. Minthorne's protected activities.

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<sup>37</sup>Since his protected activity of filing a CAA complaint at the beginning of December 2008 occurred after he was laid off, that protected activity could not have been a motivating factor in that adverse personnel action.

## Animus

A significant factor in considering whether Mr. Bailey harbored any animosity towards Mr. Minthorne for his CAA protected activities is the date Mr. Bailey arrived as the OPIS program manager. Due to the timing of his arrival in March 2007, Mr. Bailey was not the OPIS program manager in the fall of 2006 when the major events occurred that formed the foundation for many of Mr. Minthorne's subsequent protected activities, including Mr. Minthorne's April 2007 hotline allegation about OPIS not conducting adequate follow-up of motor fuel violations. Specifically, prior to Mr. Bailey's assignment as the OPIS program manager, Mr. Minthorne had completed his investigation that identified multiple CAA violations, presented his findings of violations to Mr. Alvarez, and later complained to Mr. Alvarez about interference with his investigation by Mr. Diggs, and insufficient investigation, enforcement, and compliance follow-up, as well as exemptions concerning the identified violations. Consequently, although Mr. Bailey became aware of these earlier protected activities after he became the OPIS program manager, little basis existed for Mr. Bailey to be angry about these allegations which preceded his arrival.

Another animus consideration involves the interaction between Mr. Bailey and Mr. Minthorne regarding the special projects position. Notably, while the record is unclear about the origins of the special projects assignment, by the time of Mr. Bailey's arrival, Mr. Alvarez had already talked to Mr. Minthorne about the position and explained that one reason for the assignment was to assist the new OPIS program manager, who later turned out to be Mr. Bailey. In other words, prior to Mr. Bailey's arrival, the concept of having Mr. Minthorne work at home on special projects had already been developed and presented to Mr. Minthorne who in turn was waiting for the arrival of the new OPIS program manager before he decided whether or not to take the assignment. And considering the situation when he arrived, Mr. Bailey's acceptance of Mr. Minthorne working at home to produce OPIS policy and procedure guidelines and manuals was certainly understandable and not the result of any protected activity-related anger. And, although Mr. Minthorne eventually became frustrated with the slow acceptance of his work-product, Mr. Bailey nevertheless considered his special projects function to be of continued importance, complimented him on his production as a writer, and gave him a satisfactory appraisal in October 2007.

Mr. Minthorne also acknowledged that until about January 2008, when tensions rose about the special projects EWP and Mr. Bailey developed some readily apparent frustration with Mr. Minthorne's grievance about the issue, his relationship with Mr. Bailey was somewhat cooperative, congenial, and satisfactory. Additionally, although employment stress may have developed between Mr. Bailey and Mr. Minthorne, the focus of Mr. Minthorne's August 2007 and November 2007 grievances about the continuation of his special projects position in which Mr. Bailey played a role only involved his assertion that he was suffering discrimination due to his prior participation in another employee's grievance, rather than his CAA protected activities.

I have also considered that in June 2007 Mr. Bailey did not approve a spot award for Mr. Minthorne when similarly situated employees received spot awards. However, although that inaction occurred about a month after Mr. Minthorne first told Mr. Bailey about his motor fuel violation concerns in May 2007, that CAA protected activity occurred very early in Mr. Bailey's

tenure and related to alleged OPIS inaction and investigation interference during the fall of 2006 for which Mr. Bailey was not responsible. Further, when Mr. Bailey learned about Mr. Minthorne's CAA concerns in the May 2007 meeting with Ms. Jackson, he was supportive, rather than negative, about Mr. Minthorne's observations. Finally, in his August 2007 EDR complaint about failure to receive a spot award, Mr. Minthorne asserted the basis for that alleged retaliation was his participation in another employee's grievance, rather than a CAA protected activity.

The evidentiary record also contains evidence that Mr. Bailey actually shared some of Mr. Minthorne's environmental concerns. First, during the May 2007 meeting, when Ms. Jackson indicated that Mr. Minthorne's standards about compliance and follow-up regarding the motor fuel violations may be too high for OPIS, Mr. Bailey objected and indicated that he wanted the best OPIS possible. Next, contrary to Mr. Minthorne's allegations, the state auditor subsequently determined that under Mr. Bailey's leadership, OPIS had been conducting sufficient follow-up and investigations and was only lacking in the area of effective trend analysis. And, in his January 11, 2008 e-mail to the FBI, Mr. Minthorne described a recent meeting with Mr. Bailey in which Mr. Bailey expressed concerns about motor fuel irregularities attributable to the increased use of ethanol fuel in the state.

As demonstrated by their e-mail exchanges, Mr. Bailey was aware of Mr. Minthorne's contact with a state delegate in the summer of 2008. And, since that contact led to Mr. Minthorne visiting a fuel terminal to obtain information about ethanol blended fuel distributors, Mr. Bailey may have concluded it was related to Mr. Minthorne's motor fuel concerns. Yet, Mr. Bailey's response was to simply ask Mr. Minthorne to keep him advised of his travels. Further, although Mr. Minthorne sent Mr. Bailey a copy of the state delegate's request that he obtain the ethanol information, the record is not clear whether Mr. Minthorne also provided his initial e-mail to the state delegate which contained his specific allegations. Finally, to the extent Mr. Bailey may have been aware of that correspondence, which included an allegation of OPIS inaction, Mr. Minthorne's principal allegation at that time focused on Mr. Alvarez and his actions in the fall of 2006.

Finally, Mr. Bailey's failure to respond to Mr. Minthorne's challenge at an August 2008 OPIS meeting about insufficient investigation is not particularly probative of animosity since other non-adversarial reasons could just as likely explain Mr. Bailey's refusal to address Mr. Minthorne's accusation in that forum.

In conclusion, having reviewed the various incidents and interactions involving Mr. Bailey and Mr. Minthorne, I find insufficient probative evidence to conclude that Mr. Bailey harbored animus towards Mr. Minthorne about his CAA protected activity which may have affected his decisions regarding OPIS' three budget reduction strategies, two of which included the elimination of Mr. Minthorne's special projects coordinator position.

### Temporal proximity

The sequence of events, and the temporal proximity between Mr. Minthorne's protected activities and Mr. Bailey's budget reduction decision affecting Mr. Minthorne's position, may provide some circumstantial evidence of causation. In particular, less than two months after Mr. Minthorne elevated his CAA concerns to state representatives in the summer of 2008 following his persistent internal reports of CAA violations for a year and a half, Mr. Bailey selected his position for elimination as part of the 10% and 15% budget reduction strategies for OPIS. At the same time, an intervening event occurred between the protected activities and Mr. Bailey's recommendation that Mr. Minthorne's position be eliminated which somewhat diminishes the probative force associated with temporal proximity. Specifically, on September 5, 2008, VDACS requested its divisions and program managers to prepare budget reduction strategies in accordance with state policies due to the pending requirement of the governor to make significant budget cuts for FY 2009. Of course, the intervening notice of significant state budget reductions does not preclude a determination that Mr. Bailey's inclusion of Mr. Minthorne's position in the OPIS budget cuts was in part motivated by Mr. Minthorne's protected activities. Nevertheless, the budget reduction requirement of up to 15%, with its associated guidelines for determining line item reductions, also provides a significant, permissible basis for Mr. Bailey's decision to designate Mr. Minthorne's position for elimination in the OPIS 10% and 15% budget reduction strategies. As a result, temporal proximity standing alone does not definitively establish causation.

### Personnel Policy/Disparate Treatment

Because the elimination of Mr. Minthorne's position occurred during a significant budget reduction for Virginia, a close examination of whether the supervisors and managers who developed the budget reduction strategies that eventually adversely affected Mr. Minthorne's employment with OPIS, including Mr. Bailey, followed state layoff guidelines, or treated similarly situation employees differently, may also provide significant circumstantial evidence of causation.

So, as a preliminary step, I turn to a review of the state budget reductions policies and guidelines. As the governor's chief of staff advised, Ms. Sandy Adams credibly testified, and *Policy 1.30 – Layoff* indicated, agencies developing budget reductions strategies were to be guided by multiple considerations and factors. First, as general principles, in order to reduce general fund expenditures without curtailing or eliminating core services to agency clients, an agency should: eliminate low priority or underperforming activities; avoid one-time savings and focus on long-term reductions; consider up-front costs to achieve long-term savings; avoid reductions that increase costs for other agencies; and remember layoffs generate costs including severance benefits and leave balance payments.

Second, in terms of ranking budget reductions from least impact on agency function and programs to the most impact, the process begins with the program managers, who according to Ms. Adams "are in a position to know where they can take reductions and lose someone." In ranking reductions from least to most impact, the program managers first cut discretionary costs, such as travel and office supply costs. Next, fund transfers are considered. Then, the program

manager will give up vacant positions if possible before the elimination of occupied positions, while at the same time removing administrative positions before direct service positions.

Third, if layoffs are necessary, the program manager will identify affected employees in a "manner consistent with" business needs. As part of that process, work is identified that is no longer needed. Then, in terms of seniority, if there are employees "who are performing substantially the same work," the layoff determination will be made in the following sequence: wage employees, part-time restricted employees, part-time classified employees, and least senior through the most senior full-time classified employees. In defining "substantially the same work," the role title, work title and the EWP may be considered.

With these principles in mind, I turn to the budget reduction choices Mr. Bailey made in September 2008 as set out below (CX 27 and RX 7):

<b>Reduction Level</b>	<b>OPIS Line Item</b>	<b>OPIS priority</b>
5%	Supplant general fund personnel/operational costs with non-general funds.	1
5%	Restriction in travel.	2
5%	Restriction in training.	3
5%	Reduction in equipment replacement.	4
10%	Additional replacement of general fund personnel/operational costs with non-general funds.	5
10%	Additional travel restrictions and reduction in equipment replacement.	6 & 7
10%	Elimination of occupied wage position.	8
10%	Elimination of occupied classified position (Mr. Minthorne).	9
10%	Reduction in sampling costs, additional travel restrictions; additional replacement of general fund personnel/operational costs with non-general funds.	10 to 12
15%	Additional reductions in sampling costs, overnight travel, equipment funding, as well as additional funding of personnel/operations costs with non-general funds, and supplanting an OPIS general fund FTE with non-general funds.	13 to 17

As the above chart demonstrates, in ranking his budget cut priorities for the 5% reduction level, Mr. Bailey transferred funds and cut discretionary spending associated travel, training, and equipment. At the 10% reduction level, Mr. Bailey used an additional fund transfer plus further reductions in travel and training before coming to his first position elimination. As Mr. Bailey explained, because OPIS was already stressed in terms of liquid or operational money, he had to look at cutting positions that had the least impact on field operations which involved most of OPIS' inspections (direct service) and did not have any unnecessary vacancies. So, in line with the priority system set out in *Policy 1.30 Layoff*, Mr. Bailey first eliminated a wage position

before he then ranked Mr. Minthorne's position, which was an administrative role,<sup>38</sup> as the #9 budget reduction priority.

Although Mr. Bailey then listed more reductions in discretionary spending and a fund transfer below the elimination of Mr. Minthorne's position as having greater impact on OPIS' functions, a complete reduction of all discretionary expenses and an exhaustion of fund transfers before the elimination of an administrative position was not required under the state policy and may not have been consistent with OPIS' business needs. And, Mr. Bailey was in the best position as the program manager to determine at what point the loss of Mr. Minthorne's administrative position would have less impact on OPIS' mission and function than further discretionary cost reductions and fund transfers. In terms of consideration of Mr. Minthorne's seniority, although several other OPIS employees held the same role title of compliance/safety officer IV as Mr. Minthorne, none of those individuals had the same work title or EWP, and they were not performing substantially the same administrative work as Mr. Minthorne; instead those individuals were engaged in providing direct service to OPIS clients.

In summary, in making his budget reduction determinations, including the elimination of Mr. Minthorne's administrative position, Mr. Bailey complied with state budget reduction guidelines and the associated layoff policy. He engaged in two rounds of reductions in discretionary costs and fund transfers, before he identified two occupied positions to be cut in the apparent absence of unnecessary vacant positions. Mr. Bailey also placed the elimination of a wage position before Mr. Minthorne's classified position. Finally, since seniority was not an applicable consideration, and thus in the absence of evidence of applicable similarly situated OPIS employees, Mr. Bailey budget decisions were not evidence of disparate treatment. Consequently, Mr. Bailey's compliant budget reduction process and associated determinations during his development of the OPIS budget reduction strategies for FY 2009 provide little circumstantial evidence that Mr. Minthorne's protected activities caused, or were a motivating factor in, the inclusion of his special projects coordinator job in the OPIS 10% budget reduction strategy at priority ranking #9.

#### Pretext

In light of Mr. Bailey's compliance with the state's layoff policies and his viable explanations for his budget selection process, which included designating Mr. Minthorne's job as part of the OPIS budget cuts, I find insufficient probative evidence that Mr. Bailey's stated reasons were pretextual.

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<sup>38</sup>As a special projects coordinator, Mr. Minthorne was not providing core service directly to OPIS clients that he would have been had he accepted Mr. Alvarez's January 2008 offer to return to his prior position as supervising regional inspector, or move to a regional inspector position at the same pay.

## Cumulative Consideration and Summary

Although temporal proximity provides some circumstantial evidence of causation, based on a cumulative consideration of the other evidence in the record, including the absence of demonstrated animosity towards Mr. Minthorne for his whistleblowing, Mr. Bailey's noted concern for environmental issues as the OPIS program manager, his arrival as OPIS program manager after the foundational events underlying most of Mr. Minthorne's protected activities, the intervening event of an administrative call for three budget reduction strategies due to potential significant state budget cuts, and Mr. Bailey's compliance with the state budget reduction guidelines and layoff policy, I find the preponderance of the probative evidence fails to establish that Mr. Minthorne's protected activities caused, or were a motivating factor in, Mr. Bailey's selection of the special projects coordinator position for elimination, with an OPIS budget priority ranking of #9, if the governor's budget required a reduction in general funds of 10% or more.

### **Mr. Alvarez – DCP**

According to Mr. Alvarez, after DCP received the budget reduction strategies from the division's four program managers, Mr. Frank M. Fulgham, the business manager for DCP, combined the budget strategies into one plan for DCP for each of the three budget reduction levels of 5%, 10%, and 15%, with the line items being ranked according to potential program impact on DCP with the #1 priority having the least impact. Specifically, Mr. Fulgham indicated that he merged program budget reduction worksheets, beginning with those having the least impact and marked #1. He then realigned the priority rankings to meet the assigned DCP 5%, 10%, and 15% target reduction amounts. Mr. Alvarez then approved the DCP budget reduction strategies and forwarded them to VDACS at the end of September 2008.

The September 28, 2008 DCP 5% budget reduction plan listed the elimination of one OPIS classified position (Mr. Minthorne) as priority #1 out of seven priorities. As the #2 priority, one position was changed from general funds to non-general funds. Reductions in training and travel costs were listed as #6 and #7.<sup>39</sup> In the DCP 10% reduction plan, another position was changed from general funds to non-general funds, one OPIS wage position was eliminated, and restrictions were imposed for travel, training, and equipment expenses. Finally, in the DCP 15% reduction plan, two more positions were changed from general funds to non-general funds, and additional reductions were planned for travel and equipment funding.

### Knowledge

As previously summarized, Mr. Alvarez was more than well aware of Mr. Minthorne's protected activities associated with his internal complaints in the fall of 2006. And, since Mr. Minthorne's identity associated with his April 2007 hotline complaint was released to VDACS, Mr. Alvarez may also have been aware of that protected activity. Additionally, I have

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<sup>39</sup>As previously noted, the line items associated with priorities #3 to #5 are blacked out in the DCP budget reduction working papers in the evidentiary record.

determined that Mr. Minthorne informed Mr. Alvarez in January 2008 of his external contact with the FBI.

At the same time, no direct evidence exists that Mr. Alvarez was aware of Mr. Minthorne's protected reports to state legislative representatives in the summer of 2008. And, more significantly, Mr. Alvarez denied being aware that Mr. Minthorne made any reports of CAA violations to anyone outside of VDACS, or other government agencies, after he was assigned to special projects in March 2007, and that Mr. Bailey never told him of any such reports.

In determining the probative value of that denial, I must make a determination concerning Mr. Alvarez's credibility. Initially, during the course of his hearing testimony, Mr. Alvarez appeared credible, providing direct answers without equivocation and hesitation. However, the evidentiary record reveals several contradictions with his testimony. First, as previously discussed, and based on Mr. Alvarez's inability to recall versus Mr. Minthorne's credible recollection, I have determined that Mr. Minthorne did tell Mr. Alvarez in January 2008 that he had contacted the FBI about his CAA concerns.

Next, Mr. Alvarez testified that he gave complete discretion to his program managers, including Mr. Bailey, to rank their budget reduction priorities. Mr. Alvarez stated that he approved Mr. Bailey's recommendation to cut Mr. Minthorne's job because Mr. Bailey had "complete" discretion and that the program managers' priority rankings were their "exclusive work product." Yet, despite Mr. Bailey's purported "complete" discretion, the DCP budget that Mr. Alvarez approved actually ignored a significant aspect of Mr. Bailey's priority rankings – the ranking of Mr. Minthorne's job elimination as #9 for OPIS. Contrary to Mr. Alvarez's statement that the priority ranking of a program manager was an "exclusive work product," the DCP budget reduction plan altered Mr. Bailey's priority ranking in two ways without any explanation: a) Mr. Minthorne's position elimination went from Mr. Bailey's #9 priority ranking for OPIS to #1 on the DCP budget reduction plans, and b) Mr. Bailey's determination that in terms of relative priorities, the wage OPIS wage position, #8, should be cut before Mr. Minthorne's classified position, #9, was reversed in the DCP budget reduction plan when Mr. Minthorne's classified position became #1 and the OPIS wage position was given the DCP priority ranking of #15.

Mr. Alvarez further testified that he did not alter or change any of the budget plans submitted by his program managers. Such a statement certainly implies that he was aware of his program managers' budget reduction plans, and he specifically recalled that the elimination of Mr. Minthorne's job was in the OPIS budget reduction strategy. While Mr. Alvarez's statement may be technically correct if Mr. Fulgham actually changed Mr. Bailey's budget reduction plan, the DCP budget reduction plan that Mr. Alvarez approved clearly reflected a drastic change in the OPIS budget reduction plan submitted to DCP.

As one of two final testimonial issues, although Mr. Alvarez indicated that the state budget reduction guidelines and layoff policy were applicable to everyone during the September 2008 budget reduction process, DCP placed the elimination of Mr. Minthorne's job as its #1 priority before any reductions in discretionary spending or fund transfers, which appears contrary to the applicable state budget reduction policies. And, finally, Mr. Alvarez stated that the

elimination of a full time position was only in DCP's reduction plans for 10% and 15%, which is incorrect, because with a priority ranking of #1, Mr. Minthorne's job was recommended for elimination under all three (5%, 10%, and 15%) DCP budget reduction plans.

Perhaps while taken individually, the disconnects between Mr. Alvarez's testimony about the DCP budget reduction process and the actual budget reduction actions taken at DCP in September 2008 might only represent incomplete, or inadvertently mistaken, recollection. However, despite the unequivocal nature of Mr. Alvarez's testimony, considering the importance of the budget reduction testimony to the parties' interests in the case, the multiple and significant conflicts between Mr. Alvarez's hearing presentation with the actual actions taken during the DCP budget reduction process, the apparent failure to follow state budget reduction guidelines during the determination and approval of the DCP priority ranking for the elimination of Mr. Minthorne's job, and the cumulative effect of these considerations, I have diminished confidence in the credibility of Mr. Alvarez's testimony.

In turn, that adverse credibility determination undermines the probative value of Mr. Alvarez's denial that he was not aware of any external complaints made by Mr. Minthorne after March 2007. Consequently, in the absence of a credible denial, and given the events that occurred at DCP during the budget reduction process, including the lack of compliance with state budget reduction guidelines, the specific reference to Mr. Alvarez in the allegations Mr. Minthorne made to the state legislative officials in the summer of 2008, the temporal proximity between those protected activities and the approved September 2008 DCP budget reduction plan, and the absence of any stated legitimate basis for the DCP changes to Mr. Bailey's budget reduction recommendations, I find sufficient circumstantial evidence to conclude that Mr. Alvarez was aware of Mr. Minthorne's reports to state legislative officials in the summer of 2008.

#### Animus

Initially, as to protected activities associated with CAA violation concerns that Mr. Minthorne raised within VDACS in 2006 and 2007, Mr. Alvarez did not express an overt animosity towards Mr. Minthorne for his concerns. In particular, during January 2008, Mr. Alvarez took an action that reflected an absence of animosity. Specifically, during their mediation, Mr. Alvarez gave Mr. Minthorne the opportunity to return to his prior position as supervising regional inspector or even become an inspector without a reduction in pay. In regards to the special projects coordinator position, Mr. Alvarez's assurance to Mr. Minthorne that the special projects job was not targeted for layoff did not represent a manipulative attempt to place Mr. Minthorne in an employment position that would be subject to elimination through budget cuts in the future because at that time, despite an earlier budget reduction of 5% for FY 2008 in August 2007, Mr. Alvarez was not aware in January 2008 of the actual budget cuts for FY 2009 that would arrive in October 2008.<sup>40</sup>

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<sup>40</sup>The first budget call for reduction in FY 2009 was issued February 12, 2008 and even then only anticipated a 3% shortfall in FY 2009.

Yet, in January 2008, Mr. Minthorne had informed Mr. Alvarez that he had contacted the FBI due in part to his motor fuel violations concerns. And, as I have concluded above, in the absence of a credible denial, Mr. Alvarez was also aware that Mr. Minthorne engaged in protected activities in the summer of 2008 when he contacted state representatives about his motor fuel violations concerns and made specific allegations that Mr. Alvarez actively interfered with his investigation into motor fuel violations and met with officials of ExxonMobil while that company was under investigations for such violations. His knowledge of those renewed allegations regarding the events in the fall of 2006 would have provided a basis for a change in Mr. Alvarez's attitude towards Mr. Minthorne in regard to his protected activities. Such a change would be even more likely considering that in his January 21, 2008 motor fuel issues report response to the VDACS Deputy Commissioner, Mr. Alvarez attributed the ethanol issue to new production and quality control challenges associated with the increased use of ethanol and promised a renewed effort to look at the issue again. However, regardless of the potential change in Mr. Alvarez's attitude towards Mr. Minthorne after January 2008, the evidentiary record does not contain direct evidence of overt animosity by Mr. Alvarez toward Mr. Minthorne for his CAA protected activities. As a result, I next turn to consideration of circumstantial evidence.

#### Temporal Proximity

As partially alluded to in my credibility determination, the circumstantial evidence of temporal proximity has greater probative value in regards to Mr. Alvarez and DCP. Although the administrative call for division budget reduction plans was a significant intervening event between Mr. Minthorne's protected activities in the summer of 2008 and the end of September 2008 DCP budget reduction recommendations, in approving the DCP budget reduction plan with Mr. Minthorne's job in the #1 position, unlike Mr. Bailey, Mr. Alvarez did not follow the applicable state budget reduction guidelines. Consequently, in the absence of a stated non-discriminatory basis consistent with state budget reduction guidelines for moving Mr. Minthorne's special projects coordinator job to #1 on the DCP budget reduction plan, the circumstantial evidence associated with the close proximity between that approved budget reduction recommendation and Mr. Minthorne's protected activities supports a finding that Mr. Minthorne's recent protected activities were a contributing factor.

#### Personnel Policy/Disparate Treatment

Turning first to disparate treatment, as previously discussed, given the unique nature of Mr. Minthorne's assignment as a special projects coordinator, the evidentiary record provides no evidence that Mr. Minthorne was treated differently than other similarly situated employees in DCP/OPIS.

Next, to further address DCP's budget reduction process and state budget reduction guidelines, a comparison of the DCP priority rankings in its 15% budget reduction strategy (CX 26 and RX 19) with the first nine priorities in the OPIS 15% budget reduction strategy (CX 27 and RX 7) is set out below:

OPIS Line Item	OPIS priority out of 17	DCP priority out of 29
Supplant general fund personnel/operational costs with non-general funds.	1	2
Restriction in travel.	2	6
Restriction in training.	3	7
Reduction in equipment replacement.	4	8
Additional replacement of general fund personnel/operational costs with non-general funds.	5	11
Additional travel restrictions and reduction in equipment replacement.	6 & 7	13 & 18
Elimination of occupied wage position.	8	15
Elimination of occupied classified position (Mr. Minthorne).	9	1

Again, as previously discussed, the state budget reduction guidelines require agency officials to first consider reductions in discretionary costs, such as travel and office supply costs. Next, fund transfers are considered. Then, the program manager will give up vacant positions if possible before the elimination of occupied positions, with preference first to wage positions and the removal of administrative positions before direct service positions.

Initially, as the above chart clearly demonstrates, setting aside the elimination of Mr. Minthorne's job, in regards to the elimination of the OPIS wage position (#15), DCP both complied with the applicable state guidelines and accepted Mr. Bailey's budget reduction priorities determinations by ranking several OPIS fund transfers (#2 and #11), and cuts in OPIS discretionary spending for travel (#7 and #13), OPIS training (#7), and OPIS equipment replacement (#8) as having less impact on DCP functions before reaching the OPIS wage position for elimination. Yet, as also starkly demonstrated, no similar priority considerations were taken for Mr. Minthorne's position. On its face, in apparent contrast to the state budget guidelines, which Mr. Alvarez stated were applicable to everyone and he directed his program managers to follow, as well as Mr. Bailey's budget reduction recommendation, the DCP budget reduction priority ranking of #1 indicates that the loss of Mr. Minthorne's position will have a lesser impact on the function of DCP (and in turn OPIS, contrary to Mr. Bailey's opinion) than any reduction in travel and training costs and fund transfers. Additionally, the #1 ranking of an occupied classified position before an occupied wage position also seems contrary to the state guidelines and certainly reverses Mr. Bailey's relative priority ranking for the two positions.

In the absence of any stated explanation by Mr. Fulgham or Mr. Alvarez, the only possible permissible explanation for ranking Mr. Minthorne's job as #1 for having the least impact on DCP's function is the administrative nature of his work. However, even that possible rationale rings hollow given that consideration of administrative versus direct service seems more applicable when an agency arrives at the point in ranking its budget priorities where after discretionary spending cuts and fund transfers, and in the absence of vacant positions, the elimination of occupied positions becomes necessary. Further, as previously highlighted, the change in the OPIS ranking of #9 to the DCP ranking of #1 on the basis that Mr. Minthorne was only engaged in administrative work completely rejects Mr. Bailey's assessment of the relative impacts on his program of discretionary cuts, fund transfers, the loss of a wage position, and the loss of Mr. Minthorne's position.<sup>41</sup> Finally, the abrupt change in priority ranking from OPIS' #9 to DCP's #1, making Mr. Minthorne's job the first line item to be cut, seems contrary to Mr. Alvarez's representations to Mr. Minthorne in January 2008 about the viability and importance of the special projects coordinator position to the agency.

Consequently, due to the lack of any viable explanation, and the apparent non-compliance with state budget reduction guidelines, Mr. Alvarez's approval of the three DCP three budget reduction strategies with Mr. Minthorne's job ranked #1 provides strong circumstantial evidence that Mr. Minthorne's CAA protected activities either caused, or were a motivating factor in, that DCP budget reduction priority ranking.

#### Pretext

Mr. Alvarez indicated that development of the DCP budget reduction process only included consideration of budget reduction criteria. For the reasons previously discussed, considering my adverse credibility determination, and in light of the actual DCP budget reduction working papers, Mr. Alvarez's representation about what purportedly happened in the preparation of the DCP budget reduction process has diminished probative value and supports a finding of pretext.

#### Cumulative Consideration and Summary

In summary, considering the probative circumstantial evidence associated with temporal proximity, the unexplained failure during the preparation of the DCP budget reduction strategies to comply with the applicable state budget reduction policies, the rejection of Mr. Bailey's OPIS budget reduction priorities in regard to Mr. Minthorne's position, and the adverse credibility determination and related pretext, I find that the preponderance of the probative evidence establishes that Mr. Minthorne's protected activities were a motivating factor in Mr. Alvarez's approval at the end of September 2008 of the three DCP budget reduction strategies which listed as priority #1 the elimination of Mr. Minthorne's special projects coordinator job, and reversed Mr. Bailey's relative priority rankings between Mr. Minthorne's position and the elimination of the OPIS wage position.

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<sup>41</sup>Again, in review, in his budget reduction strategies, Mr. Bailey indicates that eight other reductions, including the elimination of an occupied wage position, will have lesser impact on OPIS' functions than the elimination of Mr. Minthorne's position.

## VDACS

When VDACS received the reduction plans from its divisions, including DCP, Ms. Sandy Adams, the budget director, and the deputy commissioner went through the strategies line by line and identified 46 items in order of priority, from least impact on VDACS functions to greatest, for inclusion in VDACS' budget reduction strategies. Upon completion, VDACS sent its three budget strategies for 5%, 10%, and 15% general fund reductions to the governor's office.

The first 38 line items in the VDACS 15% budget reduction plan included the elimination of 15 vacant positions – priorities #28 to #32, #34, and #36 to #38. For the remaining eight line item reductions, an additional 53 occupied positions were identified for elimination: supervisor in market news office – #39; OPIS administrative position (Mr. Minthorne) – #40; administrative position in marketing – #41; administrative position in animal food industry service ("AFIS") – #42; OPIS wage employee position – #43; wage employee position in Onley office – #44; and 47 inspector positions in the state meat and poultry inspection program due to transfer of full responsibility for inspections to the federal government – #45. No equipment funding reductions were listed.

The VDACS 15% budget reduction plan included the following specific reductions for OPIS: a) restrict and defer OPIS travel – #6; b) reduce training costs – #9; c) supplant OPIS general fund personnel costs with non-general funds – #18 and #21; d) eliminate one OPIS FTE (Mr. Minthorne) – #40; and e) eliminate a wage position – #43.

### Knowledge

In terms of actual knowledge of Mr. Minthorne's protected activities, the evidentiary record demonstrates that in a May 2007 meeting Ms. Jackson in VDACS HR learned about Mr. Minthorne's early protected activities that occurred in the fall of 2006. However, the record does not establish that Ms. Jackson advised Ms. Adams or the deputy commissioner who prepared the VDACS budget reduction plan. Based on the release of Mr. Minthorne's identity from the April 2007 hotline report, Mr. Blankenship was aware of that protected activity. Finally, while Mr. Minthorne's January 2008 contact with the FBI included an assertion that VDACS upper management was attempting to suppress vapor pressure testing in order that such testing would not interfere with increased use of ethanol in Virginia, the record again doesn't identify who those individuals were, whether they were aware of Mr. Minthorne's allegation, and the roles they may have played in the budget reduction process.

At the same time, Mr. Alvarez's approved DCP budget reduction strategies included two recommendations that I have determined were discriminatory. First, Mr. Minthorne's position had a DCP budget priority ranking of #1. Second, by its priority rankings, the DCP budget reduction plan recommended that Mr. Minthorne's special projects coordinator position be eliminated before the OPIS wage position. Since these two recommendations were based in part on Mr. Minthorne's CAA protected activities, I find the legal concept of imputed knowledge is applicable. As a result, Mr. Alvarez's approved DCP budget reduction plan represented advice to

the persons who put together VDACS' budget reduction strategies, including Ms. Sandy Adams and the deputy commissioner. As a result, VDACS will be considered to have taken discriminatory action against Mr. Minthorne if the agency relied on either of Mr. Alvarez's approved recommendations for the OPIS special projects job and the OPIS wage position.

#### Animus

Once again, there is little probative direct evidence that the individuals involved in the development or approval of the VDACS budget reduction strategies held any animosity toward Mr. Minthorne for his protected activities. Although Mr. Blankenship was aware of Mr. Minthorne's hotline protected activity, the record does not show he developed anger about the incident or acted upon it. To the contrary, as later discussed in detail, during the development of the VDACS budget reduction strategies, the agency generally complied with the state budget reduction guidelines. I have also considered as a possible example of animus, the difficulty Mr. Minthorne experienced in obtaining release of the budget reduction working papers from VDACS, which eventually required the intervention of EDR. However, the agency's responses appear to have been driven by the initial confidential classification of the working papers, the governor's apparent sudden decision to release the budget documents, and confusion about the extent of the governor's order, as well as the sufficiency of the agency's document responses to Mr. Minthorne's requests. As a result, I consider the extended process Mr. Minthorne experienced in obtaining the requested documents is not sufficient direct evidence of animus for his protected activities. And, I also note that while through legal principle knowledge of his protected activities may be imputed to the VDACS decision makers, it provides no basis for a finding of animus. Consequently, I again address circumstantial evidence of potential impermissible retaliation.

#### Temporal Proximity

As noted above, in addition to his protected activities in the fall of 2006 and 2007, Mr. Minthorne also presented an allegation to the FBI in January 2008 which included an allegation against VDACS upper management. And, about nine months later, Mr. Minthorne's special projects position was placed on VDACS' 15% budget reduction strategy. In considering the probative force of temporal proximity between Mr. Minthorne's protected activities and VDACS' actions at the end of September 2008, I again note a significant intervening event occurred at the beginning of September 2008, the governor's requirement that state agencies develop budget reduction strategies for significant reductions in general funds. Once again, while that event does not preclude a finding that Mr. Minthorne's protected activities were a motivating factor in VDACS' budget determinations, in light of VDACS' substantial compliance with state budget reduction guidelines, temporal proximity standing alone is insufficient to establish causation.

Personnel Policy/Disparate Treatment

Again, considering Mr. Minthorne’s singular position as an OPIS special projects coordinator and the absence of similarly situated employees performing the same work, the record does not establish disparate treatment.

To assist in the analysis of VDACS' budget decisions in regards to state budget reduction guidelines, a comparison of the VDACS priority rankings in its 15% budget reduction plan (RX 19) with the first nine priorities in the OPIS 15% budget reduction strategy (CX 27 and RX 7) and the DCP 15% budget reduction plan (CX 26 and RX 19) is set out below:

<b>OPIS Line Item</b>	<b>OPIS priority out of 17</b>	<b>DCP priority out of 29</b>	<b>VDACS priority out of 46</b>
Supplant general fund personnel/operational costs with non-general funds.	1	2	18
Restriction in travel.	2	6	6
Restriction in training.	3	7	9
Reduction in equipment replacement.	4	8	---- <sup>42</sup>
Additional replacement of general fund personnel/operational costs with non-general funds.	5	11	21
Additional travel restrictions and reduction in equipment replacement	6 & 7	13 & 12	6 & ---
Elimination of occupied wage position	8	15	43
Elimination of occupied classified position (Mr. Minthorne)	9	1	40

As this chart reveals, with one apparent exception, and as Commissioner Haymore represented, VDACS complied with the state budget reduction guidelines and layoff policies in regards to the OPIS line items, which had a great impact on VDACS’ priority ranking of Mr. Minthorne’s position. In particular, consistent with the applicable guidelines, VDACS first lists reductions in discretionary spending, including restrictions in OPIS travel and training costs, and then OPIS fund transfers as having less impact on its function than the loss of Mr. Minthorne’s position. Additionally, VDACS also eliminated 15 vacant positions, priority rankings #28 to #32, #34, and #36 to #38, before cutting any occupied positions, including Mr. Minthorne’s job. Clearly, in order to comply with state budget reduction guidelines, VDACS made a drastic change in regards to the DCP priority ranking for the OPIS special projects coordinator position, moving Mr. Minthorne from #1 out of 29 line items in the DCP budget reduction plan to #40 out of 46 line items in the VDACS 15% budget reduction plan.

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<sup>42</sup>The VDACS budget reduction strategy did not contain any reductions in equipment expenditures.

Effectively, during the course of its budget reduction process, VDACS reverted back to the relative budget priority rankings for OPIS that Mr. Bailey developed with one notable exception. Specifically, contrary to Mr. Bailey's OPIS budget reduction strategy, VDACS' budget plan followed the reversal contained in the DCP budget reduction plan, eliminating Mr. Minthorne's classified position before the OPIS wage position. Considering the otherwise substantial compliance by VDACS with the state budget guidelines in ranking its budget priorities, I do not consider this one departure significant circumstantial evidence of causation in regards to VDACS. However, that reversal in relative budget reduction priorities between Mr. Minthorne's job and the wage position came from the DCP budget reduction plan which was motivated in part by Mr. Minthorne's protected activities. Consequently, through the concept of imputed knowledge, VDACS' ranking of Mr. Minthorne's job as #40 versus the ranking of the OPIS wage position as #43 was also motivated in part by Mr. Minthorne's protected activities. That is, although Mr. Minthorne's job was moved from #1 to #40, the VDACS 15% budget reduction plan that was forwarded to the governor still retained a discriminatory portion of the DCP budget reduction strategy in regards to the relative budget priority ranking between Mr. Minthorne's job and the OPIS wage position.

#### Pretext

In terms of pretext, I note that despite the significant budget reductions for FY 2009, VDACS sent out a job offer in December 2008, and advertised two positions. Yet, these vacancies were considered to be critical positions that needed to be filled, and more importantly, the jobs for a scientist, statistical analyst, and agricultural specialist were not similar to Mr. Minthorne's special projects coordinator position within OPIS. And, upon further review of the record, I find little probative circumstantial of pretext, particularly given VDACS' substantial compliance with applicable personnel policies during the September 2008 budget reduction process.

#### Cumulative Consideration and Summary

Upon cumulative consideration of the circumstances surrounding the VDACS budget reduction process, I find the preponderance of the probative evidence fails to establish that Mr. Minthorne's protected activities directly caused, or were a motivating factor in, the actions taken by Ms. Adams and the deputy commissioner in the development of the VDACS 15% budget reduction strategies, which contained the elimination of Mr. Minthorne's job, and the commissioner's subsequent approval. Yet, although the budget ranking priorities between Mr. Minthorne's position and discretionary spending and fund transfers were appropriately revised by VDACS, the discriminatory, relative budget priorities between Mr. Minthorne's position and the OPIS wage position contained in the DCP 15% budget reduction plan approved by Mr. Alvarez still remained in the VDACS 15% budget reduction strategy that was forwarded to the governor. Consequently, based on the liability principle of imputed knowledge, I find that Mr. Minthorne's protected activities remained a motivating factor in the placement of Mr. Minthorne's job as VDACS' budget reduction priority #40 versus the designation of the OPIS wage position ranking as #43.

## **Governor**

For FY 2009, the governor's budget included a 12.9% reduction in general funds, which meant the 15% VDACS budget reduction strategy was the plan partially used in the governor's final determination. The following three non-personnel line item reductions in the VDACS 15% budget reduction plan were not included in the governor's final budget reduction for FY 2009: reduction in food sample testing – #10; elimination of funding for farmland preservation – #14; and reduction in specialty agriculture – #15. The following VDACS personnel reductions also were not in the final plan approved by the governor: supervisor in market news office – #39; administrative position in AFIS – #42; and 47 inspector positions in the state meat and poultry inspection program – #45.

All the remaining line item reductions submitted in the VDACS 15% budget reduction plan were accepted by the governor's office and contained in the final governor's FY 2009 budget reduction, including all of the OPIS discretionary spending cuts and fund transfers, as well as the elimination of 15 vacant positions – #28 to #32, #34, and #36 to #38; the occupied administrative position in OPIS (Mr. Minthorne) – #40; the occupied administrative position in marketing – #41; the occupied OPIS wage position – #43; and the occupied position in Onley office – #44.

## Discussion

Although I have again reviewed the evidence associated with animus, knowledge, temporal proximity, personnel policy/disparate treatment, and pretext, given the significant degrees of separation between the governor's office and Mr. Minthorne's protected activities, only a general discussion of these factors is necessary. First, I find no direct evidence in the record that anyone in the governor's office held any animosity towards Mr. Minthorne for his protected activities. Concerning probative weight of temporal proximity, the requirement for significant budget cuts that arose between Mr. Minthorne's protected activities and the governor's approval of the elimination of his job in October 2008 was a significant intervening event. Next, in the absence of probative evidence of disparate treatment, by essentially accepting VDACS' priority rankings in the approved FY 2009 budget reduction plan, the governor's office substantially complied with the state budget reduction guidelines, which included the reductions in discretionary spending, fund transfers, and elimination of vacant positions before consideration was given to eliminating occupied positions.

In regards to knowledge, the record also contains little probative evidence that personnel in the governor's office or the governor were directly aware of Mr. Minthorne's protected activities. Yet, again, because the VDACS 15% budget reduction plan carried forward, and essentially approved, the DCP discriminatory relative budget priority rankings for Mr. Minthorne's job and the OPIS wage position, knowledge of Mr. Minthorne's protected activities is imputed to the governor's office and the governor.

Finally, as to the discriminatory relative priority ranking that remained in the DVACS 15% budget reduction plan, that change which was instituted in the DCP budget reduction plan approved by Mr. Alvarez essentially had no effect on the governor's budget because both Mr. Minthorne's position and the OPIS wage position were included in the governor's final FY 2009

budget cuts. The lack of significance of the relative position of the two OPIS positions, Mr. Minthorne's job as #40 and the wage position as #43, is further highlighted by the fact that the governor went down the VDACS priority ranking as far as #44 and also eliminated the occupied position in Onley office, in selecting his budget cuts. Or, from another perspective, even if the DCP 15% budget reduction plan had retained Mr. Bailey's recommendation that the OPIS wage position (OPIS priority ranking #8) be cut before Mr. Minthorne's job (OPIS priority ranking #9), and that relative ranking passed through to the governor in the DCP and VDACS 15% budget reduction plans, both jobs would still have been in the governor's FY 2009 budget reduction plan. Ultimately, at the end of the budget reduction process, the discriminatory, relative priority ranking between Mr. Minthorne's job (DCP priority ranking #1/VDACS priority ranking #40) and the OPIS wage position (DCP priority ranking #15/VDACS priority ranking #43) didn't make a difference because the governor's office selected VDACS priority line items #40, #43, and #44 to be included in the final 12.9% budget cuts.

### Summary

Under the legal concept of imputed knowledge, the governor's office may have been found to have taken an adverse action motivated in part by Mr. Minthorne's protected activities if the inclusion of Mr. Minthorne's special projects coordinator job in the FY 2009 state budget cuts had been based in part on the priority ranking by DCP, as retained in the VDACS 15% budget reduction recommendation, which placed the elimination of Mr. Minthorne's job before the elimination of the OPIS wage position in the budget reduction process. However, since the governor's final budget cuts included both OPIS positions, their relative budget reduction priority rankings would not have been a factor. As a result, the preponderance of probative evidence fails to establish that Mr. Minthorne's protected activities caused, or were a motivating factor in, the governor's decision to include the special projects coordinator position in the state budget cuts for FY 2009 of 12.9%.

### **Conclusion**

The preponderance of the probative evidence fails to establish that Mr. Minthorne's protected activities caused, or were a motivating factor in, Mr. Bailey's selection of the special projects coordinator position for elimination, with an OPIS budget priority ranking of #9, if the governor's budget required a reduction in general funds of 10% or more.

The preponderance of the probative evidence establishes that Mr. Minthorne's protected activities were a motivating factor in Mr. Alvarez's approval at the end of September 2008 of the three DCP budget reduction strategies, including the 15% reduction plan, which listed as priority #1 the elimination of Mr. Minthorne's special coordinator job, and reversed Mr. Bailey's OPIS relative priority rankings between Mr. Minthorne's job and the OPIS wage position.

The preponderance of the probative evidence fails to establish that Mr. Minthorne's protected activities directly caused, or were a motivating factor in, the actions taken by Ms. Adams and the deputy commissioner in the development of the VDACS 15% budget reduction strategies, which contained the elimination of Mr. Minthorne's job, and the commissioner's subsequent approval. However, although the budget ranking priorities between Mr. Minthorne's

position and discretionary spending and fund transfers were appropriately revised by VDACS, the discriminatory relative budget priorities between Mr. Minthorne's position and the OPIS wage position contained in the DCP 15% budget reduction plan approved by Mr. Alvarez still remained in the VDACS 15% budget reduction strategy that was forwarded to the governor. As a result, through the liability principle of imputed knowledge, the preponderance of the probative evidence demonstrates that Mr. Minthorne's protected activities remained a motivating factor in the placement of Mr. Minthorne's job as VDACS' budget reduction priority #40 versus the designation of the OPIS wage position ranking as #43.

Since the governor's office did not rely on the discriminatory, relative ranking of the two OPIS positions because both were selected for elimination, the preponderance of the probative evidence fails to establish that Mr. Minthorne's protected activities caused, or were a motivating factor in, the governor's decision to include his special projects coordinator position in the state budget cuts for FY 2009 of 12.9%.

Consequently, having failed to prove by a preponderance of the evidence that his protected activities caused, or were a motivating factor in, the final determination by the governor that his job as special projects coordinator would be eliminated in the FY 2009 12.9% budget cuts, which resulted in his being laid off on November 9, 2008, Mr. Minthorne's first CAA complaint, 2009 CAA 4, must be dismissed.

#### **Issue # 5 – Relief of Respondent Liability**

Even if the two DCP changes to the OPIS budget reduction strategies were considered to be actionable adverse actions standing alone, the preponderance of the evidence nevertheless demonstrates that even absent the DCP discriminatory changes Mr. Minthorne's position would still have been eliminated at the end of the state's budget reduction process because the governor selected both Mr. Minthorne's special projects coordinator position and the OPIS wage position, which Mr. Bailey placed on the OPIS 10% and 15% budget reduction recommendations, for inclusion in the FY 2009 12.9% budget cuts.<sup>43</sup>

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<sup>43</sup>Since Mr. Minthorne's two CAA complaints are dismissed, I need not address the sixth issued regarding damages.

## ORDER

The CAA whistleblower complaints, 2009 CAA 4 and 2009 CAA 6, by Mr. Bruce A. Minthorne against the Commonwealth of Virginia are **DISMISSED**.

### SO ORDERED:

RICHARD T. STANSELL-GAMM  
Administrative Law Judge

Date Signed: September 6, 2013  
Washington, DC

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW., Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

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

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.