



**Issue Date: 14 December 2011**

**CASE NO.: 2009-CAA-9**

**IN THE MATTER OF**

**BRENDA MUGLESTON-UTLEY**

**Complainant**

**v.**

**EG&G DEFENSE MATERIALS**

**Respondent**

### **DECISION AND ORDER**

This proceeding arises under the employee protective provisions of the Clean Air Act of 1977, (herein CAA), 42 U.S.C. § 7622, *et seq.*, Public Law 95-95; Safe Drinking Water Act, 42 U.S.C. § 300j-9(i); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610(a)-(d); Federal Water Pollution Control Act, 33 U.S.C. § 1367; Solid Waste Disposal Act, 42 U.S.C. § 6971; and Toxic Substances Control Act, 15 U.S.C. § 2622, and regulations thereunder, brought by Brenda Mugleston-Utley (Complainant) against EG&G Defense Materials (Respondent).

#### **I. PROCEDURAL BACKGROUND**

Complainant filed a complaint with the Occupational Safety and Health Administration (herein OSHA) on or about July 24, 2008, alleging that Respondent discharged her because Complainant reported various environmental and safety concerns regarding chemical weapons disposal and hazardous waste at Respondent's facility. Specifically, Complainant argues that because she made these complaints, Respondent "provided incorrect and prejudicial information to the Army and Complainant's certifying official that caused Complainant to be disqualified from the CPRP program," which ultimately resulted in her termination of employment by Respondent. The OSHA

Regional Supervisory Investigator dismissed Complainant's complaint on April 28, 2009, after determining that it had no merit. Specifically, the Secretary's Findings indicated that although Complainant engaged in protected activity, a preponderance of the evidence supported Respondent's position that the protected activity was not a contributing factor in Complainant's disqualification from the CPRP and UAP programs, failure to hire her in open positions and her termination of employment.

Based on Complainant's Request for Hearing, this matter was referred to the Office of Administrative Law Judges for a formal hearing. Pursuant thereto, a Notice of Hearing and Pre-Hearing Order was issued scheduling a formal hearing, which commenced on August 30, 2010, in Salt Lake City, Utah. This matter was heard over a period of seven days during the weeks of August 30, 2010 and October 24, 2010. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit oral arguments and post-hearing briefs.<sup>1</sup>

The following exhibits were received into evidence at the formal hearing: Administrative Law Judge Exhibit Numbers 1-11; Complainant Exhibit Numbers 1, 3, 4, 6, 9, 11-12, 15, and 18-21; and Respondent Exhibit Numbers 1-74. On February 3, 2011, Respondent submitted the deposition of Dr. Robert D. Gannon, which was taken on June 18, 2010, and received into evidence on March 3, 2011. The deposition was not designated or marked for identification, but will hereby be received as RX-75. Respondent also submitted various testimony from the formal transcript of the hearing in the case of Edward Tomlinson v. EG & G Defense Materials, Case No. 2009-CAA-00008, to include testimony of Sheila Vance and James "Mike" Jensen, as well as various exhibits offered and received at the Tomlinson formal hearing to include CX-8, CX-18, CX-25, RX-60, RX-70, RX-79, RX-81, RX-82, RX-83, RX-84, RX-85, RX-102, RX-106, RX-110, RX-111, RX-112, RX-113, RX-114, RX-116, RX-122, RX-128, RX-129, RX-137, RX-138 and RX-139. I also note that Mr. Tomlinson's complaint was dismissed by Decision and Order on December 30, 2010, by Administrative Law Judge Gerald M. Etchingham. The Decision and Order is presently on appeal to the Administrative Review Board.

Post hearing briefs were timely received from Complainant and Respondent by the final briefing date of April 22, 2011. No reply briefs were received from the parties by May 13, 2011.

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<sup>1</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Complainant's Exhibits: CX-\_\_\_\_; Respondent's Exhibits: RX-\_\_\_\_; and Administrative Law Judge Exhibits: ALJX-\_\_\_\_.

Based on the evidence introduced and having considered the arguments and positions presented, I make the following Findings of Fact, Conclusions of Law and Order.

## **II. STIPULATIONS**

The parties stipulated that Respondent is subject to coverage under the Clean Air Act and the Solid Waste Disposal Act, as amended by RCRA, the Resource Conservation and Recovery Act. (Tr. 11-12).

## **III. ISSUES**

1. Whether Complainant engaged in protected activity within the meaning of the Clean Air Act and the alleged Environmental Acts?

2. Assuming Complainant engaged in protected activity, whether her alleged activity was a contributing factor in Respondent's alleged discrimination against Complainant?

3. Whether Respondent demonstrated a legitimate, non-discriminatory business reason for its actions towards Complainant?

4. Whether Respondent has demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel actions against Complainant irrespective of her having engaged in alleged protected activity?

## **IV. SUMMARY OF THE EVIDENCE**

### **Background**

Respondent is a government contractor for the U.S. Army and performs decontamination and remediation work at the Tooele Chemical Agent Disposal Facility at the Deseret Chemical Depot in Tooele, Utah. (ALJX-2). The Tooele Chemical Demilitarization Facility (herein TOCDF) is a chemical weapons disposal facility which employs approximately 800 employees, many of whom work on shifts and continuously operate the facility. (Tr. 602-603). TOCDF is located on an Army Depot and is surrounded by a high-security fence, admission through which is controlled by the U.S. Army. (Tr. 610-611). The U.S. Army has 40 to 45 personnel stationed at the TOCDF Field Office who have oversight over Respondent's operation, to include contractual, environmental, safety and surety requirements. (Tr. 601).

Respondent's environmental department employs 29 employees including inspectors. An environmental compliance inspector is on each shift and department inspectors attend entry meetings at DSA every time a worker enters into a toxic area. Environmental inspectors inspect the facility and provide environmental oversight; all areas where hazardous waste is managed are inspected weekly.

Respondent's safety department consists of 34 employees. Shift safety specialists are assigned to every shift and cover the facility around the clock. There are safety-action teams on each shift consisting of 60 to 65 regular everyday employees.

As noted below, Complainant began working for Respondent in 1994 and worked in various positions thereafter. At the time of her termination, she was employed as a DSA operator providing co-workers assistance in donning and maintaining chemical protective suits and equipment and providing emergency rescue for workers in chemical agent air locks. Her position required that she maintain certification in the Chemical Personnel Reliability Program (CPRP), which was regulated by the U.S. Army. (RX-10).

For reasons explicated below, Complainant was permanently disqualified from the CPRP program, subsequently denied entry or maintenance of the Unescorted Access Program (UAP), became ineligible for and denied available job positions that required CPRP and/or UAP clearance and was terminated by Respondent.

Complainant contends her permanent disqualification from CPRP status, denial of UAP status and Respondent's refusal to employ her in other available positions were in retaliation for her protected activities and thus were discriminatory. Respondent, on the other hand, contends it had legitimate, non-discriminatory reasons for terminating Complainant's employment after the U.S. Army disqualified her from the CPRP program and denied her access to the UAP Program.

## **The Testimonial Evidence**

### **Complainant**

Complainant began working with Respondent at the Tooele Chemical Demilitarization Facility (TOCDF) on July 28, 1994. (Tr. 44). She worked in various positions as an environmental compliance clerk, Personnel Maintenance Building operation (PMB) attendant, in the demilitarization support area (DSA), in

hazardous waste management, as a document control clerk, in the Brine Reduction Area - Residue Handling Area (BRA-RHA) and cross-trained as a utility operator. (Tr. 44-46). She involuntarily left Respondent's employ in June 2008. (Tr. 46).

TOCDF is the facility operated by Respondent. Complainant stated safety equipment is issued, cleaned and laundered. (Tr. 46-47). There are protective measures necessary to go into the Munitions Demilitarization Building (MDB). (Tr. 47). In the DSA, back-up ensemble packs are tested and she performs emergency back-up work. She dressed the entrants into Demilitarization Protective Ensemble (DPE). She also built hoses that went into the demilitarization building as a life support system called LSS air hoses for the entrants. (Tr. 48). She performed monitoring and testing of various types of nerve agents and disposed of hazardous waste. (Tr. 48-50).

In the BRA-RHA area, she performed environmental inspections on tanks or sumps and worked in the Metal Parts Furnace cool-down area to check for residue and monitor temperatures. She thermally decontaminated tools and has seen munitions and ton containers still smoking or on fire exiting the furnace. (Tr. 50-51). These were safety and environmental concerns which she voiced to management from 1995 to 2008. (Tr. 51). She has filed a complaint before with OSHA which resulted in a settlement in 1998-1999. (Tr. 51-52). She was laid off in 1999 after the settlement. "Just prior" to her layoff, she raised environmental concerns to the Respondent about the Metal Parts Furnace cool down area and discharges and waste. She raised these concerns in relation to her layoff and was later reinstated. (Tr. 52-53).

She was then assigned to work in the warehouse in 1998 or 1999, where she was by herself with no restroom facility, and she was getting sick from a virus and required a respirator. (Tr. 53-54). She stated it was not normal to work in isolation. (Tr. 54).

### **Complainant's Concerns**

From 1999-2005 she had concerns about the deactivation furnace system and heated discharge conveyor, which discharged dust particulates and ashes into the outside environment. (Tr. 55-56). There was no monitoring and the alarm would go off when the door opened which meant that chemical warfare agent was present. She raised concerns about the potential releases of ash and dust in late 1999 through approximately 2002-2003 to Irv

Hillman, Scott Vonhatten, Jeff Earls, Steve Wallace, Jeff Hunt, Tim Olinger and Jim Clark. (Tr. 56, 66).

### **Mercury Vapors**

In 2001-2003, she expressed concerns about mercury vapors in the Metal Parts Furnace cool down area. She stated she could see shiny metal in the furnace. (Tr. 57-58). There was no protective equipment for the mercury vapor. She made complaints to Irv Hillman and plant shift managers, Jeff Earls and Steve Wallace. Six months later employees were eventually given respirators but with the wrong cartridges, however they finally got the right ones. (Tr. 57, 63).

### **Testimony in Oregon Proceeding**

She also testified, with Respondent's knowledge, at an unspecified time, in an Oregon proceeding addressing environmental and safety lessons learned for a new demilitarized chemical weapons facility beginning operations. (Tr. 58-59).

### **LSS Air Hoses**

She complained about LSS air hoses that were cracked or corroded which contaminated the life support room. She complained to Steve Wallace, Tim Olinger, Jim Clark, the plant shift manager, and to Scott Sorenson from 1999-2008. (Tr. 60-63).

She testified that OSHA and the Utah Department of Environmental Quality found hazardous waste being released into the outside environment and worker protection violations at the facility and gave Respondent notices and fines. (Tr. 66-67). They found personal equipment and respirator cartridges to be improper. (Tr. 67).

### **Red Dust**

She stated one month before her termination the State of Utah came out to investigate the ash and particulate waste and red dust problem. The facility was shut down approximately two to three days before her April 12th "incident" until Respondent was able to provide a response and remedy to fix the problems. The shut down lasted for six to eight hours. (Tr. 69-70). She raised the red dust complaint about six months before her termination with Max Wahlberg and then again one month before her incident, who informed Scott Sorenson, plant shift manager. (Tr. 71-75). Two weeks after her complaints, the State of Utah

investigated the issue. (Tr. 73). The red dust was on the ground outside and was treated as hazardous waste. (Tr. 71, 74-75). She also complained to the company safety and environmental employees. There was nothing to prevent air from blowing the red dust or snow/rain coming in contact with the red dust. (Tr. 77).

### **Sulfur Dioxide**

In 2006-2007, Complainant observed white smoke and fumes in the BRA, which she determined from her previous experience cutting munitions was likely sulfur dioxide. (Tr. 78). She stated "we had went clear up to the main manager" and the general manager Mr. Gary McCloskey and Mr. Joe Majestic to report that there was no monitoring, and "we were" concerned that sulfur dioxide was being emitted when the munitions were cut. When the munitions came out of the air locks, the munitions were smoking and when munitions were cut with a torch, gas was emitted. (Tr. 79). She stated she personally complained to Mr. McCloskey and to Mr. Majestic in 2007-2008. (Tr. 80-82). Testing did not reveal sulfur dioxide. (Tr. 80). Complainant testified she wrote a letter to OSHA, at an unspecified time, concerning the sulfur dioxide and lack of monitoring. (Tr. 82). She pushed it more **after** her termination. (Tr. 82-83). OSHA investigated and issued a notice of violation in late 2008, subsequent to Complainant's termination of employment. (Tr. 83).

### **Waste In Air Locks**

In 2007-2008, Complainant complained to her supervisor, Max Wahlberg, about waste in the air locks. (Tr. 83-84). She also complained to the plant shift manager Scott Sorenson and manager Pat Baker. Her complaint was that hazardous waste was not properly closed or bagged, and was left out in the open, against company procedure, which also made maneuvering around in the air locks extremely difficult. (Tr. 84). She stated it remained an ongoing problem at the time of her termination. (Tr. 85-86). The Utah State Department of Solid and Hazardous Waste issued notices after it found open drums and waste that had been left in the Toxic Maintenance Area which was not properly tracked. (Tr. 86-87). Under the RCRA permit, the company can store waste for only ninety days. (Tr. 88). She stated on numerous occasions she personally had to deal with waste left in the air locks. (Tr. 87-88).

### **Lesser Level of Protective Clothing**

In 2007-2008, Complainant worked in DSA as an emergency back-up for about 6-7 months, during which time she was tasked with the duty of dressing the entrants in their DPE suits and going behind Demilitarization Protective Ensemble (DPE) entrants into toxic areas allegedly contaminated with chemical agent, liquids or vapors, collecting the DPE entrants' bags of waste and dropping them down a chute in the floor. She would check the ACAMS monitoring system as the entrant moved from A air lock to B air lock and upon exiting. However, the equipment worn by DSA personnel was of a lesser level than DPE level. She was working in the DSA at the time of her termination. (Tr. 89-92). She raised concerns on numerous occasions about wearing a lesser level of protection and entering into potentially toxic areas. (Tr. 92-94). She complained to Brian Scott and Max Wahlberg (DSA managers) and Scott Sorenson. She had a personal meeting with Operations General Manager Jeff Hunt about the concern. (Tr. 94-95). She never stopped raising the concern. All emergency back-ups on four different shifts and the day shift were concerned and wanted to resolve the situation. (Tr. 96).

### **ACAMS Wand**

She also complained to Max Wahlberg and Scott Sorenson that the Automatic Continuous Air Monitoring System (ACAMS) wand used to measure the amount of agent present on DPE entrants was being placed in the air duct to clean it out, and was left there, which yielded lower, inaccurate readings. ACAMS was also used for checking levels to decontaminate DPE entrants with bleach or Clorox 2 to break down the agent on the DPE suits. DSA personnel would walk through the same air locks with waste and replace the ACAMS in its holster only to be told "sometimes" to remain outside because the agent readings were too high. (Tr. 97-100). She also complained to Jeff Hunt, Operations General Manager. The practice continued for three to four months before a memorandum was sent out in late 2007 or early 2008 to all personnel stating it was no longer acceptable to place the wand in the duct. (Tr. 101-103).

She testified there is a Conditions Reporting (CR) System on which she trained for 6-8 months prior to her termination. (Tr. 105). The 2007 CR report reflected 300 environmental and safety concerns, which were raised in safety meetings with Joe Majestic and allegedly not resolved over a three year period. (Tr. 106).

### **Caustic/Brine**

She cross-trained in the Pollution Abatement System (PAS) where she observed caustic caked on piping and leaking. From 1999-2008, the same problem existed with brine piping in the Brine Reduction Area. She complained about the caustic piping to John Skinner, PAS supervisor, Scott Vonhatten, plant shift manager Jeff Earls, Max Wahlberg, Scott Sorenson and Irv Hillman from 1999 to March 2008. She specifically recalled meeting with Max Wahlberg and Scott Sorenson in the latter's office in the control room in March 2008 about the caustic piping. (Tr. 109-110). Two weeks before her April 12 "incident," Utah State regulators investigated, took pictures and notified Respondent to resolve the issue. (Tr. 110).

### **Complainant's Medical Incident**

Complainant testified about her medical history. She has been taking Prozac, an anti-depressant, Fosinopril, a blood pressure medication, and Adderall to make her alert after taking Trazodone, a sleeping pill, to sleep. She claims Respondent and her certifying official had knowledge she took these medications. (Tr. 111-112). At the end of March 2008 or first of April 2008, she had been losing weight, felt good and was exercising. She decided to quit taking her medications (without first consulting her physician). (Tr. 112).

On April 12, 2008, she was working a twelve-hour shift as an emergency back-up in DSA. (Tr. 112). She got a migraine headache at the end of the shift. At 5:30 p.m. she went to the restroom, showered and dressed in her regular clothes. She told Mike Maestas, with whom she rode to work, that she was going to walk until the carpool was ready. (Tr. 113-114). She was given a ride by a co-worker, Jason Sweat, to the gas mask trailer to turn in her mask. She could not recall if she clocked out or not, but thinks she may have. (Tr. 114).

Her carpool took her home where she then got into her own car and drove to Stockton to pick up her two sons for the weekend. She picked up her sons and told them she had a migraine headache and was feeling nauseous. She testified she began feeling a "shocky feeling" when you are off of your anti-depressant. She took her regular medication and went to bed. (Tr. 114). She could not remember if she had taken her blood pressure pill, so she took another one. She did not know whether she took an additional one thereafter (for a total of two or three blood pressure pills). She "felt like her blood pressure was out of--out of whack." Her son checked on her

later; she told him she did not feel well. She did not remember if she also took an Excedrin for her migraine. (Tr. 115). Complainant asked her son to call her brother, who came over and took her to the emergency room. Complainant stated everything went black during her ride to the hospital and she thought she was dying. She was going in and out of a deep sleep constantly at the emergency room. She was unable to answer any of the doctor's questions. She remained in the hospital until April 14, 2008. (Tr. 116). She was released to follow-up with her counselors. She went home because she was on her seven-day-off schedule. (Tr. 117).

Complainant testified she returned to work the following Friday and reported to Robert Rothenberg, her certifying official, and Scott Sorenson and supervisor Max Wahlberg that she had an "accidental overdose" and had been in the hospital. (Tr. 117-118). Supervisors Sorensen and Wahlberg did not indicate any obstacle to her continuing to work. (Tr. 120-121). Certifying Official Robert Rothenberg indicated he needed to investigate the situation more, but she could perform her duties and that she needed to follow-up with the clinic. (Tr. 121). Complainant also told the physician's assistant, Steve Byrne, about taking the medication, to which he replied he needed to contact Dr. Matravers, the doctor who oversees the TOCDF clinic. (Tr. 122). Byrne later called her and told her she needed to speak with Dr. Matravers regarding the incident. Complainant explained to Dr. Matravers that she had an accidental overdose for which she was hospitalized and that she had quit taking her regularly prescribed medications, but had resumed taking them. (Tr. 122-123).

Complainant worked for four nights after returning from the incident, until Rothenberg sent a "temporary potential disqualifying letter to Human Resources" stating she had been temporarily disqualified from the CPRP program. A couple of days later, Rothenberg sent Human Resources another letter resolving the PDI, Potential Disqualifying Information, and reinstated her CPRP. (Tr. 123). She received copies of both letters from Rothenberg. (Tr. 124). Complainant was informed by co-workers that Debbie Sweeting, of Human Resources, called Complainant's supervisors in for interviews. (Tr. 124-125). Complainant worked a total of six days in the interim. (Tr. 125).

#### **Complainant's Second CPRP Disqualification**

On or about April 23, 2008, Complainant met with Sweeting and Dr. Matravers and was told she was disqualified from CPRP a second time and could not work until an investigation could be

completed. (Tr. 126). She asked Sweeting to call Rothenberg because he was aware of the whole situation, but she refused. Sweeting called another certifying official, Rick Clive, who told Complainant that Rothenberg would have final control or authority over her CPRP. She again asked that Rothenberg be contacted because the whole situation had been investigated and resolved. (Tr. 127-128). Complainant was given a letter signed by Thaddeus Ryba regarding the second suspension. Complainant called Rothenberg after the meeting, who stated he was not aware of Complainant's second disqualification. (Tr. 129). Complainant stated she was not interviewed by any certifying officials before the second disqualification. (Tr. 129-130).

Complainant testified Sweeting explained the Family Medical Leave Act and informed Complainant she could apply for short-term disability. Complainant told Sweeting she would not apply because there was nothing wrong with her. (Tr. 130). Sweeting told her to go home while the investigation was being conducted and she would be contacted when the investigation was concluded. Sweeting requested all of Complainant's hospital records; Complainant retrieved the records and gave them to Dr. Matravers. (Tr. 131).

Complainant testified she was told to stay home until the investigation was complete, and was home from April 23, 2008 to June 30, 2008, when she was terminated. (Tr. 131). She testified co-workers called her telling her Sweeting was calling them into the office and questioning them about her stability; they also told Complainant they overheard Sweeting informing the general manager and plant operations managers that Complainant had attempted suicide. (Tr. 132). Sweeting told her she would have to take personal leave during the investigation if she wanted to be paid; she asked co-workers for donated leave after her personal leave expired. (Tr. 132-133). Sweeting later informed Complainant her personal leave would be returned and classified her leave as administrative leave during the investigation. (Tr. 133).

In May 2008, Complainant called Dr. Matravers who related he was being removed from her case because Employer did not think he was competent to make the decision; Employer instead wanted to fly in a panel of doctors to review Complainant's medical file. (Tr. 134-135). Rothenberg informed Complainant that he consulted with Dr. Matravers before reinstating her CPRP. (Tr. 135).

On June 24, 2008, Complainant received a letter of termination from Sweeting during a meeting where Sweeting and Sharon Preston were present. Complainant could not recall if Dr. Matravers was present. (Tr. 136). She was given a list of jobs which she could apply for and signed her termination papers. (Tr. 136-137). Complainant was informed before the meeting that her CPRP was permanently disqualified via letter from Rothenberg; she believes the letter was signed by another certifying official for Rothenberg. (Tr. 137-138). Complainant testified she was not interviewed by any doctors of the medical panel about her CPRP. (Tr. 138).

Complainant testified she was given a chance to rebut the CPRP disqualification, and that Thaddeus Ryba would review the rebuttal. She was never given any information or access to information given to the panel of doctors which was used in making its decision to disqualify her. (Tr. 139). Claimant testified she thought the second investigation was "irregular." She stated she had not been told of any other employee losing certification, being reinstated by the certifying official, then re-suspended by another certifying official. (Tr. 140). Complainant claims it was unusual for Respondent not to interview her or allow her to talk to the medical panel prior to her disqualification. (Tr. 140-141). She testified in her past experience with temporary CPRP disqualification no other doctors, other than Dr. Matravers, were involved in advising the certifying official, nor did she know of any other employee who had any doctor other than Dr. Matravers involved in their CPRP decision. (Tr. 141).

### **Alleged Disparate Treatment**

Complainant perceived she was treated differently than other employees because other employees who had substance abuse problems were placed in other jobs that were non-CPRP positions, and some employee's certifications were not revoked. (Tr. 141-142). Burke Latham was temporarily disqualified from CPRP because of a DWI and is currently employed as the plant shift manager. (Tr. 141-144). Complainant heard from "some of the control room operators" that operations manager Jeffery Hunt had been sent home on numerous occasions in the early 1990s with alcohol on his breath while employed by the "government," not Respondent, at CAMDS, a facility "down below TOCDF". She and her husband have observed Hunt "several times" stop and "get alcohol just outside the plant." She claims Hunt admits to being a habitual drinker. (Tr. 145-149). She and her husband have also observed Hunt stop at the store, get alcohol and drink it in his vehicle or go up to the dam to drink. (Tr. 150).

Jeff Allred was in training in Maryland and was caught drinking and driving. He told Complainant he notified his certifying official and was temporarily investigated, but his CPRP was never permanently removed; his employment was not terminated and he is still employed by Respondent. (Tr. 153-154).

From 1994-1998, Bill Johnson and Felix Montijo, both of whom worked in DSA with Complainant, told her they lost their CPRP, but were reassigned to alternative jobs that did not require CPRP. (Tr. 156-159). John Schreckendgust, who worked with Complainant in DSA in 1994, also told her he was unable to obtain a CPRP while working in DSA, but continued to work there for several years. Human Resources informed him he needed to go to a non-CPRP position and he moved to the Brine Reduction Area. He subsequently obtained his CPRP status. (Tr. 159-160).

Bob Brown discussed with Complainant that he lost his CPRP in perhaps 2000; he was moved to the Brine Reduction Area where CPRP was not required at that time. (Tr. 160-161). Complainant testified that in 2008, Respondent allowed employees without a CPRP to work in the Brine Reduction Area when jobs were available. (Tr. 162).

Complainant submitted on-line applications on the same day as her termination for the jobs provided by Sweeting that were open and available with Respondent and which did not require a CPRP. (Tr. 163-164). She applied for clerk jobs in Document Control, Human Resources, as a compliance rep and a buyer's job. (Tr. 165). She applied for at least forty-five jobs, but received no interviews. (Tr. 166). Only five to eight of the prospective jobs required a CPRP. She thinks she met all the qualifications for the 45 jobs because she had trained or cross-trained or had experience in each job. (Tr. 167). She also looked for jobs with other potential employers. She applied with Praxair, Aerotek, Kacob, Broken Arrow, Tooele Army Depot North, DugWay and Watson Pharmaceuticals; she was hired by Watson Pharmaceuticals on October 31, 2008 or 2009. (Tr. 168-171).

Complainant testified Respondent had a history of retaliating against employees for raising environmental or safety concerns. In 1998 or 1999, Trina Allen, and in 2002 or 2004, Andy Harris filed whistleblower complaints with the Department of Labor; both were settled. (Tr. 176-180).

Complainant's rate of pay at Employer was \$24.00 per hour with a 401(k) pension; HAZMAT differential of 50 cents per hour; health, dental and vision benefits; shift differentials; and personal leave. (Tr. 182-183). Her husband picked her up on his health insurance after her termination. (Tr. 183). Since her termination from employment, Complainant's truck was repossessed, she was evicted from her home, and she had medical and dental bills that accrued when she did not have health insurance. She had to borrow money for regular bills and food and has been emotionally affected. (Tr. 184). She was striving to complete twenty years of service with Respondent; and "a lot of co-workers and employees . . . trusted me . . . and [she] had a lot of people relying on me and counting on me." (Tr. 184-185). She worked at Lawson (sic) Pharmaceutical for a year-and-a-half and left involuntarily. (Tr. 186).

On cross-examination, Complainant confirmed that she told Rothenberg she went to the hospital because she had quit taking her medication and later had accidentally overdosed on her medication. (Tr. 187). She also told Scott Sorenson the same information. She told Steve Byrne and Dr. Matravers that she had an accidental overdose. (Tr. 188). She told Max Wahlberg that she had an accidental overdose, but denied telling him she tried to commit suicide. (Tr. 188-189).

She denied telling the Department of Work Force Services (an unemployment agency) that she accidentally overdosed on anti-depressants. She stated she told them she had an accidental overdose of prescribed medication. (Tr. 189). In her pre-trial deposition at page 55, she testified that she did tell Work Force Services that she accidentally overdosed on anti-depressants. (Tr. 190). At the formal hearing, she recanted her deposition testimony by responding she did not remember if she "said anti-depressants." She confirmed her deposition testimony that she told Work Force Services she took the correct amount of medication, but she had been off of her medications for a while and had a reaction. (Tr. 191). At hearing, she did not recall discussing anything like that with anybody at Work Force Services. (Tr. 192).

Complainant testified RX-32 is her rebuttal to her permanent disqualification from the CPRP by the Army; she wrote most of it but had some assistance from Sharon Preston (an attorney) and Stephanie Brown (a private investigator). (Tr. 192-194). At page 463 of RX-32, she stated she did not discuss or file for divorce. (Tr. 195). She testified she stated to Dr. Lim on March 20, 2008, that she had printed the paperwork to

file for divorce, but had not fully filed. She maintained that she had not discussed divorce with her husband. (Tr. 195-196).

Claimant admitted she may have reported suicide ideation to her health care providers in January 2007. (Tr. 197). In her rebuttal to the Army, Complainant stated she ceased her various medications listed at Exhibit 10 to RX-32 in early April 2008. At hearing, she testified the list was not accurate since she continued to take Adderall. (Tr. 197-198). At hearing, she also testified she only ceased Prozac, Fosinopril and Trazadone. She was not certain whether she was even taking Prevacid and Ibuprofen at the time. (Tr. 200).

Claimant admitted she had quit taking all her prescription medications, with the exception Adderall. (Tr. 198-199). She testified she told Steve Byrne, of the medical clinic, she quit taking all of her medications. (Tr. 200). She had been taking blood pressure medication (Fosinopril) since October 2007. (Tr. 200-204; RX-6, p. 188). Complainant saw Dr. Lim on March 20, 2008, and received a refill for her blood pressure medication. Dr. Lim advised her of the risks and benefits of Adderall, for which she received a prescription at this visit, and wanted her to monitor her blood pressure daily. (Tr. 206-207; RX-6, p. 192). Dr. Lim recorded that Complainant wanted Adderall because of stressors, including "going through a divorce." (Tr. 205-206). Complainant testified at hearing that she thinks she told Dr. Lim she was "filling out paper work to go-to get a divorce." (Tr. 206). She quit taking her medications ten days later. (Tr. 207).

Claimant acknowledged that at page 461 of RX-32, the medical incident was described as an "isolated accidental incident." She testified she stands by that characterization of the incident. (Tr. 208). However, on February 2, 2007, Complainant reported to the emergency room with depression and suicide ideations without the intent to actually carry out the suicide. (Tr. 208-210). She also told Sue Fisher, a counselor with Valley Mental Health, in May 2004, that she thought of hanging herself at work to show them how badly she had been treated. (Tr. 208).

On April 12, 2008, Complainant stated she was feeling fine until she got a headache, but was not otherwise sick; she felt good enough to exercise after her twelve-hour shift. (Tr. 211). In her rebuttal to the Army, she alleged that the positive TCA result could have been caused by an over-the-counter drug such as an antihistamine. (Tr. 212; RX-32, p. 468). She did not tell the Army she took an antihistamine and was "not positive if

I did or didn't." (Tr. 212). Claimant testified that on the night of April 12, 2008, she took three 20 mg Prozac capsules, one 30 mg Adderall, two 50-mg Trazodone and one 5 mg Valium. (Tr. 212-213). She admitted Adderall is a stimulant, which she did not normally take at night when she is going to bed. (Tr. 213; RX-32, p. 465).

She worked at Watson Pharmaceuticals from October 31, 2008 to May 25, 2010, when she was terminated. (Tr. 213-214). Watson Pharmaceuticals told her they accepted her resignation; she stated, however, that she was not resigning and wanted to continue working. (Tr. 215-216). She admitted being written up two times prior to her termination for absenteeism. (Tr. 216). She testified she called-in sick to the human resources department, and was told her absence for illness would not be cause for termination. Complainant testified the company informed her that it accepted her resignation from employment, but did not tell her she was terminated for absenteeism. She did not believe the company did not want her back because of her absenteeism problem, but because of misconstrued information about her parent's medical appointments. (Tr. 214, 217-220).

She sought unemployment benefits subsequent to her termination from Respondent, and was found by the Court system to have committed fraud in seeking the benefits because she told the Department of Work Force Services she had not worked in weeks while she had been working at Watson Pharmaceuticals. (Tr. 220). She claimed there was a "misunderstanding of the way a question was read." (Tr. 220-221). She paid a fraud penalty. (Tr. 221; RX-40).

Complainant stated she was paid by Respondent for the days she took off to testify for a sister chemical demilitarization facility in Oregon and Respondent knew why she wanted time off to do so. Mr. Harrison, her attorney in the present matter, called her as a witness. Respondent additionally paid for Complainant's husband to take time off to testify as a witness. (Tr. 222).

She affirmed that inside the double fence of TOCDF an employee must have a CPRP clearance or unescorted access (UAP). (Tr. 222). She stated Gary Boswell worked inside the double fence from 1999 to 2008 as a utility operator, but did not get his clearance until 2006. (Tr. 223). She further testified that transferred employees and new hires were monitored but allowed to work inside the double fence prior to obtaining their clearance. (Tr. 223-224). New hires are escorted, however. (Tr. 226).

Complainant testified she was laid off for approximately five weeks with forty other employees in 1998 or 1999. (Tr. 227-228). She filed a claim alleging the layoff was retaliatory. (Tr. 228). That claim was settled. (Tr. 229). Claimant additionally had a two-week trial before OALJ in 2002, based on a whistleblower claim regarding safety or environmental issues, which was dismissed. (Tr. 231-232). Complainant filed a Chapter 13 bankruptcy in March 2008, one month prior to her April 12, 2008 incident. (Tr. 238).

### **Debbie Sweeting**

Debbie Sweeting testified at the formal hearing. Sweeting is the Human Resource manager for the TOCDF facility. (Tr. 242-243). She has worked for Respondent for thirteen years. (Tr. 243).

Sweeting testified she may have submitted potentially disqualifying information (PDI) to Complainant's certifying official; she consistently submits information on all the employees. Copies of the PDI are also placed in the employee's personnel file. (Tr. 243). She stated "X-files" are investigative files. If an investigation is completed, the information goes into the "X-file" and not in the individual's personnel file. (Tr. 244). Complainant has an X-file, which was produced as part of discovery in this case. (Tr. 244-245).

Sweeting testified that Complainant's medical issue of April 12, 2008, was brought to her attention by Deputy General Manager of Plant Operations, Tim Olinger, on April 23, 2008. (Tr. 245). Olinger called Sweeting to his office and told her he was concerned the "CPRP program or process was broke." He reported that Max Wahlberg, Complainant's supervisor, told him there was a rumor Complainant had walked off the facility upset, gone home from work after working overtime, had attempted suicide, was hospitalized, and came back to work the following Friday. Complainant apparently also told Max Wahlberg upon her return to work that she had attempted suicide. Wahlberg questioned Olinger about whether Complainant's CPRP should be permanently suspended per AR 50-6, which requires permanent disqualification based upon a suicide attempt. (Tr. 247). Olinger did not ask Sweeting to interview Complainant regarding the attempted suicide issue. He asked Sweeting to speak to Wahlberg and determine what Complainant reported, whether she reported to her certifying official and if the clinic was involved. (Tr. 248).

Sweeting contacted Max Wahlberg and Plant Shift Manager Scott Sorensen, and requested they come to her office for a joint meeting, which commenced on April 23, 2008. (Tr. 248-249). Sweeting told Wahlberg and Sorensen that Olinger asked her to look into rumors about Complainant's attempted suicide and to determine "what they knew about the situation." (Tr. 249). Wahlberg reported to Sweeting that Complainant told him she got upset on Saturday and walked off the facility, went home and "attempted suicide" and was in the hospital and "they had almost lost her at one point and had to revive her." She stayed in the hospital a few days thereafter. (Tr. 249-250). Sweeting testified she asked Wahlberg if Complainant used the word "suicide" and he confirmed that she had. Wahlberg then asked Complainant if she had reported this information to Rothenberg, her certifying official; she had not, but had told Mr. Byrne, the physician assistant, in the clinic, who told her she could go to work. (Tr. 250-251). Wahlberg told Sweeting that Complainant reported she had thanked Byrne for helping her get put back in the program and Byrne stated "Well, I wouldn't do it for just anybody." Wahlberg expressed concern to Sweeting that Complainant was not being managed in accordance with AR 50-6, the pertinent Army regulation. (Tr. 252).

Sorenson expressed concern and related to Sweeting that on April 18, 2008, Complainant told him she had an "intentional overdose." Sorenson told Rothenberg about the incident and reminded him about the clause in AR 50-6 regarding attempted suicide. Sorenson was concerned for Complainant being in the work area around chemical munitions and being potentially suicidal. (Tr. 256). Sweeting testified Max Wahlberg gave a written statement but Sorenson did not. Sweeting spoke with Dr. Matravers immediately after meeting with Wahlberg and Sorensen. (Tr. 257).

After her meeting with Wahlberg and Sorenson, Sweeting contacted Dr. Matravers and asked if he knew what was going on; he replied affirmatively and stated Complainant intentionally overdosed—"that Brenda had told him that she wanted to relax the suicide thing." When Sweeting informed Dr. Matravers that Complainant told Wahlberg she attempted suicide, Dr. Matravers responded, "Well, that's new information if it's worded that way." (Tr. 254).

Sweeting testified Dr. Matravers told her that Mr. Byrne contacted him at home, stating Rothenberg was going to temporarily disqualify Complainant from the CPRP. (Tr. 254-255). On April 19, 2008, Dr. Matravers spoke with Complainant and determined she was stable and he was going to release the

temporary disqualification. Sweeting reminded Dr. Matravers of AR 50-6, and that a suicide attempt required Complainant to undergo a professional mental health evaluation. Dr. Matravers indicated he would recommend another temporary disqualification in view of the new information from Wahlberg, a review of the hospitalization records and until the evaluation could be completed. (Tr. 255).

Sweeting testified that after speaking with Dr. Matravers, she reported back to Olinger that Dr. Matravers was going to recommend temporary disqualification to the certifying official. (Tr. 258). Olinger requested Sweeting check into Complainant's walking off the facility and leaving the shift short-handed. He was especially concerned with whether she walked through the area without a protective mask and to checked her time card to make sure she reported her time accurately. (Tr. 259). Sweeting investigated and determined the time card issue was inconclusive. (Tr. 260).

Sweeting interviewed employees Tyler Kimber and Gary Smith regarding Complainant's walking off the job site. She did not make any finding that Complainant had done anything wrong, but never finished the inquiry. (Tr. 260-263). She spoke with Mike Maestas, who reported he gave Complainant a ride home that day and that Complainant was not upset about anything with work, but instead upset with personal issues regarding her children. (Tr. 264).

Sweeting testified she did not think she talked to a certifying official on April 23, 2008, but instead reported Wahlberg's statement about Complainant's attempted suicide as PDI on an H2 form. (Tr. 265). She did not type the form herself, but the PDI consisted of the form, Wahlberg's statement and her notes from the meeting with Wahlberg and Sorenson. The PDI was hand-carried by a staff member and placed into certifying official Rothenberg's box near his office on April 23 or April 24, 2008. (Tr. 266-267). Complainant was subsequently disqualified, but Sweeting did not know by whom. (Tr. 267-268). She testified Dr. Matravers informed her of Complainant's disqualification, and she had also received a letter stating Complainant had been temporarily disqualified prior to her meeting with Complainant on April 24, 2008. (Tr. 268).

Sweeting testified she believed Ted Ryba was involved in the second disqualification as the surety official acting on Rothenberg's behalf because Rothenberg was on vacation for three weeks. (Tr. 269-270). Ryba signed the letter disqualifying Complainant. (Tr. 270-271). Sweeting testified Rothenberg was

told by Complainant that she had an intentional overdose and was not informed Complainant had attempted to commit suicide, as she related to Max Wahlberg. (Tr. 272). Sweeting further testified both she and Olinger were concerned Rothenberg did not follow AR 50-6. (Tr. 272-273). She did not discuss her AR 50-6 concern with Ryba. (Tr. 273).

On April 24, 2008, Sweeting and Dr. Matravers met with Complainant to verify the information given to Sweeting by Wahlberg regarding the attempted suicide. Complainant was told she had again been temporarily disqualified from the CPRP because of the incident. She provided Complainant with information on the Family Medical Leave Act and short term disability since she would not be able to work until the CPRP process was resolved. Sweeting told Complainant to meet with Dr. Matravers to provide a release for medical information. (Tr. 253, 275).

Sweeting's only other involvement was meeting with the panel of three doctors called in by the Army after Complainant had been temporarily disqualified a second time, but prior to her permanent disqualification. (Tr. 276). She testified she was asked to explain the sequence of events, as reported to her, to the panel. The panel was doing a quality assurance review, according to Joe Majestic, Deputy General Manager of Risk, and was headed by Major Mike Parker of the Chemical Materials Agency (CMA), and two contract doctors. All three doctors had expertise with AR 50-6 issues. Major Parker had medical responsibility over Dr. Matravers. (Tr. 277). Majestic had oversight of Safety, Medical and Environmental issues. (Tr. 278).

Sweeting testified she was asked to explain the sequence of events as reported to her from the time Complainant left the facility on April 12, 2008, to what she had reported to each individual about the incident. The doctors did not call in Complainant or any other managers to talk to them regarding the sequence of events. (Tr. 279). Sweeting understood the panel was controlled by CMA or the Army. She thought the quality assurance review was examining how Dr. Matravers had done his job, what was reported and probably how Rothenberg was making his decisions. (Tr. 280). Yet, as a result of the panel's review, Complainant was disqualified from the CPRP program. (Tr. 281).

Sweeting spoke with Olinger after April 24, 2008, and informed him that she had given Complainant the "FMLA STD paperwork," and that Complainant had denied an attempted

suicide; Complainant did admit she intentionally overdosed, however. (Tr. 282-283). Sweeting informed Olinger that she would not look any further into Complainant walking off the facility, that Complainant was exercising and had gotten a ride in the area where she needed a mask. (Tr. 284). Sweeting testified there have been no other reversals of certifying officials by a medical panel. (Tr. 285). Sweeting testified the panel met with Dr. Matravers, but she did not know whether they met with Rothenberg. (Tr. 285-286).

Sweeting testified certifying official Clyde was called into the meeting on April 24, 2008, with Complainant, Sweeting and Dr. Matravers. Complainant wanted to speak with Rothenberg about her rights and the appeal process. When Sweeting could not reach Rothenberg by telephone, Complainant agreed to have Clyde sit in at the meeting in Rothenberg's place. (Tr. 285-286). Sweeting could not recall if Clyde stated it was ultimately Rothenberg's decision whether Complainant kept her CPRP certification. Dr. Matravers stated he needed Complainant's medical records and he had her sign a release. (Tr. 287).

Sweeting met with Complainant at her termination meeting on June 23, 2008. (Tr. 296). She gave Complainant a list of jobs that was compiled by the recruiter; it was a weekly jobs opening list. Sweeting did not check the list to determine which positions required CPRP certification. (Tr. 297).

Sweeting testified the Army Depot operates the Unescorted Access Program (UAP), which is "like a much lesser CPRP program." She stated she believed Complainant held both the UAP and CPRP approvals prior to her disqualification. (Tr. 298). Sweeting could not recall whether there was any official decision to remove Complainant's UAP approval prior to her termination. (Tr. 298-299).

On June 24, 2008, Sweeting received an e-mail (RX-34, p. 628) from Heather Strickland, in Human Resources, concerning permanent disqualification from CPRP and questioning UAP approval status for two employees, Complainant and Chad Nelson. (Tr. 299-300). Sweeting stated when Complainant applied for jobs on June 23 and June 24, 2008, she was still qualified for UAP jobs. Sweeting testified she does not know what happened, but knows Complainant lost her UAP subsequent to June 24, 2008. (Tr. 300).

Sweeting forwarded the e-mail to Carl Johnson, who is manager over the surety department for Battelle, a subcontractor to Respondent. Johnson then sought an assessment from J.J. Gomez, the Army official in charge of the UAP program at TOCDF. (Tr. 301-302; RX-34, p. 627). Sweeting testified the Human Resources Department inquired whether Complainant still had UAP status and whether she would continue to have UAP status. (Tr. 303-304).

No jobs with Respondent at TOCDF were available to Complainant without a CPRP or UAP. (Tr. 302). Jay Gomez, the army official in charge of the UAP program at TOCDF, determined that Complainant was not eligible for UAP on or about July 1, 2008. (Tr. 310-311; RX-34, p. 625). Sweeting was involved in deciding whether Complainant would be considered for or selected for any jobs and her loss of the UAP status played a role in her lack of qualifications for the jobs for which she applied. Had she not lost her UAP status, there were some jobs for which Complainant would have been qualified. (Tr. 312). Sweeting did not place any writings in Complainant's file that she was ineligible for re-hire. (Tr. 313). She did not know whether anyone else had made such a statement in writing. (Tr. 313-314).

Sweeting testified it is routine at the TOCDF facility once an employee loses their CPRP to ask Gomez if they are eligible for the UAP. (Tr. 315). Sweeting stated that Chad Nelson also lost his UAP after losing his CPRP. (Tr. 315).

On June 23, 2008, Sweeting met with Complainant for her termination meeting. (Tr. 318). Sweeting signed a personnel action form of Complainant's termination, which was actually prepared by Cynthia Brothers. (Tr. 319-320). The form stated Complainant was NOT eligible for re-hire. (Tr. 320). Sweeting stated she did not realize that "NOT eligible" was on the form; she admitted she probably did not go over the form in detail. (Tr. 320-321). Sweeting would not have been the first person to see Complainant's applications for jobs; her staff of seven or eight employees would process the applications, but typically would not review the applicant's personnel file. She stated that "everybody assumed she was eligible." (Tr. 321-322).

Sweeting testified an employee named Feoaaki Funaki could not get CPRP approval, but is employed in a non-CPRP position as an operator at the CAMDS facility which only required a UAP. (Tr. 322-323). Shawn Ford is currently employed in the environmental department without a CPRP. (Tr. 323). Complainant would be qualified for either of these two positions

if she had a UAP clearance. (Tr. 324). Phil Brown lost his CPRP and was placed in a UAP position. (Tr. 324-325). Sweeting could not recall if an e-mail was sent to Gomez asking to revisit the UAP eligibility of Phil Brown, but did with Funaki and Ford. With respect to Funaki, Human Resources was inquiring whether he could obtain a UAP. (Tr. 325). Sweeting is not aware of any incident involving Jeff Allred. (Tr. 326). Sweeting was sure PDI was filed on Burke Latham after his incident, but he is still employed. (Tr. 326-327).

On Respondent's case-in-chief, Sweeting was questioned about her investigation into the events of April 12, 2008. (Tr. 1051). RX-29 is a summary prepared by Sweeting. (Tr. 1052; RX-29, p. 383). She concluded that Complainant did not clock in on the biometric time clock, but told Sweeting she had clocked in. The time sheet showed Complainant worked 12.5 hours on April 12, 2008. (Tr. 1052; RX-29, p. 384). Complainant did not tell Sweeting that she left work early. Wahlberg was the first to report Complainant related she had left the facility upset. (Tr. 1053). Scott Hansen prepared a statement and reported that Complainant left work upset and crying. (Tr. 1053; RX-29, p. 394). If Complainant left work without permission from her supervisor, it is a disciplinary event. (Tr. 1054). Gary Smith reported seeing Complainant walking toward the gas station at 6:05 p.m. (Tr. 1054; RX-29, p. 401). Sweeting concluded that Complainant left at 6:00 p.m. or earlier, and that she walked one-half mile where she should have been carrying her mask. (Tr. 1055). Tyler Kimber clocked out at 5:56 pm and saw Complainant "probably a mile and a half [out]." (Tr. 1056; RX-29, p. 403). Mike Maestas, who picked up Complainant, stated that Complainant was visibly upset and "really mad at her husband." (Tr. 1056-1057; RX-29, p. 404). Sweeting decided not to go further with the investigation because permanent disqualification seemed certain. Because of the potential disqualification, she did not ask Complainant for a written statement about using the time clock, leaving work early, perhaps not having her mask, putting 12 hours on the time card, but not working 12 hours. (Tr. 1057-1058).

RX-17 is a compilation of handwritten notes from her meeting with Complainant and Dr. Matravers on April 24, 2008, where Complainant stated she was "really down, upset, depressed & went home & O.D'ed" and was taken to the hospital, it was her "first attempt." (Tr. 1058; RX-17, p. 359). Complainant also commented that she was "ten times more suicidal before when I had problems before-I was going to commit suicide on the plant." This statement relates to a comment that Complainant allegedly made insinuating that she was "going to commit suicide on the

plant." (Tr. 1059; RX-17, pp. 360, 362). Sweeting stated that Complainant told Sorenson and Wahlberg that she had intentionally overdosed and used that wording in their April 24, 2008 meeting. (Tr. 1059).

RX-71 is a spreadsheet that lists the job positions for which Complainant applied and who was hired for each position. (Tr. 1060). It also shows whether a CPRP or UAP was required for the job position. (Tr. 1060). Employee Funaki was hired as a BRA-RHA operator as a dual citizen but was terminated because he was unable to obtain a CPRP. (Tr. 1061-1062). Employee Marcy Glead was in the process of getting a UAP, but was terminated before gaining a UAP. (Tr. 1062-1063). Employee Mike Anderson was also in the process of obtaining a UAP, but was without a UAP for 2 years and had to be escorted while his application was being processed. (Tr. 1063). Rick Clyde is the lead certifying official. (Tr. 1064). Positions are posted on the website. (Tr. 1065-1066). "URS" positions listed on RX-71 were not at TOCDF, but four jobs were in Morgantown, West Virginia, and four jobs were in Salt Lake City, Utah. (Tr. 1066).

Sweeting testified about employees without a CPRP. (Tr. 1067). Phil Brown is a current employee who was hired as a maintenance laborer with a UAP. (Tr. 1067-1068). He applied for a DSA operator job, had an epileptic attack and was medically disqualified for one year because he was deemed unreliable. Brown was able to reapply and gain a maintenance laborer position that was required a UAP, and then reapplied for a DSA operator position one year later. (Tr. 1068). Shawn Ford was in a UAP job and applied for a CPRP position. (Tr. 1068-1069). Ford took medication given to her by her mother for nerves at her brother's funeral and had a positive random drug test. (Tr. 1069). Ford was permanently disqualified from CPRP and applied for a UAP job. (Tr. 1069). Gary Boswell took a couple years to get his CPRP approved. Boswell's using drugs in high school caused to his CPRP disqualification. (Tr. 1070). Bill Johnson applied for CPRP and was turned down, though he was hired in a UAP job and worked for twelve or more years. (Tr. 1070). AR 50-6 later changed enabling Johnson to reapply for and obtain a CPRP. (Tr. 1070). Felix Montoya was not in a position requiring a CPRP, but had a UAP. (Tr. 1071). Montoya has been gone from TOCDF for about eight years. John Schreckengist, who was mentioned by Complainant, transferred to the sister facility in Oregon in July 2010 before the October 2010 hearing resumption and has always had a CPRP. (Tr. 1071, 1102). Bob Brown has a CPRP. (Tr. 1072). Stephen Stewart was

a trainer and may have been a control room operator, but Sweeting does not know what his status may be. (Tr. 1072).

RX-37 is a list of employees who did not qualify for CPRP and were issued permanent disqualification. (Tr. 1073). Bill Johnson was eventually able to obtain a CPRP. Ref Maestas and Jin Hebert were permanently disqualified, but successfully appealed and were reinstated into CPRP. (Tr. 1073-1074). Michael Caroon was not successful in his disqualification appeal and is no longer employed. (Tr. 1074). Hofheins, Warr and Allison could not get a CPRP or UAP. (Tr. 1074). Others are listed as well, such as Timothy Carson, Herman Candelario, Mr. McManus, Mr. Simmons, Ms. Langan, Sandy McFarlane, Dan Myers, Mr. Elmer, Elgin Perkins, Roger Reese, Chad Nelson and Lynden Uplinger who were terminated because they lost their CPRP. (Tr. 1074-1078).

RX-34 is an e-mail stream directed to Gomez in which Respondent was trying to determine if Complainant and Nelson, who were applying for open positions, could qualify for a UAP. (Tr. 1079).

On cross-examination, Sweeting indicated RX-29 was PDI on Complainant dated April 24, 2008, prepared by Cindy Brothers, which Sweeting asked her to prepare. (Tr. 1080). On Tuesday, April 23, 2008, Sweeting began her investigation of Complainant's incident. (Tr. 1080). She did not convey information to Complainant's certifying official on April 23, 2008 or April 24, 2008. (Tr. 1080). She stated the time card issue was not the basis for Complainant's termination, nor was walking in an area where she should have had a mask on. (Tr. 1080-1081). She noted that Complainant used the phrase "intentional overdose," but the hospital records called the incident a suicide attempt. (Tr. 1081). Complainant never told her it was a suicide attempt. (Tr. 1081). She is aware that Complainant testified that it was not her intent to hurt herself. (Tr. 1081-1082). RX-38 and RX-71, the listings of jobs for which Complainant applied, were prepared by Mary Chapel who works for Sweeting. (Tr. 1082). Sweeting prepared the comments with information from Cindy Johnson and her own inquiries. (Tr. 1083). The report does not reflect what program an employee was in when they applied for the job position. (Tr. 1084). She did not think to add that information. (Tr. 1086). The report reflects which program the employee is in presently. (Tr. 1086).

She stated Wahlberg was wrong when he testified that a BRA-RHA operator is now a UAP position, as it requires a CPRP. (Tr. 1092). Complainant was screened out early in the process and would not have been considered for any jobs for which she applied. There were no jobs with Respondent that she would not have been screened out of early. (Tr. 1094). On or about July 1, 2008, she called Complainant at home and told her she would not be eligible for UAP and there would be no jobs for which she would be eligible. (Tr. 1094-1096). She stated that McCloskey's testimony that the Senior Management Board knew Complainant would not be eligible for UAP could not have been possible. (Tr. 1097). She reviewed additional employees who lost their CPRP but applied for UAP, such as Shawn Ford. (Tr. 1100).

Of the employees listed on RX-37 who could not get a CPRP, she did not look at files to determine if an inquiry was made of the Army regarding UAP eligibility. (Tr. 1105). The following employees were similar to Complainant: Paul Hofheins, Shane Warr, Troy Allison, Kurt McManus and Lynden Uplinger, in that they were terminated because they were unable to obtain or retain a CPRP or UAP. (Tr. 1106-1110).

She was involved in the termination of Ed Tomlinson, but his managers, Cody Hunter and Scott Sorenson, did not want him terminated. (Tr. 1111-1112). Cindy Brothers, who worked for Sweeting in HR, did not tell her Tomlinson's termination was disparate treatment. (Tr. 1113). Brothers is no longer working at the company. (Tr. 1113). Nelson had a CPRP and reported a suicidal attempt, was permanently disqualified on or about June 10, 2008, and was terminated on June 25, 2008, because he could not get UAP in June 2008. (Tr. 1115-1119; RX-37, pp. 678-680).

#### **Dr. Gary Matravers**

Dr. Matravers is a physician and Medical Director at TOCDF, and has held that position for eight years. (Tr. 328). He is aware of the CPRP status issue involving Complainant in April 2008. (Tr. 328).

Dr. Matravers testified he spoke with Complainant about her visit to the emergency room in April 2008. (Tr. 328). After Rothenberg had temporarily disqualified Complainant, Dr. Matravers first recommended Complainant's CPRP status remain intact over the weekend, but had not yet spoken with Complainant. He felt Complainant was able to return to work. (Tr. 329). Rothenberg reinstated Complainant's CPRP status. (Tr. 330).

Subsequent to Complainant's reinstatement, Dr. Matravers spoke with Sweeting, Joe Majestic, Steve Byrne, and three physicians from CMA. (Tr. 331). Dr. Matravers testified Byrne told him that on April 18, 2008, Byrne spoke to Rothenberg about Complainant's temporary disqualification; Dr. Matravers suggested that he should talk to Complainant himself the next day. He testified Byrne did not oppose Complainant's reinstatement. (Tr. 332).

On April 24, 2008, subsequent to Complainant's reinstatement, Sweeting called a meeting to discuss Dr. Matravers's thoughts regarding the situation and what his plans were regarding a second disqualification. (Tr. 334). Rothenberg informed him Complainant had been suspended again from the CPRP. Dr. Matravers testified he told Sweeting the plans on the next step of Complainant's disqualification from CPRP were to wait for medical records from Complainant's outside treating physicians as well as her mental health provider to determine her diagnosis and treatment plans. Nothing was decided at the meeting regarding Complainant's disqualification. (Tr. 338).

Dr. Matravers testified he contacted Joe Majestic, his immediate superior, to keep him informed regarding Complainant's status. (Tr. 339). Dr. Matravers denied initiating Complainant's second disqualification. (Tr. 339-340).

A panel of three physicians under contract for CMA was formed in early May 2008, and consisted of Dr. Mike Parker (Major in US Army), Dr. Jan Drewry (consultant), and Dr. Bob Burr (a Salt Lake City private physician). (Tr. 340-342). The panel was conducting a review that related, at least in part, to Complainant's CPRP. Dr. Matravers testified he had never previously experienced a panel of three doctors contacting him regarding an employee's CPRP status. (Tr. 341). Dr. Matravers did not ask for the panel of doctors to perform the review. (Tr. 341-342).

Dr. Matravers stated Ted Ryba, site project manager, had convened the panel to consult on Complainant's CPRP status. (Tr. 342). Dr. Matravers stated he was never told he was not medically competent to decide Complainant's CPRP. He stated the mental health records alone would not have disqualified Complainant in his opinion. (Tr. 343). Complainant was ultimately permanently disqualified from CPRP. (Tr. 344). Dr. Matravers, as Clinic Director/treating physician, recommends disqualification from CPRP. Dr. Matravers denied receiving any

suggestions to recommend permanent disqualification other than the receipt of a letter from the panel that recommended disqualification. (Tr. 344-345). Dr. Matravers issued a written recommendation to Complainant's certifying official that she be permanently disqualified on "the day of the panel," before he received the written recommendation of the panel. (Tr. 345, 346-347). During the panel meeting, Dr. Matravers concurred with the panel that permanent disqualification was appropriate. Sweeting was present at the panel meeting, but he did not recall her presenting any information. (Tr. 346).

Dr. Matravers received letters from two of Complainant's family physicians, a letter from a mental health provider at Valley Mental Health and the Tooele Valley Hospital emergency room records of her April 12, 2008 visit. (Tr. 350). He reviewed the records before the panel meeting, but had not formed any opinion regarding Complainant's permanent disqualification at that time, nor had he issued any written recommendations. (Tr. 350-351). In his opinion, Complainant intentionally overdosed, which are the words Complainant used with Steve Byrne. (Tr. 351-352). Dr. Matravers testified he also asked Complainant if she had attempted to commit suicide, to which she replied, "No." (Tr. 352)

RX-28, pp. 374-375, is a memorandum reflecting the consensus of the panel which was discussed with him. (Tr. 354-356). The panel did not decide if Complainant could do a non-CPRP job, and Dr. Matravers was never asked whether Complainant would be eligible for such a position. (Tr. 356). Dr. Matravers testified that in May 2008, he would have had concerns or reservations about Complainant filling non-CPRP jobs based on the information he had been given at that time. He would have asked for an outside mental health evaluation. (Tr. 359-360). Dr. Matravers was unaware Complainant actually applied for non-CPRP positions. (Tr. 360).

Dr. Matravers testified he did not receive the Valley Mental Health evaluation. He asked Dr. Smith to clarify points of Complainant's diagnosis, treatment and care. He did not follow up with Dr. Smith with whom Complainant had a scheduled appointment on May 1, 2008, or ask for his mental health evaluation. (Tr. 364-365). Dr. Matravers testified that, to his knowledge, the medical panel did not ask for or receive an outside mental health evaluation. (Tr. 365-366). In April 2008, Rothenberg requested a mental health evaluation, and Dr. Matravers met with and evaluated Complainant. (Tr. 366).

On cross-examination, Dr. Matravers stated, as Medical Director, he oversees clinic operations and also provides medical care related to work-related issues. (Tr. 366-367). For non-work-related issues, employees go to their private physicians. (Tr. 367).

Dr. Matravers stated the CPRP "is an Army program that is put in place to ensure that individuals working around chemical agents are reliable, are healthy, are able to wear their personal protective equipment, are able to perform their job functions without -- in a safe manner without endangering themselves or their fellow employees." (Tr. 367-368). He further testified PDI is an acronym for "potentially disqualifying information," which is any medical issue that affects reliability or medical fitness to perform in job functions. (Tr. 368). Dr. Matravers stated the most common types of PDI are related to prescription medication, side-effects, diagnoses of medical conditions, work-related issues, job injuries, mental health issues, substance abuse, drug screens, and DUI. (Tr. 368-370). He further stated that the Certifying Official, who is employed by the government, is the decision maker regarding temporary and permanent disqualification of employees. (Tr. 368, 370-371).

Dr. Matravers testified his first involvement with Complainant's April 12, 2008 incident was on April 18, 2008, when Byrne called him to report that Complainant had been in the hospital for a drug overdose and had been subsequently temporarily disqualified by Rothenberg. (Tr. 371-372).

On Saturday, April 19, 2008, Dr. Matravers talked to Complainant on the telephone and subsequently decided she was stable enough to have the temporary disqualification removed pending an evaluation. (Tr. 372). He testified he asked if Complainant had tried to commit suicide and she replied "no." (Tr. 372-373). He told her to follow-up with her mental health provider at Valley Mental Health, to continue taking her previously prescribed medications and requested she come into the clinic on Monday. (Tr. 373-375).

Complainant met with Dr. Matravers at the clinic on Monday, April 21, 2008, and informed him she had some family issues and personal issues that caused her to take more medication than was prescribed, was brought to the hospital where she required resuscitation, and then was hospitalized for several days thereafter. (Tr. 375-376).

Dr. Matravers testified his assessment or diagnosis was intentional overdose of psychotropic medications requiring hospitalization. (Tr. 376; RX-4, p. 88). He determined it was an intentional overdose because Complainant informed him she intentionally took the medication. Complainant told Dr. Matravers she had overdosed on Prozac and Adderall. (Tr. 377). He requested Complainant to come back in one week after an evaluation from a mental health professional regarding the diagnosis and treatment plan, mainly to determine whether her actions represented a suicide attempt. (Tr. 378-379). Dr. Matravers testified he recommended lifting the temporary disqualification because he did not have enough information to keep it in effect at that time while gathering further information. His clinic note of that date was marked and sent as PDI to Complainant's certifying official. (Tr. 379).

Dr. Matravers identified RX-5, as a medication list of Complainant dated April 18, 2008, which listed her medications as Prozac, Fosinopril (Lisinopril) and Adderall. (Tr. 381; RX-5, p. 156). Dr. Matravers identified RX-4, p. 87, as a note placed in Complainant's chart on April 18, 2008, by Steve Byrne, in which it is recorded that Complainant "had an intentional OD of meds. Was hospitalized from 4/12-4/15 . . . She admits this was a "stupid" gesture & can't ID a specific cause except generalized probs. in her personal life." (Tr. 381-382). He identified RX-4, p. 91, as a Med Form No. 123 used to inform certifying officials of clinic recommendations. (Tr. 383). On this specific form he recommended release of the temporary disqualification on April 21, 2008. (Tr. 383). His clinic note also indicated Complainant was to have her mental health provider release information for the clinic records regarding her diagnosis and therapy recommendations. (Tr. 384-385).

Dr. Matravers testified he was later informed by Sweeting that Complainant told her supervisor she had tried to commit suicide. (Tr. 385). Complainant was temporarily disqualified a second time thereafter, but Dr. Matravers was not asked for a recommendation regarding her second temporary disqualification. (Tr. 386). Dr. Matravers concurred with the second temporary disqualification in light of the new information and while awaiting medical information from outside sources. (Tr. 387).

Dr. Matravers testified he met with Complainant, Sweeting and certifying official Clyde on April 24, 2008. (Tr. 388). He did not recall them agreeing on any action to be taken. (Tr. 389). RX-17, p. 362, is a summary of the meeting of April 24, 2008, that he signed confirming his agreement with the summary of facts in which Complainant reported she did not tell Wahlberg

she attempted to commit suicide but acknowledged she intentionally overdosed on anti-depressants. (Tr. 388). RX-18 is his letter dated April 28, 2008, to Mr. Smith requesting information regarding Complainant's intentional overdose and possible suicide attempt. (Tr. 389-390). RX-22 is a letter dated May 1, 2008, from Mr. Smith, a licensed LPC, which did not answer Dr. Matravers's questions; it was essentially Complainant's statement of what happened and was not useful to Dr. Matravers. He was never informed that a mental health evaluation was actually performed. (Tr. 390-392).

Dr. Matravers testified he asked Complainant to go to the hospital and get her records and bring them to him; she complied with the request. The medical records are contained within the TOCDF clinic records. (Tr. 392-393). Dr. Matravers was in favor of outside medical advice, but does not know who came up with the idea. (Tr. 393-394). He met with the three-physician panel and reviewed Complainant's medical records, consisting of the clinic chart as well as the hospital medical records. (Tr. 394-395). The panel consensus was to permanently disqualify Complainant, and Dr. Matravers recommended permanent disqualification based on that consensus. (Tr. 395). RX-26 is Dr. Matravers's recommendation dated May 13, 2008, to permanently disqualify Complainant based on PDI that "the intentional overdose of previously reported medications that occurred 4/12/08 provided adequate evidence of attempted suicide" which was sent to the Certifying Official. (Tr. 396).

Dr. Matravers testified the clinic records do not show that Complainant reported the use of Tylenol #3 or her husband's Ambien. (Tr. 397-398). The reported use of a medication prescribed to someone other than the employee would have been grounds for permanent disqualification from CPRP in 2008, as both medications were categorized as "scheduled medications." (Tr. 398). To his knowledge there have been no other unsuccessful attempted suicides. (Tr. 403-404).

On re-direct examination, Dr. Matravers noted that the emergency room records show resuscitation occurred. (Tr. 408). He confirmed Max Wahlberg was the supervisor who told Sweeting of Complainant's suicide attempt. (Tr. 411-412). Dr. Matravers did not talk to Wahlberg. (Tr. 414). Prior to the three-physician panel being convened, he had not communicated with anyone that he desired help with Complainant's CPRP issue. (Tr. 418). Dr. Matravers testified that he relied upon the ER medical records in making his recommendation to disqualify Complainant, but did not seek to verify the accuracy of the records. He did not review the ER records with Complainant.

(Tr. 418). He also considered the inconsistencies between Complainant's statements and the statements of others. (Tr. 419). He also relied upon AR 50-6. (Tr. 420). Although he possessed the above three items, he did not make a decision to recommend permanent disqualification because he believed a psychiatric evaluation was needed. (Tr. 421). The panel did not provide for such an evaluation, nor did he obtain such an evaluation in an effort to answer the question whether Complainant's medical incident was or was not a suicide attempt. (Tr. 421-422).

Complainant did not tell Dr. Matravers that she had taken Tylenol #3 during her medical incident, nor did he see any medical tests result that found Tylenol #3 in her blood. (Tr. 422). He had no reason to believe Complainant had actually taken Tylenol #3. (Tr. 422-423). He did not make a finding that Complainant was taking medication prescribed for another person. (Tr. 424). He was not asked to contact Complainant nor did he contact her about the results of the three-doctor panel. (Tr. 429). He and the panel decided to recommend Complainant's permanent disqualification from CPRP. (Tr. 429).

### **Brian Scott**

Brian Scott testified at the formal hearing. Scott is a safety engineering technologist at TOCDF and has worked there since November 1997. (Tr. 440). He has also been a BRA-RHA and DSA operator. He was a DSA supervisor from April 2004 to 2006. (Tr. 440). He supervised Complainant while over DSA. (Tr. 441).

DSA is a support area for toxic entrants, and the DSA operator duties include care and maintenance of life support equipment to physically backing up the DPE entrants. (Tr. 441). Part of Complainant's job was to take bags of waste left in the air locks and move them from the B air lock to the A air lock. (Tr. 442). DPE ensembles, which were fully enclosed with supplied air, were built by the military and approved by OSHA. (Tr. 441-442). Bags of waste contained gloves, boots and DPE suits, which could have liquids but may have hazardous waste or chemical agent on them since entrants are "de-conned" when they come out of toxic entry. (Tr. 442-445).

DSA employees wear a lower level of dress than the DPE ensemble. The DSA ensemble was considered adequate protection against liquid chemical agents by the military, but not by OSHA. (Tr. 445). When DSA employees have to facilitate an emergency rescue of DPE entrants, they wear military level B or 3<sup>rd</sup> level

instead of the military level A worn by DPE entrants. (Tr. 446). Level "A" is encapsulated, not fully contained suit, full-body coverage, supplied air and a "CBA;" level "B" is an apron and mask, but no supplied air and not fully encompassing. (Tr. 447).

Scott testified he does not recall Complainant raising complaints about the protective suits, Clorox as a decontaminate or the ACAMS wand. (Tr. 447). When Complainant began working for Scott, he asked management if he could not work with Complainant because of her past history as a whistleblower and "falsifying" documents, and other "minor things." (Tr. 448). Management did not grant his request, and he was asked to continue to work with Complainant. He recalled Complainant asking for a meeting with the crew, but did not recall other employees being concerned about Complainant's taking notes on the job. (Tr. 449). He further did not recall Complainant raising an issue to Rob Ralston, an operations supervisor. (Tr. 450).

Scott testified he was aware of the red dust problem, which turned out to be cadmium on the plant side from ton containers. "The whole plant is aware of it." (Tr. 451). Cadmium is a toxic metal. He saw red dust in the Metal Parts Furnace cool down area, which had the potential to escape into the open environment. He testified he heard it was later reported that the dust "was on the outside." (Tr. 452). He was aware of employees putting the ACAMS in the air ducts. Management stopped the use of the ACAMS wand in the air ducts rather than leaving it in the holder in the air lock because it was prohibited by the RCRA permit issued by the State of Utah, which required constant monitoring of the air locks. (Tr. 453).

### **Scott Sorenson**

Scott Sorensen testified at the formal hearing. He is the plant shift manager for the "B team" at TOCDF. (Tr. 455-456). He began with Employer on December 7, 1992, and has worked as an engineering technician for systemization, control room operator and control room supervisor. (Tr. 456). He is aware of Complainant's CPRP status, but had no involvement in her disqualification. (Tr. 456-457). He is an alternate certifying official, "AO," but only prepares paperwork in the event the certifying official is off site. (Tr. 458). The alternate certifying official does not have the authority to disqualify employees. (Tr. 459).

Sorensen testified he is aware of the red dust problem in the cool down area from projectiles being cooked in the furnace. It was an environmental issue. (Tr. 459-460). He testified he was told that the red dust was cadmium; he knows cadmium is a toxic metal. (Tr. 460). Sorensen observed the red dust outside the cool down area. "It was very apparent." (Tr. 460). TOCDF's "environmental people" and the State of Utah environmental agency were extremely concerned. He testified he understood that the TOCDF facility operates under a hazardous waste permit and a Clean Air Act permit issued by the State of Utah. (Tr. 461).

Sorensen stated placing the ACAMS wand in the air duct instead of in its holder in the air locks would be problematic. (Tr. 461-462). He testified that if the wand was left in the duct, it would have to be physically put there. If the ACAMS wand is not in its holder it would be a hazardous concern because other employees might enter into a chemical agent area without knowledge because of the low ACAMS reading. (Tr. 463). He further testified a lot of people were concerned about the ACAMS wand issue and Complainant may have raised a concern. He was aware that Complainant had raised environmental and safety concerns from time to time. She did not raise any concerns directly to Sorenson or to her supervisors. (Tr. 464). Complainant was pro-active in raising concerns. (Tr. 464-465).

Sorensen testified he was also aware of the sulfur dioxide exposure concerns, but does not recall Complainant raising a concern. (Tr. 465-466). He further testified Complainant and others raised concerns that backups were not adequately protected while performing tasks in toxic areas. (Tr. 467). He acknowledged that the use of Clorox as a decontaminate would mask the presence of chemical agent on the ACAMS wand, and give a false negative reading. He could not recall Complainant raising a concern about the use of Clorox. (Tr. 468).

Sorensen stated Rob Ralston is "boss of the entry supervisors." (Tr. 469). He acknowledged a build-up of bags of waste in the air lock. DPE entrants initially removed the bags of waste, which duty later changed to the DSA backups. The bags of waste are treated as hazardous because they are contaminated. (Tr. 469-470). He did not hear of waste being left in the air locks without being bagged. (Tr. 477). He further stated it is possible that liquids could be on the bags after the suits had been washed down for decontamination. (Tr. 471). Caustic liquids are no longer used for decontamination, and peroxide and soap were used in lieu of caustic liquids. (Tr. 471-472).

A UAP is a lower level of clearance than a CPRP. He would not oppose Complainant's hiring for a UAP job. (Tr. 473).

On cross-examination, Sorensen testified a company named URS bought EG&G. (Tr. 479-480). He further testified that in 1996, some employees suffered injuries and scarring from caustic liquids burning them. (Tr. 480-481).

On re-direct examination, Sorensen testified GB is a nerve agent; VX is also a nerve agent, but is more lethal and persistent than GB. (Tr. 482-483).

### **Jeffery Hunt**

Jeffery Hunt testified at the formal hearing. He is the plant operations/maintenance manager at the TOCDF facility, and has worked there for nineteen years. (Tr. 484). He has worked as a utility operator, pass utility supervisor, operations supervisor and plant shift manager, operations manager and operations plant maintenance manager. (Tr. 484-485). He also worked at Respondent's CAMDS facility. (Tr. 485).

Hunt stated a root cause analysis discovered the problem with the ACAMS wand being placed in the air duct. If the wand is left in the duct, the wand reads the contamination level in the air duct and not the actual area where the employee would be walking; the reading might be diluted. (Tr. 485). He recalled that on two occasions an alarm was set off after decontamination had been monitored clean by the ACAMS wand that had been in the air duct. (Tr. 487-488). A supervisor was sent to the air lock to supervise every egress. He does not recall a memo being put out that the ACAMS wand was to be in its holder and not in the air duct. (Tr. 487).

Hunt knows Complainant; he worked with her seventeen years prior to the hearing. Complainant never came to him with any complaints about the ACAMS wand or anything else since he became manager at TOCDF. (Tr. 489). Complainant's supervisors did not raise concerns on her behalf. (Tr. 490-491). Complainant never complained to Hunt about inadequate protective clothing and handling bags of waste. (Tr. 491). Complainant may have been in his office with other employees six or seven years prior, but Hunt did not recall why the employees were present. (Tr. 491-492). He attends safety meetings, but does not remember Complainant being present at any of them. (Tr. 492-493).

Hunt testified the red dust issue was raised by the environmental department. They needed to do a better job of

cleaning the red dust from cradles; dust was on the ground in the cool down area to the breezeway. (Tr. 493-494). He was also aware of a flange leaking caustic material in the BRA. (Tr. 494-495). The State inspected the Pollution Abatement System and Respondent received a small fine when notices of violations are issued in November of each year. (Tr. 495).

Hunt testified he never lost his CPRP, nor was it ever suspended. (Tr. 496-497). He testified he has no problem with alcohol or substance abuse. He drinks socially maybe once a month; he does not consume alcohol on a daily basis. His nickname is "Juice," but it is with regard to betting on football games, not alcohol. (Tr. 497-498).

### **Jeffery Utley**

Jeffery Utley testified at the formal hearing. Utley, Complainant's husband, is a mechanic in maintenance at CAMDS. He worked at TOCDF for Respondent for 12 years as a BRA-RHA operator. (Tr. 498-499).

Utley testified he saw red dust in the cool down area where he worked. Complainant raised concerns to her supervisor Max Wahlberg. (Tr. 500). OSHA inspected it and shutdown the operation until it could be cleaned up and placed under control. (Tr. 500-501).

Utley testified Complainant also raised issues about sulfur dioxide with Max Wahlberg. The mustard munitions were putting off sulfur dioxide when it came out of the Metal Parts Furnace. (Tr. 501). OSHA became involved and Respondent eventually just quit cutting the munitions because the sulfur dioxide could not be controlled; the munitions were shipped off site to be cut. (Tr. 501-502). He is also familiar with the issue of the ACAMS wand being left in the air duct rather than replacing them in the holder in the air lock. Between the years 2002-2008, he saw firsthand the ACAMS wand being put into the air duct; the last time was in 2007-2008. (Tr. 502-503). Complainant told him she had raised issues with Max Wahlberg about the ACAMS wand being left in the air ducts within three to six months before her termination. (Tr. 503-504).

Utley has not worked at TOCDF in the last two years. (Tr. 503). Utley testified he did entry in a DPE suit in the "A" air lock where ACAMS would reveal high readings of agent present and decon measures were taken. Backups entered the same area approximately ten minutes later, but wearing less protective gear. (Tr. 504-505). He stated Complainant told him she raised

safety concerns about the inadequate protective clothing to Max Wahlberg three to six months prior to her termination. (Tr. 506). She also complained to Shawn Palmer in the safety department. (Tr. 506-507).

In 2006, he saw firsthand that bags of waste containing used DPE suits, trash, boots, plugs and hazardous waste were left in the "A" air lock. (Tr. 507-509). In 2008, Complainant told Utley she raised concerns about the accumulation of hazardous waste bags in the air locks to her supervisor, Wahlberg. (Tr. 510-511).

Utley testified he and Complainant have been married for seven years. (Tr. 511). He further testified her termination has had an emotional impact; she lost her livelihood, truck and house. (Tr. 511-513). The family has also been impacted. (Tr. 512). Complainant lost her health insurance upon termination, but Utley picked her and the kids up on his insurance within one month. (Tr. 513).

Utley testified Clorox was used as a decontaminant on the ACAMS wand, but it masked the readings of mustard agent; he thinks Casey Sorenson of the safety department relayed that information to him. (Tr. 514-515). Utley thought Complainant raised a concern regarding using Clorox as a decontaminant to her supervisor. "I think we all did, pretty much. I mean, there was a bunch of us on the band wagon because we didn't want to be using Clorox as a decon." (Tr. 516). Rob Ralston, the entry supervisor, pushed the issue to have PPE downgraded for backups. (Tr. 517).

On cross-examination, Utley acknowledged that on June 25, 2010, he was deposed by the parties. In his deposition at pages 43-46, he stated all kinds of concerns were raised about sulfur dioxide, and that a lot of employees, including Complainant, were involved. (Tr. 520-521). He stated he did not know of any concerns she alone raised to management. (Tr. 522). On page 46 of his deposition, Utley stated he would hope that Complainant raised concerns to Wahlberg, but he does not know whether she actually had. (Tr. 522-523). He has no personal knowledge of any meetings Complainant had with anyone. (Tr. 523).

On re-direct examination, Utley affirmed that Complainant wrote his complaint to OSHA about sulfur dioxide. (Tr. 524-525).

## **William Muggleston**

William Muggleston testified at the formal hearing. He is Complainant's brother, and he lived with her on and off for two years. (Tr. 526-527).

Muggleston testified that on April 12, 2008, Complainant's son called and told him she was not feeling well. Complainant did not know what was wrong and requested Muggleston take her to the hospital. (Tr. 527). He helped her to the car, and on the way to the hospital, Complainant's vision began to black out. (Tr. 527-528). He brought Complainant to the emergency room; no one asked him any questions. He stayed with her overnight in the hospital. (Tr. 527). Muggleston testified Complainant did not tell him anything that caused him to believe she tried to commit suicide. (Tr. 528-529).

Muggleston testified Complainant loved her job and lost a big part of her life when she was terminated. (Tr. 529). Complainant got behind on her house payments and lost her truck. Prior to her termination, she always had a positive disposition. (Tr. 529-530).

## **Thaddeus Ryba, Jr.**

Thaddeus Ryba, Jr. testified at the formal hearing. Ryba is site project manager for the US Army Chemical Materials Agency (CMA) at TOCDF. (Tr. 536-537). He is employed by the US Army. He has full responsibility for operation of the facility. He is the highest authority for the Chemical Surety Program, which includes the Chemical Personnel Reliability Program (CPRP). He has three certifying officials who work for him at TOCDF, including Bob Rothenberg, Roger Whaler and Rick Clyde. (Tr. 537-538). The certifying official's duties include adjudicating an individual's reliability for entry into and sustainment in the CPRP. (Tr. 538). Upon receiving potentially disqualifying information regarding an employee's reliability, the certifying official's options are to do nothing, temporarily disqualify or permanently disqualify employees. (Tr. 538-539). The certifying official's proposed permanent disqualification requires review by a reviewing official. (Tr. 540). Ryba is the reviewing official at TOCDF and has been since October 2004. (Tr. 541, 550).

Ryba testified he knows Complainant and knows of her CPRP disqualification issue. (Tr. 540). The first time he had any involvement with Complainant was on April 23, 2008, when he received information from Joe Majestic that Complainant had

attempted to commit suicide. (Tr. 541). Majestic further informed him that Complainant had previously attempted suicide and had gone through evaluation at Mountain West Medical Center. (Tr. 541-542).

Ryba stated that Bob Rothenberg, Complainant's certifying official, was not scheduled to be on duty at the time. (Tr. 542-543). Ryba determined that Complainant had been temporarily disqualified by Rothenberg following the incident, and subsequently was reinstated. Ryba contacted Rothenberg by phone and told him he had new information regarding Complainant (but did not share any particulars) and that he should consider temporarily disqualifying Complainant again and the matter be investigated. (Tr. 543). Ryba signed a second disqualification letter for Rothenberg since he was not on duty. (Tr. 544). Ryba assumed that Rothenberg concurred with the recommendation to temporarily disqualify Complainant a second time because the disqualification letter was sent to Ryba to sign. (Tr. 544-545).

Ryba based his recommendation on documents contained in the certifying official's file, that was given to him by the surety manager, who he thinks was Mary Hoy at the time. (Tr. 546). He does not know if Rothenberg investigated the matter any further, and agreed he provided Rothenberg no further information regarding a basis for temporary disqualification other than a recommendation. (Tr. 548).

Ryba stated Scott Sorenson is a manager at TOCDF. He further stated Sorensen may be an administrative official within the CPRP, but there is no such thing as an "alternate certifying official." A certifying official is "an inherently government role." (Tr. 549).

Ryba testified a reviewing official reviews permanent disqualification proposals and provides guidance to the certifying officials. (Tr. 550). Ryba is the only reviewing official at TOCDF. He could not recall with any specificity an occasion where he played a role in directing or recommending temporary disqualification of an employee from the CPRP and also played the role of a reviewing official to sustain a proposed permanent disqualification for the same employee. (Tr. 551). Ryba testified Mary Hoy, acting for Rothenberg, proposed Complainant's permanent disqualification since Rothenberg was on leave from work. He coordinated with Mary Hoy about arranging for a medical review team from the Chemical Materials Agency prior to permanently disqualifying Complainant. (Tr. 552-554).

He stated the communication between he and Hoy was more logistics and less substance. (Tr. 553-554).

Ryba testified Respondent requested assistance from the CMA competent medical authority to assist with evaluating the actions that had been taken by the TOCDF clinic in reviewing the circumstances associated with Complainant's initial incident and return to duty. (Tr. 554-555). "Competent medical authority" as used by Ryba was the CMA command with regard to the overall surety program. Majestic verbally requested a review team from Ryba, who in turn requested the review team from CMA, and Hoy arranged the logistics. (Tr. 556-557).

He knows Sweeting, but has no direct knowledge of her role in either the information gathering or decision process regarding Complainant's disqualification. (Tr. 558). He stated, however, that there was disqualifying information related to Complainant provided to Rothenberg by Human Resources. He does not know who gathered or provided the information to Rothenberg, nor does he know how the information was gathered. He never spoke with Sweeting about Complainant's CPRP status. (Tr. 559). Tim Olinger was the deputy general manager at the time, but Ryba had no knowledge of his involvement in Complainant's CPRP issue. (Tr. 559-560).

Army Regulation (AR) 50-6, Chemical Surety, controls the CPRP program. (Tr. 561). Verbal notification of potentially disqualifying information is a sufficient basis for a temporary qualification. (Tr. 560). Although Ryba does set requirements or expectations for permanent disqualification, he does require the certifying official to perform "as thorough an evaluation as they deemed necessary to come to the conclusion to render the proper judgment." (Tr. 563-564). An interview of the employee is not required. (Tr. 564-565). The AR provides the certifying official with discretion to decide what information to use for the evaluation, including whether to interview the employee. (Tr. 565-566).

Ryba testified an employee has an obligation to contact the certifying official and report their own potentially disqualifying information, as well as other employees' potentially disqualifying information. (Tr. 568). Hoy was a delegated alternate to Rothenberg and would not have had any role if Rothenberg had been present. (Tr. 569). Hoy made the decision to propose permanent disqualification of Complainant because Rothenberg was on scheduled leave. Ryba did not propose to Hoy that she permanently disqualify Complainant. (Tr. 570-571).

Complainant and Respondent were notified of Complainant's proposed permanent disqualification and that Complainant had a limited time within which to submit a rebuttal to the certifying official for consideration. (Tr. 571-572). Hoy's recommendation for permanent disqualification was made to Ryba on June 2, 2008. Complainant submitted her rebuttal to Hoy. Both the proposing official and reviewing official review the rebuttal before sustaining disqualification. (Tr. 572-573). Ryba did not know if Rothenberg proposed permanent disqualification before he went on leave, and he also did not know if anyone else suggested permanent disqualification to Hoy. (Tr. 571). The recommendation for permanent disqualification came to Ryba, and he sustained the recommendation; Complainant was permanently removed from the CPRP program. (Tr. 572).

The rebuttal was submitted to the certifying official to determine whether the permanent disqualification was valid. (Tr. 573-574). Ryba received Complainant's rebuttal with the recommendation as part of the package for his final review. He did not interview Complainant. (Tr. 574-575, 579).

On May 13, 2008, Ryba received verbal communication from Major Parker, informing him that the medical review panel had observed and reviewed enough information to warrant a recommendation for permanent disqualification. (Tr. 575-576). He asked Parker to communicate the same information to Rothenberg, but does not know whether Rothenberg actually received the information. (Tr. 576-577). From May 13, 2008 to June 2, 2008, Rothenberg may have been available for a few days, but did not issue a recommendation for Complainant's permanent disqualification. (Tr. 578-580).

Ryba testified he knew Sweeting met with the medical panel. (Tr. 582-583). Complainant's rebuttal package had records from her emergency room visit. (Tr. 584). He focused on Complainant's statement upon discharge that she would "never do this again . . . . I believe that I would go to hell if I do this again" in reference to her attempted suicide. (Tr. 584-585). He did not interview the doctor that discharged Complainant from the emergency room. (Tr. 586). Complainant's rebuttal attempted to explain inconsistencies, but Ryba did not see anything that suggested the medical records were incorrect. (Tr. 586-587). He did not interview Dr. Gannon, one of the treating physicians at the emergency room; nor did he read Dr. Gannon's deposition testimony. (Tr. 587). Complainant argued it was not an attempted suicide, but was instead an "inadvertent overdose of medication." (Tr. 588). Ryba focused on

Complainant's overall reliability, with Complainant's attempted suicide being only one factor. He concluded that Complainant "did not maintain the levels of performance expected for an individual to remain in--to remain reliable within the personnel reliability program." (Tr. 588-589). Ryba testified no further gathering of information was warranted given the information in the review package, which included Complainant's rebuttal. (Tr. 589).

Ryba received information from either Hoy or Rothenberg of Complainant's actions on April 12, 2008, including her behavior on shift, and the fact that she left early from her scheduled work shift and walked off site, which was included in the review package as PDI. (Tr. 594-595). Complainant contacted Ryba about April 23 or April 24, 2008, and attempted to explain "what was going on." Ryba told her to follow through with her medical appointment with Dr. Matravers. (Tr. 596). He does not recall raising his voice to Complainant during the conversation, but does recall "taking market (sic) measures to remain very objective and professional during that conversation." (Tr. 597). Ryba recommended Complainant see Dr. Matravers because he thought following through with the steps Employer asked her to take would be the best course of action for an open and honest resolution of the issue. (Tr. 597-598). Additionally, Dr. Matravers, as the site's competent medical authority, has a role in making medical recommendations for disqualifications and is thus a valuable part of the CPRP program. (Tr. 598).

Ryba testified that to his knowledge, there have been no other three-doctor review panels on CPRP issues. (Tr. 598). It was not significant that Complainant left work early on April 12, 2008. (Tr. 599).

On cross-examination, Ryba stated the TOCDF is one of the four disposal sites, which is owned by CMA, responsible for disposing of chemical weapons. (Tr. 600-601). In the TOCDF field office he has forty to forty-five government and support contract employees. As site manager, his duties are to oversee the operation of the entire TOCDF facility, including oversight of Respondent's employees and the chemical surety program. (Tr. 601). He has been at the TOCDF since March 1996. He stated a security clearance is one component of a CPRP, along with a background investigation, medical screening, work performance, criminal records and financial records. (Tr. 602).

AR 50-6, which was in effect April through June 2008, states attempted suicide is a cause for permanent disqualification. (Tr. 603-604; RX-9, p. 285). Page 10 of AR

50-6 states that an inadvertent overdose will not necessarily require a permanent disqualification. There is no specific provision governing advertent or intentional overdose. (Tr. 604; RX-9, p. 284). Ryba testified that "any purposeful overdose, advertent overdose would be considered as -- or as grounds potentially for permanent disqualification." (Tr. 605). He further testified all individuals in the CPRP program have a duty to report potentially disqualifying information, as does the human resources, medical and security departments of non-government contractors and the TOCDF clinic. (Tr. 606-609).

Ryba stated the certifying official is the individual who makes the decision whether to temporarily or permanently disqualify a person from CPRP status. Certifying officials generally consider the clinic's recommendation, but is under no obligation to follow it. (Tr. 609). The Unescorted Access Program (UAP) is a program administered by the depot commander, and it provides access to the "chemical limited area," but not access to chemical weapons or munitions; access to those areas requires CPRP status. Ryba testified he has no role in the UAP. (Tr. 610). "The chemical limited area is the area immediately outside, adjacent to a chemical exclusion area [toxic area] that has a higher level of security to prevent unauthorized access. For TOCDF, that starts at -- at our double fence and ends at the boundary to the toxic areas inside of the plant." (Tr. 611).

RX-15 is the April 23, 2008 letter of Complainant's second temporary disqualification signed by Ryba for Rothenberg. (Tr. 611). Mr. Majestic had requested that the Chemical Materials Agency's (CMA) competent medical authority come to TOCDF and review the processes and procedures within the local clinic, and analyze whether they "were followed in reviewing and adjudicating the information that was initially received from [Complainant] and associated with the - the circumstances upon her return to duty." Majestic did not request three doctors or any number of doctors; his request was limited to assistance. (Tr. 611-612). The CMA personnel also perform annual "continuous quality inspections." (Tr. 615). There has been one other case of attempted suicide after Complainant's case, but none prior. (Tr. 615).

Ryba testified he received a conference call from Major Parker which included the other two panel doctors, along with Dr. Matravers. (Tr. 615-616). Dr. Parker's May 29, 2008 report of the review panel was received as RX-28; Ryba stated he had not seen the report prior to the hearing. The medical panel report acknowledged the sensitive nature of Complainant's position as a DPE back-up, medically-related PDI and health

records revealing a diagnosis inconsistent with her position as well as the CPRP requirements specified in AR 50-6. It was noted Complainant had quit taking medications without any evidence that she stopped the medication under the advice of a medical professional and such action "may have contributed to a clinical downturn." It was the consensus of the medical panel to recommend to the TOCDF competent medical authority permanent disqualification of Complainant, which was not binding on the TOCDF competent medical authority, Dr. Matravers. The final medical recommendation to the certifying official rested on the TOCDF competent medical authority. (Tr. 616-617; RX-29, pp. 374-375).

RX-30, p. 417, is Rothenberg's letter to Respondent dated May 16, 2008, notifying it that Complainant's permanent disqualification from the CPRP had been initiated. The letter was part of the review package received by Ryba. (Tr. 617). Ryba stated Rothenberg was the first to think permanent disqualification of Complainant was appropriate. (Tr. 620). RX-30, p. 419, is Hoy's recommendation of Complainant's permanent disqualification dated June 2, 2008, which Ryba subsequently sustained. (Tr. 621). RX-30, p. 414, is a letter dated June 12, 2008, addressed to Complainant from Ryba which sustained the recommendation to permanently disqualify Complainant from the CPRP and his reasoning therefor. (Tr. 623).

Ryba testified he primarily relied on the medical records Complainant provided in her rebuttal and other references to conclude that she had attempted to commit suicide. (Tr. 625-626). RX-32 is Complainant's rebuttal to the disqualification which includes her medical records in which Complainant reported, "I can't ever do this again. I hurt my children. And I am religious and do not want to go to hell like I believe I will if I kill myself." (Tr. 626-627; RX-32, p. 527). Ryba also identified other references in RX-32 to a "desperate suicide gesture" at page 497; "suicide thoughts, suicide gesture through drug ingestion with the intent to die" at pages 504 and 505; "suicide ideation through ingestion of medication" at page 505; and "an intentional overdose of unknown medication" at page 506. (Tr. 627).

Ryba's June 12, 2008 letter at paragraph 3(a) states Complainant made the decision to stop taking her prescribed medication, which was not considered reliable behavior. (Tr. 627-628; RX-30, p. 414). Paragraph 3(b) describes "Unexplained, erratic, emotional behavior on the job." Ryba testified those statements came from Complainant's supervisor, Wahlberg, and co-workers regarding her behavior on the afternoon of April 12,

2008. (Tr. 628). Paragraph 3(d) indicates Wahlberg suggested Complainant tell her certifying officer about the April 12, 2008 incident; Ryba concluded that if Wahlberg had not persuaded her to do so, Complainant would have never reported the incident to Rothenberg. (Tr. 628-629). Paragraph 3(e) of the letter relates to the inconsistencies in Complainant's story after reviewing the information from the conversation between Complainant and Rothenberg and statements provided by supervisors and co-workers, and the language used in the rebuttal. (Tr. 629).

Complainant's rebuttal, RX-32, contained Exhibit 2 which was the results from a lie detector test of May 21, 2008, and Exhibit 3 which was the results of a lie detector test of May 29, 2008, in which Ryba did not place much credence; there was no context provided of how the documents were generated or how the test was administered. (Tr. 630; RX-32, pp. 530-536). The rebuttal also contained Exhibit 4, an additional lie detector test of May 29, 2008, wherein Complainant denied having a boyfriend, and Exhibit 5, an affidavit from Mr. Utley, both of which related to "marital situations." Ryba testified they were inconsistent with "other things" in the package with regard to her overall erratic behavior. (Tr. 631; RX-32, pp. 537-544). Also contained within the rebuttal is an affidavit from a private investigator, Stephanie Brown, who met with Dr. Gannon, which provided nothing sufficient to overturn the initial diagnosis of attempted suicide according to Ryba. (Tr. 631-632; RX-32, pp. 546-548). Exhibit 14 of the rebuttal was a letter from Michelle Paxton, a Licensed Clinical Social Worker, dated April 30, 2008, regarding a counseling session conducted with Complainant on April 29, 2008, in which Complainant's version of the medical incident is reiterated. (RX-32, pp. 587-589; RX-4, p. 80). Ryba concluded the report did not have a great deal of context associated with the events leading to the hospitalization on April 12, 2008, or what occurred during the hospitalization. (Tr. 632-633).

RX-29, RX-30 and RX-32 constitute the Army's file on Complainant's CPRP disqualification. (Tr. 622-625). Ryba's overall judgment was that Complainant was not reliable to remain in the CPRP for reasons documented in his June 12, 2008 memorandum. (Tr. 623).

On re-direct examination, Ryba testified AR 50-6, paragraph 2-9(c)(i), has been interpreted broadly by the Army's Inspector General to permit a request for assistance and a review by a medical panel for a CPRP decision. (Tr. 636-640; RX-9, p. 284).

He did not review Complainant's personnel file prior to sustaining the recommendation for permanent disqualification. (Tr. 640).

AR 50-6, p. 293, states that the employee is to be notified of the permanent disqualification to include the reasons for initiating permanent disqualification within fifteen working days of the determination. (Tr. 641; RX-9, p. 293). Ryba testified he considered information from Dr. Parker received by phone call in his decision. He did not know if Complainant was provided that information or the substance of it prior to her submission of her rebuttal. (Tr. 644). AR 50-6, p. 283, sets forth reliability standards, which are the types of things the certifying official should consider in making the determination to disqualify. Ryba was not aware of any regulatory provision describing the option of the reviewing official making a disqualification decision rather than a certifying official. (Tr. 644-645).

UAP is the depot commander's program, and Ryba does not know what is required for approval under the program. (Tr. 647).

RX-15 is a letter dated April 23, 2008, which he signed either late in the morning or in the afternoon. Majestic approached him on the same day, but after he had signed the letter. (Tr. 648). Major Parker called Ryba off-site on May 13, 2008, which he did not consider to be a potentially biasing communication since AR 50-6 is construed broadly. (Tr. 650-652). RX-30, p. 417, was a letter from Rothenberg to Mr. McCloskey dated May 16, 2008, informing him that Complainant's permanent disqualification had been initiated. (Tr. 653). As a reviewing official and not a certifying official, Ryba cannot disqualify employees himself. (Tr. 654). Ryba testified he signed Complainant's temporary disqualification for Rothenberg, but was not the one who disqualified her. (Tr. 654-655). RX-29, p. 376, is an April 24, 2008 memorandum to Rothenberg from Cynthia Brothers in Human Resources transmitting potentially disqualifying information on Complainant. (Tr. 656-657). There was nothing in the packet that transmitted potentially disqualifying information to Rothenberg prior to April 24, 2008, nor had there been anything in writing transmitting such information. (Tr. 657-658).

Ryba testified that on April 23, 2008, Majestic called him and verbally relayed PDI information. (Tr. 658). Ryba testified Complainant's "TCA" and alcohol use were part of Complainant's rebuttal, but did not factor into his decision regarding permanent disqualification. (Tr. 658-659).

RX-31, p. 458, is a Memorandum for Record by Ryba, which sets forth the reasons for sustaining the permanent disqualification. (Tr. 659). Paragraph 3(a) indicates Complainant reported to Mr. Byrne at the medical clinic after she stopped all of her medications, including psychotropic medications. (Tr. 659-660). The memorandum does not show any consultation by Complainant with medical authority prior to stopping the medication. (Tr. 660). Paragraph 3(b) explained erratic, emotional behavior such as receiving multiple phone calls, crying and leaving the site early without permission from a supervisor, as reported by a Mr. Hanson and another individual; Ryba did not interview either employee nor did he interview Complainant. (Tr. 667-668). Paragraph 3(d) stated Complainant's April 12, 2008 incident was not reported to Rothenberg in a timely manner; it was reported only after prompting by Wahlberg. He would have expected an attempt by Complainant to reach Rothenberg before returning to duty. (Tr. 670). Paragraph 3(e) stated Complainant did not tell different stories herself, but the stories that came from other employees did not match hers. (Tr. 672-673).

On recross-examination, Ryba testified that under AR 50-6, Section 2-7, certifying officials have broad latitude in gaining assistance or using information to render a judgment on an employee's reliability. (Tr. 678-679). The Department of Army Inspector General (DAIG) has oversight of the Chemical Surety Program. (Tr. 679). RX-32, pp. 592 to 616, provided to Ryba by Hoy, indicates that on April 19, 2008, Rothenberg requested review of the April 12, 2008 incident, based on Complainant's account of events provided to Rothenberg. (Tr. 679-682).

On re-direct examination, Ryba stated there is no guidance document or statement from the Inspector General regarding the application of AR 50-6. (Tr. 682-683). AR 50-6, Section 2-8, provides that the competent medical authority must provide the certifying official an evaluation of the individual's physical capability and mental reliability to perform CPRP duties. (Tr. 686; RX-9, p. 283). Ryba reviewed a summary of the results of the evaluation but did not see the medical evaluation. (Tr. 691-692). Such a medical evaluation would be provided during the initial evaluation of an employee for CPRP, but also during the continuing reliability decision process. (Tr. 693-694).

Ryba was recalled by Respondent to testify that Chad Nelson was permanently disqualified from the CPRP program because he had ideation or thoughts of suicide and had attempted suicide. (Tr. 1398). Michael Griffith, Nelson's certifying official, is his basis of knowledge about Nelson. (Tr. 1398). RX-37, page 678, is the notification letter addressed to Respondent from Griffith that Chad Nelson had been permanently disqualified from the CPRP program. RX-37, page 680, is Nelson's June 25, 2008 termination letter for permanent disqualification from the CPRP program. (Tr. 1399-1400).

On cross-examination, Ryba stated he did not review the medical records of Nelson. (Tr. 1400). Griffith reported to Ryba that Nelson told him he had suicidal ideation. (Tr. 1400-1401). Nelson self-disclosed his ideation of and attempted suicide which was not in dispute. (Tr. 1401).

### **Alice Medina**

Alice Medina testified at the formal hearing. She is a BRA-RHA operator at TOCDF and has been for eight years. She worked with Complainant on the same crew, and saw her in the dressing room and at safety meetings, where Complainant raised environmental and safety concerns. (Tr. 696-697).

In April 2009, Medina also complained and requested a transfer because of ill treatment from her male managers and co-workers. (Tr. 698). Cody Hunter, her supervisor, did nothing. (Tr. 698-699). She went to Scott Sorenson, but the problem was not resolved. (Tr. 699). She talked to Cindy Brothers in Human Resources and then had to talk to Jeff Hunt; her complaint was finally resolved after she went to Debbie Sweeting. (Tr. 699-700).

Mike Maestas, a supervisor in DSA, mentioned to her "Are you going to be the next Brenda Mugleston . . . and complain and . . . just be like her?" (Tr. 700-702). He did not use the word "whistleblower." (Tr. 703).

### **Sheila Vance**

Sheila Vance testified at the formal hearing. She is an environmental manager at TOCDF, and has been with Respondent since March 1996. (Tr. 705-706). Her duties include responsibility for compliance of the facility with air and RCRA permits and environmental regulations. (Tr. 705). RCRA is Resource Conservation Recovery Act permit that manages hazardous

waste, treatment and storage at TOCDF. The permit is issued by the State of Utah, Department of Environmental Quality, Division of Solid and Hazardous Waste. An Air Permit is issued by the Utah Department of Environmental Quality's Division of Air Quality, under the Federal Clean Air Act. (Tr. 706).

Vance testified Respondent has received notices of violations over the 14 year period of her employment. They are issued annually and are based on self-reports and State-discovered violations. (Tr. 707-708). Inspections are performed weekly by the Department of Environmental Quality. There has never been a year without an issuance of notices of violation. (Tr. 708).

The red dust problem came from 155-millimeter projectiles with mustard agent in late 2007. (Tr. 708-709). In January 2008, they noticed red stains on the cement where they had been handling the munitions after they came out of the Metal Parts Furnace. The red dust was hazardous waste that came off the projectiles. (Tr. 709). In February 2008, they sampled the red dust and discovered Cadmium, a toxic metal, above regulatory levels. (Tr. 709-710). They tried to clean the stains off the cement with industrial sweepers and attempted to "containerize" the material. (Tr. 710). In March 2008, Vance and the inspectors met with senior management and decided to shut down operations while attempting to come up with better ways to manage the residue. (Tr. 711). Vance testified she did not believe TOCDF was ever given a notice of violation regarding the red dust issue. (Tr. 713).

The ACAMS wand measures levels of chemical agent in the air locks. (Tr. 715). She was aware that DSA backups entering the area could be exposed to chemical agent if the ACAMS wand was in the wrong location and not actually monitoring the air lock for personnel protection. (Tr. 716-717).

Vance testified bags of hazardous waste were accumulating in air locks, but it was not an environmental compliance issue as long as DEQ was able to do their weekly inspections; the air locks were a 90-day storage area approved by the State of Utah for an unlimited quantity of bags. (Tr. 717-718). Vance clarified, "As a generator of hazardous waste, you're allowed to accumulate, for 90 days or less, in a container, as long as it's closed and labeled, and you do not accumulate it longer than 90 days" anywhere in the facility. (Tr. 718-719). The container must be inspected weekly for leaks or cracks. (Tr. 719).

Vance stated that as a result of HAZOP residue building up, caustic began to build up on piping in the BRA. (Tr. 720). The State inspector took photos of the caustic build-up in the BRA in February 2008. (Tr. 720-721). A notice of violation was issued under Respondent's hazardous waste permit. (Tr. 722). Notices for violation were also issued in the past regarding uncontainerized waste in the air locks. She could not recall whether any were issued in 2008. Respondent has also had violations in the past for failing to follow chemical warfare agent monitoring plans and procedures and failure to store hazardous waste in a permitted storage area. (Tr. 723).

Vance testified she knows Complainant, and has worked with her in the past. Complainant has not raised any environmental or safety concerns directly to her. (Tr. 724). She received no anonymous reports, although such reports have been made to her department through the Condition Reporting System. (Tr. 724-725). She has not seen an electronic board with complaints in the lunchroom. She does not normally attend "all hands" meetings. (Tr. 725). She works from 9:00 a.m. to 5:00 p.m., Monday through Friday. (Tr. 726).

On cross-examination, Vance stated she has a Bachelors of Science Degree in Physiology with a minor in Environmental Toxicology. (Tr. 726). She worked four years in Hawaii as a DEQ State regulator. (Tr. 726-727). As an environmental manager for TOCDF, she is tasked to ensure compliance with state and federal environmental rules and regulations and managing hazardous waste and clean air permits. She has worked at the TOCDF for fourteen years. (Tr. 727).

Vance testified management encourages employees to voice environmental and safety concerns through the Condition Reporting System as one avenue. (Tr. 727). She has twenty-nine employees under her supervision, including inspectors. One environmental compliance inspector is on each shift and there are two alternate inspectors that can fill in when necessary. (Tr. 729-730). Department inspectors attend entry meetings at DSA every time a worker enters into a toxic area. (Tr. 730). The inspectors independently inspect the facility and provide environmental oversight; all areas where hazardous waste is managed are inspected once a week. (Tr. 731). Any violations are documented in their log and the violation and non-compliance are reported to the shift manager and to state and federal regulators. (Tr. 731-732). Corrected oversights are not reported as violations, but the report contains information regarding the potential violations and that it had been corrected. (Tr. 732).

Vance testified that the last notice of violations was issued in 2009 and it contained seven violations. Ten years ago, Respondent had up to forty violations. (Tr. 733). Self-reports have gone up to eighty percent from fifty to sixty percent in the last ten or twelve years. (Tr. 733-734). In 2008, Respondent had twenty-two notices of violations. Fines are associated with the notices. In 2009, they had no penalties with the notices. In 2008, they had penalties of \$13,000.00. (Tr. 734).

State regulators have offices on site and are present weekly. They have free access to the site. Employees are free to talk to them when on-site. State regulators can monitor Respondent's furnaces and all parameters of the furnaces at their office site. (Tr. 735). State inspectors are in the unescorted access program. (Tr. 735-736). Vance stated management provides the State regulators access to the inspector's records. The Army oversight group is also on site and TOCDF receives regular visits from the Center of Disease Control and the National Research Council. (Tr. 736). The Chemical Material Agency performs regular environmental inspections as well. (Tr. 737).

Vance testified she became aware of the sulfur dioxide problems in the Metal Parts Furnace cool down area. (Tr. 737). She further testified that State and federal regulatory agencies were notified of that issue. (Tr. 744).

In 2006, mustard agent was in one-ton containers, which were approximately six by three feet in size. (Tr. 737). Each new type of munitions or agent is referred to as a campaign. (Tr. 738). They had at least 3,000 containers, and samples were taken of the contents of all the containers, testing for mercury and other metals. (Tr. 737-738). Three holes were punched into the container and the agent (mustard) was drained to the maximum extent possible, in an effort to stay under the weight limit that can be fed into the Metal Parts Furnace. If the weight limit could not be achieved, a field transfer system sprayed hot water into the container to remove more mustard. The containers are fed to the Metal Parts Furnace for approximately two hours and the mustard agent is destroyed. (Tr. 739). The container is then taken to the discharge air lock, where it is cooled and monitored for agent detection. (Tr. 739-740). Monitoring must be passed prior to opening the air lock. The container then goes down the conveyor to the cool down area. The liquid agent drained from the containers is fed into liquid incinerators and destroyed. (Tr. 740). Mustard agent was never detected in the

residue. (Tr. 742). She did not recall any mercury testing in the ash of containers that remained after the process was complete, but mercury was present in the agent prior to it being placed into the Metal Parts Furnace. (Tr. 742-743).

Vance testified the ACAMS is a system that holds a sample of air every five to six minutes and alarms if there is agent present in the air. (Tr. 740). There are 100-120 ACAMS in the plant. (Tr. 741). The control room monitors the ACAMS; cameras in the toxic areas also provide oversight. (Tr. 741-742).

Vance became environmental manager in 2008. (Tr. 745). She testified that RX-70, p. 1808, relates to documents in October 2006 from the State of Utah Department of Air Quality stating the sulfur dioxide emissions were not a compliance issue or permitting issue. Respondent only needed to quantify the amount being released for Respondent's annual air emissions report. (Tr. 746-747). Vance testified she is not aware of Complainant raising concerns regarding sulfur dioxide. (Tr. 747-748).

Vance stated caustic is a decontamination solution product; it is not hazardous waste. (Tr. 748-749). Brine is "F99" hazardous waste created from the treatment process for an agent as part of the pollution abatement system. (Tr. 748-749). RX-63 is a condition report documenting brine residue which was discovered by a State regulator and an environmental inspector of Respondent. (Tr. 750). Condition reports are e-mailed out site-wide on a daily basis to every computer on site. Though not every employee has a computer, everyone has access to a computer. The Condition Reporting System has been in place since 2005 or 2006. (Tr. 751). It was determined the residue in the brine reduction area was not acceptable. State regulators took pictures of the condition, but it did not result in a shut down. (Tr. 753-755; RX-63, pp. 1506, 1594). A notice of violation with a \$138.00 fine was assessed for the brine residue issue. She is not aware of Complainant raising any concerns about the brine issue. (Tr. 756).

Vance first became aware of the red dust issue in January 2008, when it was brought to her attention by operators and shift inspectors. (Tr. 756). The operators were directed to manage the residue as hazardous waste. (Tr. 757). An Urgent Bulletin was issued regarding the red dust, and a one-day shut down occurred in March 2008. (Tr. 758-759; RX-62, pp. 1581-1582). In February 2008, Respondent sampled the tray that held the projectiles; Cadmium above regulatory limits was found. (Tr. 759-760). Red dust made it out onto the ground; when the

snow melted, Cadmium was discovered on the soil, which was subsequently removed and handled as waste. (Tr. 760-761). Complainant did not raise any concerns about red dust to Vance. (Tr. 761-762).

On re-direct examination, Vance noted a March 2003 Department of Defense Inspector General Report, which stated that more than fifty percent of employees thought Respondent stressed production over safety in 2003, and sixteen percent stated they had been told to fix a problem and not report it. (Tr. 762-763).

Vance testified the safety department determines proper safety equipment to be used by the employees. (Tr. 773-774). She thinks employees have been trained on the Condition Reporting System. Employees can always report environmental concerns and conditions to their supervisors. Complainant did not report any concerns to Vance. (Tr. 775).

### **Robert Rothenberg**

Robert Rothenberg testified at the formal hearing. He is a government shift representative at TOCDF. (Tr. 787-788). Ryba is his supervisor. (Tr. 788). He has worked at TOCDF for eleven years. (Tr. 789). His duties include contract oversight, and he is a certifying official for CPRP. He testified that for the CPRP program, personnel must meet certain reliability standards as defined in AR 50-6. He initially screens employee background information and makes determinations as to whether they should be in a CPRP position. Once employees are in the CPRP position, he continues to monitor their behavior/actions to insure they continue to meet reliability standards. (Tr. 788).

Rothenberg testified he knows Complainant and has been her certifying official for several years. He has temporarily disqualified employees, including Complainant. He stated he recalled Complainant's medical incident of April 2008. (Tr. 789). On a Friday evening in April 2008, Max Wahlberg escorted Complainant to Rothenberg's office and stated she needed to talk to him. (Tr. 789-790). Complainant revealed what had occurred during her seven days off the week prior; the meeting with Rothenberg took place on her first day back after being off for seven days. (Tr. 790).

After hearing Complainant's story,<sup>2</sup> Rothenberg walked her down to Scott Sorenson's office and she told her story to Sorenson. Rothenberg then told her to go to the medical clinic to see Steve Byrne, which she did. (Tr. 790-791). Rothenberg did not take action until he spoke with Sorensen and Byrne; they all concurred she seemed to be doing okay that evening and did not need to be sent home right away. After reviewing AR 50-6, Rothenberg decided he had no choice but to temporarily disqualify Complainant. (Tr. 791). He allowed her to finish the shift, but gave her a temporary disqualification letter; Complainant knew she could not work on Saturday. (Tr. 791-792).

At approximately 4:00 p.m., on Saturday, Dr. Matravers called Rothenberg and stated he had talked to Complainant who seemed to be doing okay; that he recommended lifting the temporary disqualification, and was sending paperwork to that effect. (Tr. 792-793). Complainant was allowed to return to work on Saturday night. (Tr. 793).

Rothenberg testified his actions were not intended to impact her UAP status. (Tr. 793). On Monday or Tuesday, he heard Complainant was again temporarily disqualified by Ryba, his supervisor. He had no conversations with Ryba prior to Ryba's decision to temporarily disqualify Complainant. (Tr. 793-794, 796). Rothenberg testified the medical panel met. He thought they were evaluating the clinic's actions in the "whole thing." He had no role in and did not meet with the panel. He testified he was contacted by Dr. Matravers who informed him the panel ultimately concluded there was sufficient evidence of attempted suicide, and permanent disqualification was recommended. (Tr. 795). Rothenberg stated attempted suicide is a mandatory disqualifying factor under AR 50-6. Rothenberg testified he would not have acted to permanently disqualify Complainant without the information given by Dr. Matravers and the review panel regarding Complainant's suicide attempt. (Tr. 796).

RX-30, p. 420, is his letter of permanent disqualification which he drafted. (Tr. 797). He testified the basis for paragraph one was the information from Dr. Matravers, and in paragraph two, the reference to "additional information which

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<sup>2</sup>Rothenberg did not testify to the explanation nor any details provided by Complainant about her medical incident. On April 19, 2008, he prepared a memo memorializing the conversation with Complainant which states, inter alia, that as "an accumulation of stressful events in her life away from work, she took an overdose of her anti-depressant medications and had to be hospitalized for several days because of the life-threatening nature of the overdose." (RX-11, p. 349).

became available" was the voluntary discontinuation of her medication. (Tr. 798). Rothenberg stated he got together with Dr. Matravers and they went through Complainant's medical records from her hospital admission. (Tr. 798-799). Dr. Matravers pointed out the medication in the toxicology screen had not all been reported to the clinic, and the fact that the discontinuation of medications was not reported. (Tr. 799). Complainant also left the work site early, of which he had been previously aware after speaking with Complainant; leaving work early alone would not have caused permanent disqualification. (Tr. 800).

The permanent disqualification procedure requires a letter be sent to the employee, who can provide a rebuttal to the reviewing official, who, in turn, will make the final decision regarding disqualification. (Tr. 800-801). The employee has five working days within which to submit the rebuttal. Rothenberg stated the reviewing official provides oversight of the certifying officials to maintain uniformity. (Tr. 801). Rothenberg testified the certifying officials or the reviewing official can temporarily disqualify employees. (Tr. 801-802). Rothenberg stated Complainant's case is the only one wherein a reviewing official (Ryba) temporarily disqualified an employee. (Complainant). (Tr. 802).

Rothenberg testified he received PDI from either Sweeting or Cynthia Brothers about Complainant's time clock discrepancy on the day Complainant's permanent disqualification letter went out. He had spoken with Sweeting a day or two prior and Sweeting informed him there was documentation of Complainant not clocking out when she left, which he subsequently documented in the letter. Rothenberg stated he did not actually release the letter until he got the documentation. (Tr. 804). He stated Mary Hoy was the field surety manager and a certifying official at the time Complainant was disqualified; her position as a certifying official is parallel to Rothenberg's. (Tr. 806-807).

Rothenberg affirmed he was not on vacation in April or May, but knows that his vacation began one day prior to Hoy's receipt of Complainant's rebuttal. (Tr. 807-808). He had a three-week vacation in June and if he had not been on vacation, he would have been the official to receive the rebuttal information and forward it to Ryba. (Tr. 808). He would have received the package and forwarded it, but would not have recommended any action one way or another regarding the merits of the disqualification. Hoy was acting for him in his absence, and he

would expect her to do the same as he would. Hoy never discussed with Rothenberg whether she should or should not recommend Complainant's disqualification. (Tr. 809).

Rothenberg stated he did not know how early Complainant actually left work on April 12, 2008, but that Complainant told him she was upset and left work early without consulting anyone or getting permission. (Tr. 810-812).

Rothenberg testified he reviewed Complainant's medical records with Dr. Matravers after the review panel met with Dr. Matravers. (Tr. 813). There were substances on the toxicology screen that had not been reported to the clinic as medication she had been taking. He did not know which specific medication had been reported. (Tr. 814). Alcohol was not an issue or a concern and did not factor into his decision. (Tr. 815). RX-30, p. 420, mentions "mood or mind-altering medications" Complainant was taking, and that she failed to report to the clinic that she had voluntarily ceased taking her medications. (Tr. 815-816). Rothenberg testified Complainant's permanent disqualification was based on the medical reasons given by Dr. Matravers as the CMA, competent medical authority, for TOCDF. (Tr. 817).

On cross-examination, Rothenberg stated he likes Complainant and talked to her frequently about issues and considered her a friend. (Tr. 817). He did not send Complainant home on Friday when she returned to work because he did not want to embarrass her and she did not seem like a threat at that time. (Tr. 817-818). Complainant told him that she got upset at work on April 12, 2008, because she got a phone call from her ex-husband about child custody issues and she left the plant in anger. (Tr. 818).

He stated Wahlberg reported that Complainant told him she attempted to commit suicide, but Rothenberg was not aware of it until after the deliberations had been finalized. (Tr. 819). If he had known of Wahlberg's report, he would have issued a second temporary disqualification. (Tr. 819, 827). Rothenberg testified he made the decision to permanently disqualify Complainant, and Mary Hoy had no involvement in the decision that he sent out on May 16, 2008. (Tr. 820). Rothenberg called Complainant on the phone and informed her of the disqualification prior to sending the letter. (Tr. 821).

Rothenberg identified RX-30, pp. 454-456, as e-mails related to Complainant's permanent disqualification. Page 454 is a May 26, 2008 e-mail from Rothenberg telling Complainant what her deadline was for the rebuttal and telling her if she wanted him to look at it, she had to get it in before he left for vacation. (Tr. 821-822). He identified RX-32 as Complainant's rebuttal package. (Tr. 822). He reviewed the rebuttal package after his vacation, out of curiosity as to what her response had been. (Tr. 822-823). He was surprised by some of what was in the rebuttal because it was not the same information he had been told on the Friday night when Complainant reported to him her medical incident. He testified he never got any pressure from Respondent about Complainant's permanent disqualification because CPRP decisions are strictly made by the government and they are "not under any kind of control from EG & G." (Tr. 823). He did not feel any pressure from Ryba to make a decision. There was no other choice given under AR 50-6. (Tr. 824).

On re-direct examination, Rothenberg stated on Complainant's return on Friday, he gave her a temporary disqualification, but allowed her to stay and finish her shift. (Tr. 824-825). Sorensen and Byrne concurred with letting her finish her shift. (Tr. 825).

Rothenberg testified the medical panel was precipitated in part by Wahlberg's statement about the attempted suicide from what he understood later. (Tr. 826-827). He would have wanted Complainant to go for a medical evaluation prior to immediately disqualifying her. He would have also spoken with Complainant and asked if she told Wahlberg she had attempted suicide. (Tr. 827).

Some time after he returned from his vacation, Rothenberg testified he met with James Gomez and reviewed files of two people who had been recently permanently disqualified. He recommended Complainant not be approved for the UAP. (Tr. 829-830). Complainant's background investigation was reviewed in the security office. If she was terminated on June 23, 2008, he probably met with Gomez after her termination. (Tr. 830-831). Rothenberg stated an employee has to meet UAP standards before they can be considered for CPRP. (Tr. 832). Gomez asked Rothenberg for a recommendation on UAP approval for Complainant and another employee who had been disqualified from CPRP. Gomez did not tell him what he should decide and Rothenberg did not know the requirements for UAP. (Tr. 835). An employee has to

have at least a UAP to work for Respondent. He concluded his recommendation may have indirectly impacted Complainant's termination if she was not allowed to have a UAP. (Tr. 836).

Rothenberg identified RX-29, p. 376, as a PDI memo dated April 24, 2008, from Cynthia Brothers in Human Resources. (Tr. 837-838). He did not recall previously seeing the memo. (Tr. 837-838). RX-29, p. 378, is PDI from HR which is a statement from Wahlberg, which he does not recall receiving, but agrees he probably did. (Tr. 838-839). RX-29, p. 382, is PDI from HR dated May 16, 2008, which is timecard information. He did not get anything else on the time card issue, but did receive the memo before issuing his permanent disqualification. His impression was Complainant had done something wrong when she left work early and Respondent did not tell him differently. (Tr. 840-841). RX-29, p. 411, is PDI which he saw at some point. (Tr. 841-842). He glanced at the time cards but could not make heads or tails of them, so he did nothing specific with them. He trusted Respondent's evaluation of the time cards. (Tr. 842).

Upon questioning by the undersigned, Rothenberg testified the day Complainant returned to work, he disqualified her and reinstated her the following day. Two or three days later, Ryba temporarily disqualified her again. The second disqualification ultimately became the permanent disqualification. As the reviewing official, Ryba was reviewing his own temporary disqualification but also Rothenberg's initial permanent disqualification. (Tr. 844-845). He testified it was unusual for the reviewing official to disqualify, but thinks it is permitted by the regulation; he could not cite a specific provision from memory or the regulation. (Tr. 845).

#### **James J. Gomez**

James Gomez testified at the formal hearing. He has been the security manager for the Deseret Chemical Depot for five years and is employed by the US Army. (Tr. 847). His job duties include processing security investigations; he adjudicates access under the UAP. (Tr. 847-848). The criteria for the UAP is set forth in a local regulation, DCD Reg 50-2, which mirrors the guidelines set forth in AR 50-6. (Tr. 849). He also uses AR 380-67, a personnel security regulation which provides guidelines for adjudication investigations for suitability. (Tr. 850).

Respondent determines if an employee is retained after UAP is revoked. (Tr. 853). Examples which may affect retention of UAP based on suitability are problems with drug use, personal or sexual misconduct or financial matters. (Tr. 852). There are 2,000 employees for which he has responsibility, and there have only been a small number of UAP revocations. (Tr. 855).

He makes a determination from a dossier of the investigative file. The matter then goes to a Chemical Surety Board for consideration of revocation. (Tr. 855). He sits on the board with the surety officer, Doug Pierce (head official), and the director of law enforcement and security. (Tr. 856). If the revocation is sustained, Gomez sends out a letter of revocation to the proponent or contractor. He does not contact or interview the employees. (Tr. 857-858). The commander gives him discretion and authority to do whatever he deems necessary in the UAP program. (Tr. 858).

He knows of Complainant; he has not met her but has talked to her. (Tr. 858-859). Complainant's UAP status first came to his attention through an e-mail from Rothenberg that reported he was disqualifying Complainant from CPRP status. (Tr. 859-560). Rothenberg did not ask him to review Complainant's UAP status. (Tr. 860).

RX-34, p. 628, is an e-mail from Sweeting to Carl Johnson, who was the Batelle surety security representative for Respondent. Johnson was in charge of ensuring compliance with surety and security of TOCDF. (Tr. 862). Surety deals with chemical agents and unauthorized access; whereas security deals with law enforcement and personnel/physical security. (Tr. 863-864). RX-34, p. 627, is a request to assess the status of two individuals who had been disqualified from CPRP, but were applying for non-CPRP positions at TOCDF. (Tr. 863). He stated that, as applicable to Complainant, she was being taken out of the CPRP program and was applying for positions in the UAP program. She did not have UAP approval on June 24, 2008. (Tr. 863-864).

Gomez testified he knew Complainant had lost her employment as of June 25, 2008. (Tr. 867). He was not looking to revoke UAP of Complainant, but instead was attempting to make a determination whether she would be an eligible applicant for UAP. He did not initiate a process to revoke Complainant's UAP, if she already had one. (Tr. 866-868). He did not seek Rothenberg's opinion nor speak to him in person because he is not involved in the process; only e-mails were exchanged. (Tr. 868). RX-34, p. 625, reveals that he reviewed the security file

from the Office of Personnel Management and his own security file for employees, neither of which was provided to Complainant for her rebuttal. (Tr. 869-870). Complainant called Gomez twice requesting information in the files, but he did not recall UAP status coming up in the conversations. On July 1, 2008, he e-mailed Johnson that he determined Complainant would not be eligible for the UAP. (Tr. 870). He does not recall any other communications with Johnson other than the e-mails. (Tr. 871).

Gomez testified he determined Complainant was not eligible for UAP and presented his findings to the surety board which concluded Complainant was not eligible for UAP. (Tr. 872). He did not mention revocation of any pre-existing UAP to the surety board. (Tr. 871-872).

The OPM file is a federal government file with no documents generated by Respondent. It contains Complainant's background check information performed by the government. (Tr. 873). His security file may have had an e-mail from Respondent, but he was not sure. Gomez issued no written document listing what factors were considered or why Complainant did not qualify for UAP. (Tr. 874).

On cross-examination, Gomez stated DCD means Deseret Chemical Depot, which is a military base. TOCDF is a contractor working for the Army and DCD. (Tr. 876). The Chemical Materials Agency (CMA) is the headquarters over DCD and all sister depots. (Tr. 876-877). RX-34, p. 625, is his recommendation presented to the Director for Law Enforcement & Security, the DCD chemical surety officer and TOCDF field office lead, Mary Hoy. (Tr. 877-878). RX-46, p. 1215, are e-mails dated July 1, 2008, of his final determination that Complainant should not have UAP status. Law Enforcement and Security Director, Rick Knudsen and Chemical Surety Officer Doug Pierce, did not recommend UAP. (Tr. 879-880). Pierce concluded Complainant had been involved in an "apparent suicide attempt" and was not eligible. (Tr. 881). In a phone call with Hoy, he received a "no recommendation for entry into the UAP based on her personal knowledge of the subject." (Tr. 882).

On re-direct examination, he testified he reviewed a credit report on financial issues, information from OPM and the FBI end-result interview with Complainant. He stated Complainant had been decertified from the CPRP program on more than one occasion. (Tr. 883). **Complainant was not in the UAP program.** An employee does **not** hold a UAP just because they hold a CPRP, because they are two separate and distinct programs. (Tr. 885). He had no knowledge of a criminal record of Complainant without

looking at the file. (Tr. 885-886). Whatever criminal record Complainant may have, he could not answer whether it resulted in her disqualification from CPRP. (Tr. 886). His handwritten comments on page 1215 of RX-46 were not communicated to Respondent. (Tr. 888-889). There was no other documentation which reflected the decision of the surety board. (Tr. 889). Mr. Gomez stated the issue of revocation of Complainant's UAP was not presented to the surety board because she did not hold a UAP. (Tr. 891).

### **Gary W. McCloskey**

Gary McCloskey testified at the formal hearing. McCloskey has been Vice-President and General Manager of Respondent since May 2004. (Tr. 913). He is responsible for the execution of the Tooele Chemical Agent Disposal System program. He is the hiring manager for his direct reports, which include two deputy general managers, an operation and maintenance manager, an administrative assistant, a technical communications person and a public outreach employee. (Tr. 914-915). He has indirect authority over Debbie Sweeting who physically works at the facility, but reports to Corporate Human Resources in Germantown. (Tr. 914, 938).

McCloskey testified that as a member of the Senior Managers Board, which considers serious misconduct and disciplinary cases, he has a role in employee terminations. (Tr. 915-916). He does not know if any document established the Board. The HR Department determines which disciplinary cases come to the board, depending on whether there is a potential for termination. (Tr. 916). Medical cases could come to the Board if the medical case might result in an employee's termination. (Tr. 917-918). He has been on the Board for six years, and has only considered one medical issue, which was not Complainant's case. (Tr. 918-919). Complainant's case came to the Board because she was no longer qualified for the CPRP or UAP programs. (Tr. 920). The Board met on Complainant's case. (Tr. 919).

Prior to Complainant's termination, McCloskey did not understand that she held both a CPRP certification and a UAP approval. An individual who has CPRP status has unescorted access in the site. (Tr. 920). He also understands that the two certifications are "done by different entities." (Tr. 921). His staff received communication from the US Army that

Complainant was no longer in the CPRP program and that the Depot found her unsuitable for UAP. (Tr. 921-922). He was unaware of any direct communications he had with the Army regarding Complainant's CPRP and her eligibility for UAP. (Tr. 922).

McCloskey testified HR notified him, probably through Debbie Sweeting, there was a need for the senior managers to convene regarding an employee's discipline issue. The meeting was held in his office, and he attended. (Tr. 923). Present were the senior people who are his direct reports; Jeff Hunt, Sweeting and Joe Majestic were present. (Tr. 924, 932). They discussed and voted on each action. HR and the involved department, which would have been operations, ordinarily make a recommendation for termination, which in this case would have been from Sweeting and possibly Hunt. The recommendation was verbally communicated. (Tr. 924). HR takes notes but there are no formal minutes of the meeting. McCloskey voted with the board in favor of termination because Complainant lost her CPRP, which was essential to her position. (Tr. 925). He believes he was aware Complainant would also be ineligible for UAP at that time, but did not have clarity of that recollection. (Tr. 925-926).

McCloskey testified that ordinarily there would be communication between HR and the Army regarding an employee's UAP status, and he was told Gomez denied Complainant's eligibility for a UAP. He could not recall specifically when he was so informed. (Tr. 926-927). McCloskey testified Complainant was not terminated because of a medical condition, but because she lost her CPRP status and was ineligible for UAP. (Tr. 928).

In 2008, Respondent was granted VPP status from OSHA. VPP is Voluntary Protection Program, which is specific recognition or status as a high-performing safety organization. (Tr. 934-935). He recalls OSHA inspected the facility during the sulfur dioxide issue and interviewed employees. (Tr. 936). Respondent has an award fee contract from the Army and environmental and safety are substantial components of the award fee. (Tr. 936-937).

On cross-examination, McCloskey stated Sweeting reports to an individual at Respondent's Federal Services Division Headquarters in Germantown, Maryland. (Tr. 937-938). He testified he has met Complainant, but would not say he knows her personally. (Tr. 940).

McCloskey stated the Senior Managers Board meets very little, maybe two to three times per year when serious disciplinary matters rise to the level of potential time off or potential termination. (Tr. 940). Regarding Complainant's case, the Board's principal discussion was the attempted suicide, permanent disqualification from CPRP, and the fact that her job required CPRP and she was no longer eligible. They also talked about the time card issue and Complainant walking through an area without her respirator mask. He was not aware of Complainant having raised safety and environmental issues. He testified there was no suggestion made that anyone was motivated to terminate Complainant because she had raised safety or environmental issues. (Tr. 941). He further testified Respondent encourages its employees to raise safety and environmental issues because it strengthens the programs. (Tr. 942-943).

McCloskey testified Army doctors routinely come to the site for quality control checks of the clinics, and that they have also been on site for issues regarding potential agent exposure. (Tr. 941-942). Dr. Roger McIntosh (Army doctor) has consulted on a nerve agent baseline elevation case and on skin disorders. The base line shift was a concern if caused by nerve agent exposure. (Tr. 942, 961).

McCloskey stated TOCDF will not remain open indefinitely, and the mustard munitions disposal will be finished by approximately May 2011, while the remaining chemicals should be finished and the facility actually closed in approximately December 2011. (Tr. 943). Employees will retire, transfer, or become part of a reduction in force in 2012 or 2013. Specifically, Complainant would have been laid off in January 2012 as part of the first major reduction in force. (Tr. 944-945).

On re-direct examination, McCloskey testified he has had about 18 cases in 6 years on the Senior Managers Board, and there were other cases involving an employee's loss of CPRP. (Tr. 945-946). The focus was on the loss of CPRP because that made it an "unequivocal decision." (Tr. 946). It was not recommended by anyone that Complainant be terminated for any basis other than loss of her CPRP status. (Tr. 947).

McCloskey stated Respondent's projected dates of closing the munitions facilities have not always been met prior to 2004, but Respondent's predictions have been reasonably accurate for the last six years. (Tr. 949). Operations and Maintenance will be finished by 2013, and the secondary waste will be destroyed.

The facility will be cleaned, demolished and landfilled. Contract close-out and final closure of the RCRA permit will take longer. (Tr. 950). The United States has an obligation under international treaty to conclude operations by April 2012. (Tr. 951). There are no plans for Respondent to do any future work at the TOCDF site or even in the State of Utah after 2013. (Tr. 952). CAMDS will also close by 2012. (Tr. 953).

McCloskey testified there is an end-of-program bonus for employees, which is more of a "stay and perform" bonus. It is based on a percentage of salary. If Complainant had still been employed, she would have been eligible for the bonus. (Tr. 954). Respondent currently employs approximately 900 employees at the TOCDF facility. (Tr. 955-956).

### **Max Wahlberg**

Max Wahlberg stated he is currently entry coordinator and has worked for Respondent for fifteen years, under Rob Ralston. (Tr. 964). He has worked as a maintenance laborer, CHB unpack operator, control room operator, maintenance lead, DSA supervisor, and now entry coordinator for the last two years. (Tr. 964). As DSA supervisor, Wahlberg was familiar with the DPE suit for entry into toxic areas. (Tr. 964-965). The DPE suit is an encapsulated suit worn in highly contaminated areas. (Tr. 965). The areas are toxic because Respondent destroys chemical warfare agents which are lethal to human beings. (Tr. 965-966). Complainant worked under Wahlberg's supervision from 2006 to 2008. (Tr. 966).

Wahlberg testified he was familiar with the ACAMS wand issue which is used to verify toxicity levels. (Tr. 966). Wahlberg stated that Complainant never brought up the issue to him, nor was he aware of her concerns. (Tr. 966-967). The practice happened and it was stopped. (Tr. 967). His crews made entries through air locks that DPE entrants had used to exit the toxic areas to cut DPE entrants out of their suits. (Tr. 967-968). DSA personnel also entered through the air lock and into toxic areas to gather waste or do other tasks. (Tr. 968).

The ACAMS wand is part of the monitoring device which is connected to the control room and verifies the presence of agent. The wand is used to monitor the outside of the DPE suit for the presence of agent or if the area is free of agent for employees to enter. (Tr. 969). If chemical agent is present, employees should not exit the air lock into areas until the ACAMS shows the area is free from chemical warfare agent. (Tr.

969-970). He confirmed that if the ACAMS was put in the air duct, rather than leaving it in the air lock, it could lead to a false assurance that there was an absence of chemical agent. There are two wands monitoring in all air locks. (Tr. 971).

Someone raised the concern about the wand being placed in the air duct "before monitoring themselves while they were decon," but he was not aware of the wand being left in the air duct. (Tr. 979, 982-983). Jeff Hunt wrote a memo disapproving of the wands in the air ducts in 2008 and the memo probably did state it should stop. (Tr. 979-980). Complainant wore level B clothing which is lower in protection than DPE. (Tr. 981). If the wand is entirely in the air duct, there is no way to know of toxic levels in the air lock. (Tr. 981-984). Complainant did not raise an issue to Wahlberg of entering the air lock with a lower level of protective clothing. (Tr. 990).

He was also aware of the red dust problem in the Metal Parts Furnace cool down area. (Tr. 984-985). Everybody knew about the red dust and Respondent was trying to deal with it because Respondent was concerned it was potentially hazardous waste that was not containerized. The red dust was treated as hazardous waste. (Tr. 988). He was neither aware of what was done regarding the red dust problem, nor that the State of Utah's environmental agency was inspecting it. (Tr. 989). Neither Complainant nor her husband raised the red dust problem to him. (Tr. 989-990).

Sulfur dioxide monitoring was done on ton containers exiting the Metal Parts Furnace cool down area. (Tr. 990-991). Complainant did not raise any issues about sulfur dioxide with him. (Tr. 991).

In 2008, bags of waste were left in the air locks by DSA operators who put DPE suits, gloves, and boots in the bags which were treated as waste. The bags were potentially contaminated waste and treated as hazardous waste. (Tr. 992). The bags accumulated in the air locks. (Tr. 992-993). During 2006-2008, the bags were brought to his attention. (Tr. 995). All supervisors knew about the build-up of bags. (Tr. 993). Complainant did not raise an issue about the accumulation of bags during this time period. (Tr. 993).

He also attends safety meetings before daily shifts where environmental and safety employees are present, but Complainant did not attend. (Tr. 995-997). He never attended a meeting

where Complainant was absent and her name was mentioned. (Tr. 997). "All hands" meetings are held with everybody on a shift, and Complainant would attend the meetings which could have related to safety or environmental issues. (Tr. 996-997).

He was responsible for Complainant's performance appraisal from 2006 to 2008. He recalled Cindy Brothers of HR asked him to change an evaluation on Complainant because she did not maintain forty hours of personal leave which is required. (Tr. 997-999). Complainant missed a few days. In 2006-2007, he rated Complainant above average in attendance, though he was later informed by Cindy Brothers that Complainant's maintenance of leave requirements were not met. (Tr. 999). Complainant should have had a lower rating because she had missed time. (Tr. 999).

It was a routine practice for the plant shift manager or safety representative to tell Wahlberg about any environmental and safety issues which he would share with his employees. (Tr. 1000-1001). He does not recall any anonymous reports coming to him. (Tr. 1001). He does not recall ever seeing any safety or environmental concerns displayed on a message board in the lunch room. (Tr. 1001-1002). Complainant never complained to him about safety or environmental concerns at all. (Tr. 1002).

Rob Ralston was involved in resolving the accumulated bags of waste in the air locks in 2008 by having DSA operators carry the bags to be dropped into the TMA chute. (Tr. 1003-1005). He does not know if Complainant raised any issue about the bags with Ralston. (Tr. 1006). He did not receive any complaints about the level of protective clothing worn by DSA operators to carry the waste. He did not recall any meeting when Ralston spoke to his DSA operators about the issue of transferring bags of waste to the TMA chute. (Tr. 1006). Complainant did not raise an issue about materials or the suit-sealer machine burning through the DPE suits. (Tr. 1007-1008). He recalled an issue in 2008 about the suit-sealing machine and an investigation by maintenance, but does not know the results of the investigation. (Tr. 1007-1010).

Complainant did not raise a complaint about life support system air hoses to him. (Tr. 1010-1011). A checklist was generated for monitoring DPE entrants, but Complainant did not have anything to do with the checklist. (Tr. 1011-1012). Jeff Hunt approved the checklist. (Tr. 1012). The ACAMS reader would use the checklist. (Tr. 1013). The checklist was laminated and left at the ACAMS. (Tr. 1015). He never went into the air lock with Complainant where she pointed out her

safety or environmental concerns. (Tr. 1016). He attended pre-entry meetings where Complainant was present, but Complainant never raised any safety or environmental concerns. (Tr. 1016-1017). He heard through the rumor mill that Complainant had raised concerns before she came to work for him. (Tr. 1017). Complainant was not discussed in the control room from 2002-2006 when he worked as a control room operator. (Tr. 1018).

In April 2008, on a Friday night, Complainant asked to talk to him, and the conversation occurred in the DSA office where no one else was present. (Tr. 1018-1019). Complainant was in the process of being made an alternate supervisor, and she mentioned she had missed some training classes on her days off. (Tr. 1019). She told him she had left work after getting upset over a conversation with her ex-husband. (Tr. 1019). **"When she got home she tried committing suicide by taking some pills."** (Tr. 1019). She stated she went to the hospital for several days and had to be revived with CPR. (Tr. 1020). He asked if she had reported the incident to her certifying official. (Tr. 1020). She stated she was afraid to tell Sorenson because he would disqualify her. (Tr. 1020). She wanted to talk to Rothenberg. (Tr. 1020). He did not take notes or write a memo or talk to anyone about their conversation. (Tr. 1022). He determined Rothenberg was on shift that night and he walked with Complainant to Rothenberg's office and returned to DSA. (Tr. 1021). Complainant later returned to DSA and after the pre-entry meeting talked to Sorenson, but he does not know what was discussed. (Tr. 1023). Rothenberg came to him and stated he was going to have to potentially disqualify Complainant. (Tr. 1023). After Rothenberg presented Complainant with the disqualification letter, Complainant wanted to talk to Steve Byrne at the clinic to set up an appointment with the doctor for later that day. (Tr. 1024). It was agreed that Complainant would leave at the end of the shift. (Tr. 1024-1025). On Saturday, Rothenberg cleared Complainant to return to work. (Tr. 1025). Complainant had a letter of clearance from Rothenberg and gave it to Sorenson. (Tr. 1026).

On Monday, he was "bothered" by Complainant stating she tried to commit suicide and he did not want it on his conscience if she used an agent to harm herself or others. He wanted to know if she had told her certifying official the same thing she told him. He thought the CPRP program "was broke." (Tr. 1026-1027). He wanted to go to a higher authority and went to speak with Hunt about it on Tuesday morning. (Tr. 1027). He told

Hunt about the situation, who was involved, what Complainant had reported to him and that Complainant was allowed to return to work. Hunt stated there was "no way that could happen in our program," and he would look into it. (Tr. 1027).

On Tuesday, he was called by HR and told he needed to meet with Sweeting on Wednesday morning. (Tr. 1027). On Wednesday, he was told to meet with Sweeting and Sorenson. He was not interviewed by anyone after his meeting with HR except during the OSHA investigation. (Tr. 1027-1028). He told them what Complainant had related to him. (Tr. 1028). One week later, Complainant called him at home and stated that someone had leaked her medical information to HR, either him or Sorenson had gone to Hunt. (Tr. 1029-1030). She stated that she was not upset when she left work on April 12, 2008, but was just exercising the day she left the facility. (Tr. 1030-1031).

He has had no further contacts about Complainant's CPRP. (Tr. 1030). He did not speak to Tim Olinger, the operations manager. (Tr. 1031). He did not interview any DSA co-workers about what Complainant may have told them, nor did he talk to Joe Majestic. (Tr. 1031-1032). He wrote a statement and e-mailed it to Sweeting. (Tr. 1033). He did not talk to Sorenson as his immediate supervisor because he assumed Sorenson was told the same thing by Complainant as he was told. Hunt was Sorenson's supervisor. (Tr. 1037). He was not interviewed by anyone on the senior management committee that deals with employee terminations, nor did he speak with Ted Ryba about Complainant's situation. (Tr. 1039).

He stated there are jobs which do not require a CPRP, e.g., either DSA or the BRA/RHA operator position. (Tr. 1034). He indicated a blue stripe is placed on a CPRP badge and a red stripe on a UAP badge; he had both stripes on his badge. (Tr. 1036).

In October 2008, he became the entry coordinator, but did not receive a pay increase. (Tr. 1038).

On cross-examination, he stated that when Complainant phoned him she also told him that she did not try to commit suicide, but that it was just an accidental overdose. (Tr. 1040). He stated he had a good relationship with Complainant. (Tr. 1041). He recommended Complainant for training as an

alternate supervisor with which Sorenson had agreed. (Tr. 1041). When he met with Sweeting and Sorenson, Sorenson stated that Complainant had not told him about attempting suicide. (Tr. 1043). He did not talk to Dr. Matravers or Steve Byrne. (Tr. 1043-1044).

His statement is RX-12, dated April 23, 2008, five days after the conversation with Complainant. (Tr. 1044). He stated Complainant was extremely upset and crying when she talked to him on her return to work on Friday night. (Tr. 1044-1045). That was the first time he learned that Complainant had gone off her medications "cold turkey." (Tr. 1045). RX-23 is an e-mail he sent Sweeting after Complainant called him at home about her medical information being "let out." (Tr. 1045-1046). He was bothered by Complainant working with suicidal tendencies, being concerned about the 100 employees on shift and the possibility of something else happening. (Tr. 1047).

He does not recall Complainant bringing him holes burnt in DPE suits or anyone else doing so. (Tr. 1048). He added that anyone could write a condition report on the issue of "suit sealing." (Tr. 1049-1050).

### **Joe Majestic**

Majestic is employed by Respondent as a deputy general manager of risk management and technical support. (Tr. 1131). He has responsibility for all operational support, which includes health and safety, medical, quality assurance and the surety program. His educational background is in environmental health and industrial hygiene. He achieved Bachelors and Masters Degrees from Colorado State University. He has worked in the health and safety field for over 30 years. (Tr. 1132). He has been with TOCDF for seven years. (Tr. 1133). The medical clinic works for him, but he is not a physician. He relies upon the two physicians and their physician assistants to assure the work force is healthy, reliable and ready to go to work. (Tr. 1133).

Dr. Matravers is (1) a patient advocate for 1250 employees, (2) the medical director who cares for employees and the interest of the company and manages resources, and (3) is a competent medical authority of the site and makes recommendations on medical issues, PDI, what is reportable and the continued reliability of individuals in the CPRP program. (Tr. 1133-1135). The surety program is unique to the Army and requires a reliability program, CPRP. (Tr. 1135-1136).

He became aware of Complainant's incident in April 2008. (Tr. 1136-1137). On Monday morning, Olinger came to him with a concern about events involving Complainant. (Tr. 1137). Dr. Matravers had given an opinion to the certifying official that lifted the temporary disqualification which allowed Complainant to return to work in the reliability program. (Tr. 1137). He was told of Complainant's behavior being agitated at work, upset and leaving the plant without approval. (Tr. 1137). Olinger related reports by Complainant's supervisor about an intentional drug overdose or suicide attempt. (Tr. 1139). Olinger questioned the reliability of Complainant. (Tr. 1139). Majestic had questions about Dr. Matravers giving a medical opinion to a certifying official that Complainant was fit to work. Majestic wanted a medical opinion that Complainant was fit for duty. (Tr. 1139).

Majestic contacted Dr. Matravers who related that he had made a phone call to Complainant at the request of the certifying official. (Tr. 1139-1140). The doctor had not talked to the hospital or medical providers. (Tr. 1140). Majestic did not think Dr. Matravers had done his due diligence. (Tr. 1140). He directed the doctor to act more diligently by accessing the required medical records to form a more informed opinion. (Tr. 1140). The doctor had not talked to Complainant's supervisor. (Tr. 1140-1141).

Majestic then talked to Ted Ryba, who has responsibility for the Chemical Materials Agency, since he was not certain Dr. Matravers had made the kind of conservative call that he would have expected, and the information on which he made his decision was definitely not comprehensive. Based on Dr. Matravers's recommendation, Complainant's certifying official perhaps would not have made the call he made. He informed Ryba that he was not sure that "we did the right thing here." He asked Ryba if he was comfortable with the decision made by his certifying official since they had the same interest, whether they had a reliable person inside the double fence. (Tr. 1141-1142).

He testified he found himself in an interesting situation since the site had only one competent medical authority and there was no one on staff authorized to review the doctor's opinion. (Tr. 1142). Because he did not know what was factual or not, Majestic wanted a second opinion and requested assistance from CMA to assist/review the opinion to determine if the right thing had been done. (Tr. 1142-1143). **This was the first time he had asked for a second opinion and it was unprecedented.** (Tr. 1143). Dr. Matravers has also sought other

medical consultation in his decision making. Dr. Matravers is a licensed gynecologist and has the capability to refer employees to specialists for treatment. (Tr. 1144).

He asked Dr. Matravers to consider whether a mental evaluation was warranted after he talked to Complainant's attending physicians and health care providers and asked Ryba for a second opinion from CMA on Dr. Matravers's decision and the information upon which he made the decision. (Tr. 1144-1145). Ryba contacted CMA and Dr. Michael Parker, the Medical Director of CMA. (Tr. 1145). Parker called Majestic and asked what he wanted from the review. (Tr. 1145). Majestic stated that he wanted a second opinion from a second competent medical authority on the correctness of Dr. Matravers's decision and the information he had passed on to the certifying official. (Tr. 1145). He also expected a review of the medical/hospital records. (Tr. 1145). He had no further contact or involvement with Dr. Parker or the review panel in Complainant's disqualification. (Tr. 1145-1146). Majestic attended the senior management board meeting related to Complainant's termination, but did not have any involvement in the subsequent UAP process. (Tr. 1146). The Army decides on UAP status. (Tr. 1146-1147).

Majestic testified that Respondent encourages employees to bring forth their concerns and issues. He views his job as keeping the people that Respondent has employed, healthy, reliable and at work. He would not allow an individual to be targeted for bringing forward concerns; it is not what Respondent stands for. (Tr. 1147). He stated Complainant's status in the CPRP program "was pretty clear cut;" since she could not be placed in the UAP, she was terminated. (Tr. 1149). He could not recall if he knew about Complainant's UAP decision before or after the senior management board meeting. (Tr. 1150).

On cross-examination, Majestic stated he does the performance appraisal for Dr. Matravers and that he does the hiring and firing of employees in Dr. Matravers's position. (Tr. 1150). The only individuals to whom Majestic spoke in managerial positions regarding Complainant's incident were Dr. Matravers, Olinger and McCloskey. (Tr. 1151). Majestic told McCloskey of the directions he gave to Dr. Matravers, and McCloskey agreed with Majestic's concerns. (Tr. 1151, 1152-1153). He also talked to Sweeting at some point, possibly the same day as his discussion with Dr. Matravers and McCloskey. (Tr. 1153). This was a HR event since it takes a person out of their day-to-day job. (Tr. 1154). Majestic told Sweeting that

he was concerned that Dr. Matravers had not done the right thing and may have given information to a certifying official that was not "conservative." Sweeting acknowledged awareness of the concern over Complainant, along with concerns expressed by Complainant's immediate supervisor about Complainant's reliability. (Tr. 1155-1156). He decided to speak with Ryba after he talked to Sweeting. (Tr. 1156).

When Majestic talked to Dr. Michael Parker, Parker wanted to know why Majestic was concerned, what he expected from a second opinion, and the logistics of getting a panel together from a budget standpoint. Dr. Parker suggested using the Army's Continuous Quality Improvement Program, which is an ongoing external assessment by CMA of medical programs at demilitarization sites, to fund the panel. (Tr. 1157-1158). Parker agreed that obtaining a second opinion was a good decision. (Tr. 1158). Majestic may have talked to Jeff Hunt about Complainant's CPRP situation, though he could not specifically recall. (Tr. 1160-1161).

He does not remember whether either Hunt or Olinger were present at the senior management board meeting to terminate Complainant, but Sweeting was present. (Tr. 1161, 1162). A recommendation was made to terminate Complainant and Majestic approved of the recommendation. (Tr. 1163). It was a unanimous decision made verbally. (Tr. 1163). His reason for approving Complainant's termination was--without a CPRP or UAP, termination was necessary since no other jobs were available. (Tr. 1164).

Dr. Matravers did not confirm that he had reviewed Complainant's medical records or talked to Complainant's treating providers. (Tr. 1165-1166). He would have expected any reviewing panel of medical doctors to at least have been as well informed as he intended Dr. Matravers to be. (Tr. 1166-1167). He expected the panel to do what was proper in terms of looking at Complainant's records and communicating with her attending health care providers. (Tr. 1167). Majestic was asking for a second opinion because he was concerned that due diligence by his physician, Dr. Matravers, was not performed. (Tr. 1167-1168). He had no knowledge of the medical panel proceedings; whether the panel looked at Complainant's medical records or communicated with her attending physicians. (Tr. 1169). Majestic asked Dr. Parker for an independent review of Dr. Matravers's decision. (Tr. 1170).

He expressed concern to Ryba over Dr. Matravers's opinion and verbally asked for his assistance in an independent review. (Tr. 1170). Olinger was deputy general manager of operations and Complainant worked in operations. (Tr. 1171). Olinger brought other CPRP issues to him when he was concerned about employee reliability and fitness. (Tr. 1173). There have been numerous occasions when employees have been sent to Dr. Matravers for medical tests, maybe four to five times, but Majestic did not ask for second opinions on those occasions. (Tr. 1173-1174). These occasions were more for referrals to specialists for treatment and care for employees than for CPRP issues. (Tr. 1174).

Majestic received nothing from the medical review panel after they performed their work since he believed it would have been inappropriate for him to have it. (Tr. 1177). He learned of the panel decision from Dr. Matravers and Ryba. (Tr. 1177). The panel decision was to recommend that Complainant was not reliable and should not be in CPRP. (Tr. 1177). Majestic told Dr. Matravers that he requested a second opinion from the medical panel. (Tr. 1177-1178).

Majestic testified in the Tomlinson case about concerns over sulfur dioxide and the resolution which OSHA investigated. (Tr. 1179-1180). He attended meetings where employees raised concerns about sulfur dioxide. (Tr. 1182). He was aware that Complainant had raised environmental and safety concerns. (Tr. 1183). Everyone has a right to raise such concerns. (Tr. 1184). Complainant raised (unspecified) concerns to him. (Tr. 1184). He does not know if Complainant raised air monitoring issues with sulfur dioxide. (Tr. 1185).

Majestic recalls no further discussion with Olinger about Complainant after her termination. (Tr. 1181). Olinger did not express any opinion about whether Complainant should be disqualified from CPRP. (Tr. 1181-1182).

He has responsibility over the surety program. (Tr. 1186). He knows employee Jeff Allred, but does not recall him being involved in a car accident involving alcohol where CPRP disqualification occurred. (Tr. 1186). Burke Latham had a DUI and potentially disqualifying information was delivered to the certifying official. (Tr. 1187). Latham still works at the plant as a plant shift manager; there was no additional medical information requested, and no permanent disqualification occurred. (Tr. 1187-1188).

## **James Jensen**

Jensen is an industrial hygiene supervisor and was hired by TOCDF in December 2002. (Tr. 1189-1190). He also worked as a safety engineer. (Tr. 1190). He is concerned with occupational safety and health and is certified as an industrial hygienist and as a safety professional. (Tr. 1190). He is notified when OSHA receives an employee complaint which has occurred twice since 2002. (Tr. 1190-1191). Respondent does not investigate who lodged the complaint, which is anonymous. (Tr. 1191).

There are thirty-four employees in the safety department. (Tr. 1191). There are several groups within the safety department: a process hazard analysis group; work control safety group; a shift safety group; an industrial hygiene group; an emergency preparedness group; and an administrative group. (Tr. 1191). All groups report to the deputy safety manager, who reports to the safety manager. The safety manager reports to the risk manager, Joe Majestic. He oversees the industrial hygiene group which consists of four employees. (Tr. 1192).

There are shift safety specialists who are assigned to a shift and cover the plant operations around the clock. They are the safety point of contact for each shift. (Tr. 1191). There are safety action teams on each shift which are generally outside of the safety department and consist of regular everyday employees. There are some safety department personnel who "attend the safety action team." There are 60 or 65 safety action team members on the roster. (Tr. 1193-1194).

The safety department is evaluated by OSHA and the government as well. (Tr. 1194). Every two years the Army sends a team to the depot where a surety management review occurs. The team consists of ten members from the Department of the Army. They are interested in how Respondent performs its day-to-day operations, how safe those actions are performed, if Respondent adheres to procedures, how Respondent maintains and secures the chemical agent and reviews industrial health and safety. (Tr. 1195-1196). In alternate years, a Chemical Surety Inspection (CSI) is conducted. (Tr. 1196).

There is a Condition Reporting System for employees to report improvements needed or what is going well. (Tr. 1196-1197). They receive about sixty items monthly which are assigned to the departments with the most knowledge of the condition to resolve them. (Tr. 1198). Each report is categorized that requires something be done or cause analysis performed. (Tr. 1198-1199). A written report is issued and

follow-up is tracked. (Tr. 1199). Management is "very aware of the condition reports" and very interested in a resolution of the conditions. (Tr. 1200). The Condition Reporting System was implemented in 2005 and employees were trained on the system. (Tr. 1201). Complainant submitted several minor work orders, to have repairs performed, and one condition report on August 30, 2006, which is RX-61, pages 1563-1564, relating to DSA transport trucks needing additional steps adjusted for entrants entering and exiting the trucks. The work control safety supervisor was assigned to track the issue that already had an engineering work order which was increased in priority after Complainant's condition report. (Tr. 1201-1205). He is not aware of Complainant raising any other safety or environmental issues. (Tr. 1205).

Sulfur dioxide came up in mustard gas processing of ton containers, a large bulk container used by the Army to store the mustard agent, which released sulfur dioxide in the cool down area in 2006, in the form of ash residue. Jensen testified that sulfur dioxide was determined to be an issue at the onset of the processing of the ton containers in September 2006. (Tr. 1205-1207). Jensen was the lead person in the investigation of sulfur dioxide. (Tr. 1207). RX-68 is a timeline of significant events related to the mustard campaign and the sulfur dioxide investigation. (Tr. 1207). He is not aware of Complainant raising an issue about sulfur dioxide. (Tr. 1208-1209). The BRA-RHA operators raised the concern over sulfur dioxide. (Tr. 1209). Complainant was not employed in the BRA/RHA area at the time. Meetings were held to address the sulfur dioxide issue between him and managers and employees who worked in the area. He recalls Complainant sat in the back during one meeting, but did not raise any issues. (Tr. 1209-1210). There was no mercury found in testing in the cool down area. Respirators with mercury protective cartridges were used on one day because mercury was detected through the pollution abatement system prior to discharge of these munitions through the discharge air lock. (Tr. 1210-1211). He was not aware of the wrong cartridge being used in respirators in the cool down area. (Tr. 1211).

In January 2008, he first became aware through the environmental group of cadmium in projectiles producing red dust in the cool down area. (Tr. 1213-1214). RX-62 is a condition report on red dust submitted by John Patilla, plant operations; it was the only condition report submitted on the red dust issue. He was aware of the red dust issue before the condition report. (Tr. 1214). They conducted industrial hygiene sampling of the dust and employee exposure testing on a time-weighted average eight-hour shift. (Tr. 1214-1215). They tested

cartridges and found cadmium was extremely low and not anywhere close to action level. The action level would be the point at which action would be taken to protect the employees. (Tr. 1215-1216). RX-62, p. 1570, is a report he generated that red dust was not an employee exposure or health concern because of low levels of cadmium in the dust even for transients in the area without a respirator. (Tr. 1216-1218). He is not aware of Complainant raising a red dust concern. (Tr. 1218).

The Voluntary Protection Program (VPP) is a safety compliance award granted by OSHA when a company is compliant with all of their standards to a higher degree and is an employee driven award. (Tr. 1218-1219). OSHA inspected the site with a VPP team and walked down the site, conducted an extensive review of Respondent's programs to assure Respondent was in compliance with all requirements at a high level of compliance. (Tr. 1219). The inspection was in early 2009 by six members, consisting of OSHA members and employees from other VPP sites, for about two weeks and looked at every one of Respondent's safety-related programs. They walked through the operations and inspected every area of the site. (Tr. 1219). They also interviewed and talked to employees. (Tr. 1220). RX-67, p. 1605, is a document from OSHA dated May 4, 2009, which approves Respondent's site as a VPP Star site. (Tr. 1220). The VPP site report which consists of OSHA's findings from its VPP audit commences at RX-67, p. 1608. (Tr. 1220). Plants that obtain a VPP status are exempt from random inspections, but are inspected extensively every three years. (Tr. 1221). Before attaining VPP status, TOCDF was subject to random inspections, however Jensen could not recall Respondent ever receiving a random inspection. (Tr. 1221).

He is aware of the computerized board in the lunchroom which displays various information about recordable injury rates, safety and first-aid issues. (Tr. 1222, 1247). It never flashes messages of complaints to OSHA or the Department of Environmental Quality or any environmental issue to his knowledge. (Tr. 1223).

On cross-examination, Jensen stated the VPP application was submitted about the same time in June 2008 as the sulfur dioxide concerns. (Tr. 1224). He attended safety action team meetings and never saw Complainant, though he does not attend regularly. (Tr. 1224). The condition reports are retained long-term and should be in Respondent's records. (Tr. 1225). Condition reports can be submitted anonymously, but he does not know if Complainant submitted reports anonymously. (Tr. 1225). No one asked him to review the anonymous condition reports. (Tr. 1225-

1226). Employees do not have to submit concerns through condition reports, but can report environmental and safety concerns to their immediate supervisor, higher management, to the safety committee, to an industrial hygiene representative or to an environmental official. (Tr. 1227-1228). The condition report group reviews the open condition reports and assigns them for action and follows up on the resolution of the issues. (Tr. 1229). He did not review the safety action team complaints for issues Complainant may have raised. (Tr. 1230).

Jensen testified that Respondent has a good safety record and responds well to safety concerns. The safety department has received noncompliance notices requiring corrective actions on safety concerns based on observations from CSI teams and Army inspection teams. (Tr. 1234).

Red dust, or cadmium, is a toxic metal. (Tr. 1234). The red dust escaped the Metal Parts Furnace cool down area into the outside environment. (Tr. 1235). The red dust issue began in January 2008 and ran through the spring of 2008. (Tr. 1235-1236). Jensen testified that from 2006 to 2008, Complainant was not employed in the Metal Parts Furnace cool down area, but worked in DSA. (Tr. 1237). On occasions when he was in the area, he did not see Complainant working in the Metal Parts Furnace cool down area. (Tr. 1237-1238).

Jensen testified that mercury was found to be present in the mustard agent. Respondent made modifications through the pollution abatement system which was required by the State Environmental Agency. (Tr. 1239-1240). Mercury did not make it into the exiting process which was sample tested by Respondent's environmental department. (Tr. 1240-1241). He recalls employees who worked in the Metal Parts Furnace cool down area were concerned about mercury and complained about the need for a respirator and were given a respirator, but with the wrong cartridge for one day. (Tr. 1242-1243). The State found the presence of mercury from 2006 onward, for a total of ". . . maybe two years, three years maybe even." (Tr. 1243).

The State of Utah Environmental Agency became involved with the red dust issue. In March 2008, the State inspected and determined that Respondent was not adequately controlling the spread of the red dust from the cool down area. The red dust problem caused Respondent to shutdown to curtail the spread. (Tr. 1244). Jensen confirmed that when he testified that the red dust was not an employee exposure issue, he did not intend to testify that the red dust issue was not an environmental compliance issue. (Tr. 1244-1245).

RX-61, p. 1563, reflects that he looked for issues raised by "B Utley" and "B Mugleston." (Tr. 1248). If a condition report is submitted anonymously, no effort is made to determine who submitted an anonymous condition report. (Tr. 1248-1249). To submit a report anonymously, an employee would have to go through the safety action team or another employee on the safety action team. (Tr. 1249). Typically, a condition report is closed in a month or two. There have been exceptions when issues required significant changes, such as when a report was opened for a year or two pending engineering implementation and processes or pending approval from the government. (Tr. 1250-1251).

Sulfur dioxide issues consumed one-half of his days for two years and he was frequently in the Metal Parts Furnace cool down area working on improving the condition. (Tr. 1251). He testified in clarification that he did not think a mercury cartridge respirator would have been in use for several months. (Tr. 1252). He explained mercury volatilizes in the furnace and exits through the pollution abatement system, which is equipped with the pass filtration system to specifically collect the mercury. (Tr. 1252-1253). Condition reporting on safety is his concern which does not include environmental concerns. (Tr. 1253).

### **Robert Ralston**

Ralston was hired in 1995 and has been an entry manager for over twenty years in the toxic area. He is responsible for the toxic entrants conducted at TOCDF. (Tr. 1257-1258). Entry supervisors report to him; there are two on each shift for a total of ten supervisors who are responsible for planning the briefing, execution and the egress entries. (Tr. 1258). "Egress" is safely exiting the toxic area through the air lock. (Tr. 1258).

He began as a DPE operator in DSA and worked as a DSA operator and lead. (Tr. 1258-1259). He did not supervise Complainant as a DSA lead. (Tr. 1260). He was not aware of Complainant raising any safety or environmental concerns. (Tr. 1260).

Respondent demilitarizes weapons or dismantles them, the liquid being separated from the projectile as both are destroyed. Respondent has destroyed GB, VX (nerve agents) and mustard (a blister agent). (Tr. 1260-1262). There is a cascading airflow in the air locks: "C" is clean air; "B" is

contaminated vapors present; and "A" is the most toxic with liquid and air-contaminated by vapor or liquid. (Tr. 1263-1264). PPE is personal protective equipment. (Tr. 1265). RX-49 is an informational guideline for toxic area entry requirements and safety procedures. (Tr. 1265-1266).

RX-59 is the PPE guidelines and addresses levels A, B and C. OSHA level A and DPE are the highest level of protection. (Tr. 1266). RX-60, p. 1558, depict DPE suits with air hoses, which are never re-used; level B has a self-contained breathing apparatus; level C consists of an air purifier and respirator or a mask. RX-60, p. 1559, is a picture of an OSHA A suit which is the same protection as DPE. (Tr. 1266-1271). RX-59, p. 1543, is M2C clothing which has an air purifying respirator, boots, gloves, and apron worn to help someone out of the air lock. (Tr. 1270-1271).

RX-47 is SOP-109 which is a step-by-step process for entry/egress. (Tr. 1271-1274). RX-56 is the toxic area entry permit for DPE, which is a form filled out for each entry, and RX-56, p. 1505, is a list of required persons who must be present at the pre-entry meeting. (Tr. 1274-1276). There are two back-ups for each entrant who are trained and certified to make emergency rescues, if needed. (Tr. 1276). Back-ups are located in the C air lock when the entrant is in the toxic area. (Tr. 1276). Entrants are monitored from the control room by a control room operator, by an entry supervisor, by the work supervisor, by the paramedic and sometimes by the plant shift manager through the closed circuit television system. (Tr. 1276-1277). RX-56, p. 1506, is the decontamination process. (Tr. 1277). Decontamination occurs during the last twenty minutes of an entry to physically remove any agent contamination source off of either the DPE suit or the equipment. (Tr. 1278). There are door guard responsibilities when the doors are unlocked per Army regulations. (Tr. 1279).

DPE entrants and back-ups wear specialized radios and are in constant communication. (Tr. 1280). A "rover" helps the back-ups in the event of an emergency. (Tr. 1280). Back-ups wear level "A" ensemble suits with SCBA, self-contained breathing apparatus. (Tr. 1280-1281). RX-48 is the SOP for less than DPE entries where no back-ups are used. (Tr. 1283). RX-57 is a toxic area entry permit for "other than supplied air," which is the same as less than DPE. (Tr. 1284). Both entries have ACAMS monitoring. (Tr. 1284-1285). RX-60, p. 1560, is a photo of three ACAMS, an automatic continuous air monitoring system, with hoses going to different points. (Tr. 1284-1285). There are 200 ACAMS throughout the plant. (Tr.

1286). Entrants decontaminate before going into the first air lock. (Tr. 1289). There are four sets of air locks in the plant. (Tr. 1292). RX-73 represents diagrams of the various plant floors and levels. (Tr. 1294).

RX-60, p. 1553, is a photo depicting bags of gear and DPE suits in B air lock. (Tr. 1299). The air duct shown is from C to B air lock. (Tr. 1299). RX-60, p. 1556, is a photo of the Toxic Maintenance Area (TMA) drop chute; RX-60, p. 1557, is a photo showing the netting below the chute where the bags travel through to the floor. (Tr. 1301). The decontaminators used are peroxide-based neutralizers and soap. (Tr. 1302).

In the toxic area, entrants spray each other with decontaminators and scrub each other with a brush to remove contaminants and wash each other down with water. (Tr. 1302-1303). They then go to "A" air lock and may repeat the decontamination process multiple times by rinsing their suits off. (Tr. 1303-1305). They monitor each other with the ACAMS wands and wait for the ACAMS reading. (Tr. 1305-1306). Back-ups go into "B" air lock once the ACAMS reading is complete and the entrants enter "B" air lock depending on their reading. (Tr. 1307-1308). Their reading has to be lower than 1.0 VSL to enter the "B" air lock, at which time they are cut out of their DPE suits. Once at .5 VSL, the entrants can exit to "C" air lock. (Tr. 1308). RX-50 is an operator SOP for egress. (Tr. 1309-1310). A supervisor is present at egress because of problems with entrants not following procedure, e.g., an ACAMS wand left in the air duct and not in the holder. (Tr. 1310-1311).

RX-51 is the ingress/egress process which explains what entrants are to do if they are having trouble decontaminating. (Tr. 1311). RX-52 is a shift order, which is used to change procedures, effective November 16, 2006, issued by Operations Manager Jeff Hunt, about ACAMS being placed into "B" air lock duct during ingress into the toxic area. (Tr. 1312, 1317). If the ACAMS is placed in the holder, it effectively avoids false readings and saves time on egress. (Tr. 1317-1318). When the entrants returned to the A air lock, they were "to leave the ACAMS in the duct while deconning for up to 10 minutes before removing the wand from the duct to help the normal air exchanges in the A air lock take out any potential contamination that was brought in from the munitions processing bay." (Tr. 1318). When leaving the A air lock, the ACAMS wand is supposed to be removed from the duct and placed in the ACAMS holder. If the wand is left in the duct on egress from A air lock, only 50% of proper monitoring of the A air lock is detected since it is

monitoring air from the B air lock as well. (Tr. 1319). He testified hypothetically that if the ACAMS is left in the duct anyone entering A air lock would not be contaminated because there are no toxic/agent levels present because the DPE suits are cleaned, bagged, double bagged and thrown away. (Tr. 1320).

RX-52, p. 1467, is SOP-109, step 6.1 which requires the supervisor to verify the wand is secured in the ACAMS sample holder. (Tr. 1322). **The level of dress is based on the ambient source and room readings and the potential risk.** (Tr. 1324-1325). It has never happened that the capacity of PPE has been exceeded during the mustard campaign. An "interferent" masks negative or positive ACAMS readings which may mean agent is present or not. (Tr. 1326). DAAMS, the depot area air monitoring system, is a separate air sampling system, in addition to the ACAMS. (Tr. 1327-1328). Bleach, as a decontaminator, was a negative interferent and was discontinued on July 25, 2006. (Tr. 1328; RX-72).

There was a problem with waste build-up in air locks from 1996 to 2001 and 2003 to 2004; the waste being DPE suits, boots, and gloves. (Tr. 1331-1332). There were multiple bags of waste for multiple entries. (Tr. 1332). The last time he could recall build-up of bagged waste was in 2003. He was not aware of unbagged waste accumulating in the air locks. (Tr. 1334). LSS hoses are tested every 12 hours for mustard agent and every 24 hours for VX. The hoses are replaced if the agent contamination level is more than one WPL, working population level. Less than one WPL can be breathed without any protection. (Tr. 1335).

On cross-examination, he stated he authored the procedure for back-ups to carry monitored bags of waste to the TMA or to a ninety-day disposal area. (Tr. 1338-1342). Before the change, the practice was for DPE entrants to carry bags of waste to the TMA or ninety-day disposal area, and they still do at times. (Tr. 1342-1343). It is possible that Complainant may have carried bags since she worked as a DSA operator. (Tr. 1345-1346).

He had meetings with DSA operators, but not about handling waste or with Complainant in attendance. (Tr. 1346). He has made fifty changes to procedure and meets with supervisors and crew shifts about the changes made. (Tr. 1346-1347). He does not recall a meeting about the change of procedure regarding carrying bags of waste. (Tr. 1347-1348). He would not allow employees in an area if agent was present as monitored by ACAMS. (Tr. 1348-1349). The upper munitions corridor contains, from

time to time, chemical agent. (Tr. 1348). There has been an occasion when a person entered the upper munitions corridor in which the ACAMS reading indicated it to be clear, but afterwards ACAMS showed the presence of agent. (Tr. 1351). He does not recall DSA supervisors or managers bringing to his attention concerns of DSA operators or potential backups over carrying bags of waste into the upper munitions corridor. (Tr. 1352).

The risks as shown on ACAMS readings dictate the level of protective clothing required for workers. (Tr. 1354-1356). There is no difference in the airflow when the TMA is open because it is sealed by another door which swings up, and when the hatch is closed, the bags then fall down the chute. (Tr. 1359-1360). RX-53 is an Apparent Cause Investigation Report of an alleged violation of procedure, where M2C entry exceeded PPE action level in the upper munitions corridor, but no one was exposed. (Tr. 1360-1361). It was investigated because of a procedure violation and the potential for having a chemical agent level greater than the level of protection of the clothing worn by the employee. (Tr. 1361-1663).

Pre-entry meetings are conducted for all entries, including when backups or DSA operators carry bags of waste from the air locks into the upper munitions corridor, which is considered part of the toxic area. (Tr. 1364). RX-49 is the toxic area entry requirements; page 1430 is the DPE/OSHA Entry log for entries of entrants and the backups. (Tr. 1364-1365). The rover would make entries on the form in the event of a non-normal exit because he is reading the ACAMS. (Tr. 1366).

In April 2008, Complainant would have worn M2C level clothing with an air purifying respirator or M40 gas mask, a hood, an apron, boots and gloves. (Tr. 1370). He stated an apron, which is open in the back, worn by back-ups is not adequate protection if liquid is present. (Tr. 1370-1371). In July 2002, an employee was exposed to liquid chemical agent when liquid was not expected to be present. (Tr. 1371).

The ACAMS wand is suppose to be placed under the clean air flow of the air duct, but it was discovered that employees were placing it in the air duct. (Tr. 1373). RX-55, p. 1503, is a shift order dated October 25, 2007, from Operations Manager Jeff Hunt which states that a supervisor must be present when egress occurs from the A air lock to insure the ACAMS wand was not left in the air duct. (Tr. 1374, 1376). Three ACAMS monitored "A" air lock in April 2008. (Tr. 1379-1380). He stated that once bags of waste are bagged, there is no longer an agent source present or only a miniscule amount of agent on the DPE suits

bagged up in the A air lock. (Tr. 1383). He testified that procedurally DSA backups can only carry bags of waste after a normal "B cut out," and there would be no readings of agent in the "air lock ever." (Tr. 1385).

Although he had not reviewed all records at TOCDF, Ralston testified there was only one situation when a backup went through A air lock to drop bags of waste into the upper munitions corridor, and thereafter the ACAMS in the A air lock started to read chemical agent that was not read or was not detected before. That incident was the subject of a report at RX-53, because it is a significant event. (Tr. 1384-1386, 1394). Even though bags of waste rip and tear, he was not aware of liquid being in bags of waste. (Tr. 1387-1388).

In 2006, the facility stopped using bleach as a decontaminator. Clorox-2, which is a peroxide and not a bleach, was used as a decontaminator after 2006. (Tr. 1389-1390, 1392). Chlorine is the interferent in Clorox, but not Clorox 2. (Tr. 1392).

### **Cynthia Brothers**

Cynthia Brothers has worked in HR for twenty-five years and has a BA in business administration and management. (Tr. 1396). She worked for Respondent at the TOCDF as a HR "rep/generalist." She was hired in December 2005. Her supervisor was Debbie Sweeting. (Tr. 1402). Her job was to assist operations with recruiting, benefits, hiring, employee relations issues and terminations. (Tr. 1403). She interacted with Sweeting and received feedback from Sweeting about "good job" performances. (Tr. 1404).

In the Tomlinson case, she handled his termination and testified at the formal hearing. (Tr. 1404-1405, 1407). She reviewed his evaluations and discipline and determined he was a model employee. (Tr. 1405). She told Sweeting that others, including his manager and supervisor, had spoken up for Tomlinson, but the company terminated him anyway. (Tr. 1405). She felt the employment decision could have been handled differently. (Tr. 1405-1406). Sweeting commented "remember, he's one of the SO2 boys." (Tr. 1406). She was told by Sweeting and the attorney handling the case that she had done a good job. (Tr. 1410).

Two weeks later, her boss found derogatory e-mails she had written about Sweeting at work on her work computer that she had sent to a friend, which she admitted were "terrible," and she

was humiliated. Sweeting was also humiliated. (Tr. 1410). Sweeting called her into the office and told her she did not think they could work together and she was given two options: sign a paper accepting severance/unemployment and leave her position or face a defamation of character suit. Sweeting told her she did not have to quit and she was not firing her. (Tr. 1411). She signed the papers and took a severance. (Tr. 1411). She acknowledged she was guilty. Sweeting told her no one in the office wanted to work with her. (Tr. 1412).

There was another incident involving employees on an easy-go cart in the winter of 2009 running into a fire hydrant and both were injured, during work time which happened after Tomlinson was terminated, but these employees were not terminated. They were given days off without pay and a written warning. (Tr. 1415-1416). This incident was considered a safety violation as was Tomlinson's case which did not result in injury. This incident was offered as an indication of disparate treatment/pattern by Respondent of environmental whistleblowers. (Tr. 1414).

When she took her severance and left employment with Respondent, Sweeting told her she could apply for any job for which she qualified. She called about one job and asked Sweeting if there would be a problem because she had been applying. She was told McCloskey did not like to move problems from one department to another. (Tr. 1418). She handled Complainant's job applications after Complainant's termination and put them in the "considered category" on the HR website. (Tr. 1419). She sent Complainant through a couple of times to a hiring supervisor. (Tr. 1419). Sweeting told her that Complainant could not return to the Depot because she could not qualify for a UAP. (Tr. 1419).

On cross-examination, she stated she told the truth at the Tomlinson hearing. (Tr. 1420-1421). She testified that she personally thought his termination was warranted because he endangered his own life by removing his protective mask and Tomlinson stated he had done so. (Tr. 1421-1422). When she testified at the Tomlinson hearing that she expressed concern for Tomlinson, she meant that she was sorry that his incident lead to termination, but she did not think the termination action was inappropriate. (Tr. 1422). Her e-mails to her friend made fun of Sweeting's appearance, actions and management, called her nicknames and a criminal. She also wrote an e-mail about Tomlinson's case and that he did not "have a leg to stand on but his story has changed." (Tr. 1423-1426). She stated one of the easy-go cart employees had to have stitches,

but could not recall if one was terminated because of the incident. (Tr. 1426-1427). The e-mails she sent to her friend were during the period from January 2009 to March 2010. (Tr. 1431).

### **Brenda Mugleston-Utley-Rebuttal**

Complainant knows Ralston. (Tr. 1438). She had a meeting with him in mid-2007 about the change in procedure in the level of dress for personal protective equipment (PPE) worn by the emergency back-ups when transferring bags of waste to the TMA. (Tr. 1438-1439). Before the change, DPE entrants picked up waste and dropped the bags over the upper mezzanine of the upper munitions corridor onto a waste tray. (Tr. 1439). She claims she raised concerns about the level of PPE as inadequate with Wahlberg and Sorenson and co-workers discussed respirators. (Tr. 1440-1441). The supervisors also had concerns and contacted Ralston to come to speak to the employees. (Tr. 1441). Ralston came and explained the changes to the crew, at which meeting Complainant was present. (Tr. 1441). Complainant claims she complained to Ralston at the meeting that she did not feel safe transporting waste in the level of PPE to which they were being changed. Wahlberg was also present at the meeting. (Tr. 1442-1443).

Co-workers Robert Darling and Mike Maestas were present when she raised complaints with Wahlberg. (Tr. 1443). Neither testified at the instant hearing. Complainant claims she complained to Wahlberg about the build-up of waste bags in the air locks. (Tr. 1444-1445). She also raised ACAMS wand issues to Wahlberg. (Tr. 1446-1447). In late 2007 or early 2008, Pat Baker, operations manager, and Wahlberg observed her in an air lock with unbagged waste. (Tr. 1447-1450).

Complainant also testified that sumps, where DPE entrants wash up, were not pumping and were full to the top in 2007. (Tr. 1450-1451). Documentary evidence exists in the DPE entry log form for equipment worn which shows the suit sealer burned through the suits and new DPE suits were brought in to dress entrants. (Tr. 1452-1454). Wahlberg re-checked everything she did to dress entrants and also reviewed and signed the records. (Tr. 1454-1456).

Complainant met with Wahlberg after her medical incident and did not tell him she attempted suicide and did not tell him she had to be revived. (Tr. 1457-1458). Bryne did not tell her

he "wouldn't do this for just anybody" when she related the medical incident, and she did not tell Wahlberg he did. (Tr. 1458).

Complainant claims she sat in the back at Jensen's meeting in late 2007 or early 2008, and raised issues of red dust on the ground. (Tr. 1458-1459).

She was training with Wahlberg as an alternate supervisor when they discovered entrants were not properly "ACAMS'ing." (Tr. 1461-1462). She claims she suggested a checklist. (Tr. 1460-1462). She helped Wahlberg prepare the checklist and suggested ACAMS be used over quadrants of the body. (Tr. 1461-1462). Hunt approved the checklist and it was used by all teams. (Tr. 1463-1464). She claims Wahlberg destroyed the checklists after 3 months, but she did not complain about the destruction to anyone other than Wahlberg. (Tr. 1467-1468).

Complainant knows Tim Olinger, operations manager. (Tr. 1468-1469). She worked under his supervision for about eight years. (Tr. 1469). She sent several letters to Olinger and Jimmy Clark, an operations manager, in 2002 about ash being released outside of the Metal Parts Furnace cool down area and when rain or snow storms occurred it would flood the inside and push ash out into the outside environment. She continued to raise these issues with Olinger into 2003 and 2004. (Tr. 1470-1471). Olinger knew of Complainant's history of protected activities and raised the medical incident issue to Majestic. (Tr. 1471).

Robert Darling helped her with condition reporting training and submission of condition reports. (Tr. 1474).

Scott Hansen, DSA supervisor, gave her permission to leave early on the day of the medical incident since all the work was done; it was about 5:45 p.m. (Tr. 1475-1476).

She worked on the safety action team (SAT) from 1999 to 2005 or until she went to DSA. (Tr. 1476). The most recent time she served on SAT was 2006 or early 2007. (Tr. 1477). A safety action report is a document maintained by Respondent which contains safety and environmental concerns raised by employees. The report shows the concerns raised, how long the concern has been open and if the concern or problem was resolved. (Tr. 1477). She claims she raised safety and

environmental concerns which are in the safety action report by her name and anonymously. (Tr. 1478-1479). The safety database condition report system did not always exist. An employee could also submit concerns to safety. (Tr. 1479).

On cross-examination, Complainant testified if there is an issue of fraud in her unemployment application and an overpayment, there was no such finding by the work force commission. (Tr. 1480-1481). Paperwork would indicate there was a fraud. (Tr. 1480). There was a recent satisfaction of the judgment. (Tr. 1482; RX-74).

**Dr. Robert D. Gannon**

On June 18, 2010, the parties deposed Dr. Gannon. (RX-75). He is board-certified in Emergency Medicine and was employed by Mountain West Medical Center in Tooele, Utah, in April 2008, when Complainant was brought to the emergency room (ER). (RX-75, pp. 5, 9).

He testified Complainant was brought to the ER by her brother and a young son on the night of April 12, 2008, at 9:45 p.m. (RX-75, pp. 10, 20, 59; RX-2, p. 7). He completed a history of present illness on a Psychiatric Issues medical record reflecting a chief complaint of "depression," "suicidal thought," "suicide gesture," and "drug ingestion." (RX-2, p. 4). The Initial Assessment Form completed by the attending nurse indicated "Chief complaint: Overdose-Intentional." (RX-2, p. 7). Dr. Gannon stated Complainant presented "fairly sleepy and somnolent, but was very arousable." (RX-75, p. 13). He testified that her son informed him that Complainant was depressed; that "she had recently broken up with her boyfriend and was very depressed and had taken a bunch of pills." (RX-75, p. 15). The son thought she had taken pills 30 minutes before she was brought to the ER, which included Tylenol with codeine, Lisinopril (a blood pressure medication) and one Adderall (a stimulant, an amphetamine). (RX-75, pp. 16, 23). It was reported to Dr. Gannon that the pills were taken because of Complainant's "suicidal thoughts." (RX-75, pp. 16-17). Dr. Gannon clarified that he could not remember exactly what the son reported but "that was the thought, is that she had taken an overdose of medication." He concluded that Complainant having actually taken medication, she had made a gesture toward suicide. (RX-75, p. 18). He was only able to obtain a minimal history from Complainant. (RX-75, p. 19). Dr. Gannon noted on

the Psychiatric Issues medical form that Complainant's "intent of ingestion/injury" was "to die." (RX-75, pp. 21-22; RX-2, p. 4). He was not sure if the son or Complainant had reported the intent of ingestion. (RX-75, p. 22).

Dr. Gannon testified that it was his judgment upon Complainant's presentation at the ER that she was trying to commit suicide. (RX-75, p. 23). He stated that what he witnessed on Complainant's presentation would not be consistent solely with Lisinopril usage. (RX-75, p. 54).

He also noted Complainant exhibited "nystagmus," which means "your eyes are shaking in your head" and there is something going on with your neurologic system. (RX-75, p. 28). The initial toxicity screen revealed Tylenol at 2.3, which is a safe level, as well as a normal level of aspirin and a low level of alcohol at 7.4. (RX-75, p. 30). Dr. Gannon stated that "usually you don't check for the toxicity of Tylenol until you're four to six hours into it. The curves for blood levels aren't accurate right after injection (sic)." (RX-75, p. 31). Dr. Gannon stated that a standard "tox screen" was performed on Complainant which he referred to as a "psych panel" that looks for medications of abuse and overdose. (RX-75, p. 32). The "tox screen" results "rings positive or negative . . . and doesn't give us any quantitative amount of how many they've taken, just whether they have those in their system at a high enough level to ring positive." (RX-75, p. 33).

Dr. Gannon testified that when Complainant arrived at the ER her blood pressure was much more normal at "87 over 54" than later when the blood pressure decreased below "70s over 40s," which he described as "bad." (RX-75, p. 35). The lower blood pressure readings are a **life threatening condition** according to Dr. Gannon. (RX-75, p. 36). Complainant was admitted into the Intensive Care Unit because she was on drugs to support her blood pressure and required monitoring. (RX-75, pp. 37-38).

Dr. Gannon's impression and diagnoses of Complainant were suicidal ideation, suicide attempt, medication ingestion and hypotension or low blood pressure. (RX-75, pp. 38-39; RX-2, p. 5). Although Dr. Gannon later met with Complainant about her ER visit and admission, **it remained his impression that she had taken an overdose of medication to harm herself and to apparently take her life.** (RX-75, p. 39). He further described her level of intoxication as "sleepy, somnolent, couldn't give us a very good history . . . her blood pressure dropped significantly. She was fairly critical at that point in time." (RX-75, p. 41).

Dr. Gannon testified that Complainant called him and wanted to come in to discuss her ER visit. They met on May 26, 2008, about six weeks after her ER visit. Complainant was accompanied by two lady friends and wanted Dr. Gannon "to change the record that it wasn't a suicide attempt, because apparently her job has some issue with suicidal issues . . . She was concerned that she would lose her job because it stated that it was an overdose and suicide attempt." (RX-75, pp. 43-44). He stated "their primary concern was the charting." He informed Complainant that he could not change the initial charting which was done on his impressions. Complainant explained that she had been off of her medications and had "tried to restart them by taking a few extras," and that the episode was not a suicide attempt. (RX-75, pp. 44-45). Complainant also wanted to know if he could define how many pills she had taken, but he told her he could not, but his impression was that it was an "individual response medication and it could be anywhere from 3 to 7 or 20 of these tablets." (RX-75, pp. 46-47, 58).

Dr. Gannon memorialized the meeting in a note dictated after the meeting in which he noted Complainant was "concerned that this really was not a suicide attempt . . . that she was off of her medications for a period of time and then decided to get back up on them and just took too many of her primarily Lisinopril." Complainant wanted to set the record straight but Dr. Gannon told her he could not alter his medical record. (RX-75, pp. 49-51; RX-2, p. 6).

He also testified that what he witnessed in the ER with Complainant would not be consistent solely with Lisinopril usage. (RX-75, p. 54). He interpreted Complainant's EKG to reveal prolonged QT syndrome, "which is one of the things we look for in EKGs. It's a sign-sometimes it's a sign of toxicity of some medications." (RX-75, p. 69; RX-2, p. 9). He concluded it was an abnormal EKG and if the QT waves "start getting longer, it's more of a sign of real toxicity." (RX-75, p. 70). After reviewing nurse's notes, he stated Complainant must have been admitted into the hospital about 3:00 a.m. (RX-75, pp. 73, 89).

Dr. Mark Jackson admitted Complainant into the hospital on April 13, 2008, with a chief complaint of "overdose." (RX-75, p. 83; RX-2, pp. 19-21). Dr. Jackson notes in his history that Complainant "had been told by her boyfriend that he was leaving her. It was apparently unbearable news to her, and she had made a rash decision to take a drug overdose of essentially unknown drugs and quantities." It was further noted that her son

reported she took one Adderall, a few (according to Complainant) Lisinopril tablets, a few Topamax, and possibly some aspirin and Tylenol #3, in unknown quantities, "but not thought to be large numbers—in the less than 10 estimated range." Complainant called her brother and told him "about how bad she felt about this poor decision that she had made." (RX-2, p. 19).

Dr. Jackson's handwritten admission notes reveal Complainant took 8 Lisinopril, "a few" of an illegible medication, one Adderall, and "several Tyl #3" in a desperate suicide gesture, but called her brother "feeling remorse about the poor choice." It is further noted that Complainant sees a counselor at Valley Mental Health and takes Prozac for depression and Adderall for day-time somnolence. She "took pills [secondary to] boyfriend left her today." (RX-2, p. 33).

On April 14, 2008, Complainant met with a "psych social worker" who prepared notes of the meeting. (RX-2, p. 30). The note indicates Complainant was admitted to ICU after "poly drug OD" as her Lisinopril caused dangerously low blood pressure and she needed monitoring. It is noted that Complainant was reportedly upset by her boyfriend who told her that he was going to leave her. Complainant denied any previous suicidal acts/gestures and denied any previous psychiatric hospitalizations. Complainant reported that she "stopped taking her meds during her breakup." She stated she "is very embarrassed and upset that she hurt her children by ODing." She added "I can't ever do this again I hurt my children and I am religious and do not want to go to hell like I believe I will if I kill myself." (RX-2, p. 30).

Dr. Gannon testified that the hospital records indicate Complainant tested positive for "ACE, TCA, benzo and meth," on the urine drug screen. ACE is the blood pressure medication. Methamphetamines are all stimulants which would include Adderall. (RX-75, pp. 92-93; RX-2, p. 32). The Triage Urine Drug Screen taken on April 12, 2008, showed a positive reading for benzodiazepines which is in the Valium family of drugs, a second substance which Dr. Gannon could not read was also positive as was TCA which is tricyclic antidepressants. (RX-75, pp. 100-104; RX-2, pp. 43-44). Dr. Gannon opined that Complainant had to have taken another drug other than Lisinopril and that benzodiazepines would have been consistent with Complainant being somnolent and hard to arouse. (RX-75, pp. 110-111). He opined Lisinopril would not cause a positive reading on the Triage Urine Drug Screen. (RX-75, pp. 113-114).

Complainant's discharge planning summary of April 15, 2008, indicates she was admitted to ICU with hypotension secondary to Lisinopril OD and with suicide attempt "took Lisinopril, Tylenol #3, Adderall, Prozac." (RX-2, p. 35).

On cross-examination, Dr. Gannon confirmed that one of Complainant's family members reported "suicide" in reference to her overdose and a breakup of the boyfriend. (RX-75, pp. 119-120). He subsequently indicated he inferred "suicide," and was not certain if "suicide" was actually said or not. (RX-75, p. 120). Dr. Gannon testified he was given a list of possible medications by one of Complainant's family members. He opined that Complainant over-ingested Lisinopril because of her hypotensive state. (RX-75, p. 122). He further stated Complainant had an altered mental status that was not consistent with Lisinopril and she had taken something else. He did not what other medications could have been taken, but indicated the drug screen was positive for "benzos" which is a common drug out on the street and was not on her list of medications. It would not have been an over-the-counter source, but would be from the Valium family such as "Xanax, Ativan, Klonopin." (RX-75, p. 123).

Dr. Gannon stated that Complainant's drowsy state upon presentation in the ER would not have been caused by low blood pressure since her reading was "87 over whatever she came in with." (RX-75, p. 125). Dr. Gannon agreed with the "psych social worker" that Complainant "does not meet the criteria for a psychiatric emergency at this time" on April 15, 2008. (RX-75, pp. 128-129; RX-2, p. 30). He also agreed that TCA is commonly detected in drug screens as a false positive because of a number of things including over-the-counter medications such as antihistamines. (RX-75, p. 129).

On re-direct examination, Dr. Gannon affirmed that without medical intervention there was a "good chance that [Complainant] would have died or else had real problems because the blood pressure was very low." "Lots of problems" could have included stroke, kidney failure, injury to the intestines or bowel. (RX-75, p. 132).

## **V. FINDINGS OF FACT, CONCLUSIONS OF LAW, ANALYSIS AND DISCUSSION**

### **A. Credibility**

Prefatory to a full discussion of the issues presented for resolution, it must be noted that I have thoughtfully considered

and evaluated the rationality and consistency of the testimony of all witnesses and the manner in which the testimony supports or detracts from other record evidence. In doing so, I have taken into account all relevant, probative and available evidence and attempted to analyze and assess its cumulative impact on the record contentions. See Frady v. Tennessee Valley Authority, Case No. 1992-ERA-19 @ 4 (Sec'y Oct. 23, 1995).

Credibility of witnesses is "that quality in a witness which renders his/her evidence worthy of belief." Indiana Metal Products v. NLRB, 442 F.2d 46, 51 (7th Cir. 1971). As the Court further observed:

Evidence, to be worthy of credit, must not only proceed from a credible source, but must, in addition, be credible in itself, by which is meant that it shall be so natural, reasonable and probable in view of the transaction which it describes or to which it relates, as to make it easy to believe . . . Credible testimony is that which meets the test of plausibility.

442 F.2d at 52.

It is well-settled that an administrative law judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. Altemose Construction Company v. NLRB, 514 F.2d 8, 16 and n. 5 (3d Cir. 1975). Moreover, based on the unique advantage of having heard the testimony firsthand, I have observed the behavior, bearing, manner and appearance of witnesses from which impressions were garnered of the demeanor of those testifying which also forms part of the record evidence. In short, to the extent credibility determinations must be weighed for the resolution of issues, I have based my credibility findings on a review of the entire testimonial record and exhibits with due regard for the logic of probability and plausibility and the demeanor of witnesses.

Generally, I found Complainant's testimony riddled with inconsistencies, recantations and contradictions. She consistently portrayed documentary evidence which was unfavorable to her as misconstrued, misunderstood, incorrect or inaccurate. This is true regarding comments found in her ER medical records, which she sought to change in discussions with Dr. Gannon, her presentations to Dr. Lim regarding her "divorce" proceeding, her medications list at Respondent's clinic and the list provided in her rebuttal to the Army, her representations to the Department of Work Force Services about being out of

work, and her characterization about her "resignation" from Watson Pharmaceuticals.

Furthermore, much of Complainant's testimony was not impressive or persuasive and was contradicted by her co-workers, supervisors and documentary evidence. Although I found several supervisors also generally not entirely credible, the preponderance of the evidence from co-workers and supervisors contradicted Complainant's version of complaints made or concerns raised. The variety of statements made by Complainant about the events of the medical incident to supervisors, Dr. Matravers and certifying officials were not consistent or believable. Therefore, I credit Complainant only where her testimony is corroborated by other witnesses or documentary evidence.

I found Jeffery Utley equally unreliable as a witness on behalf of Complainant. Although he testified at the formal hearing that Complainant raised environmental and safety issues with her supervisors, his testimony was clearly hearsay and unsupportive. In complete contradiction, in his pre-hearing deposition, Utley acknowledged that he did not know of any concerns Complainant raised to management and had no personal knowledge of any meetings Complainant may have had with anyone about any concerns.

I was not entirely impressed with the testimony of Sweeting or Hunt. I find it incredible that Sweeting, who signed Complainant's termination papers, would have not known Complainant was characterized as "not eligible" for rehire. Her statement that she assumed Complainant eligible in light of the termination action is not believable. Likewise, Hunt denied issuing a memorandum regarding the ACAMS wand which was clearly contrary to Complainant and her supervisor's testimony that such a memorandum was promulgated to clarify the issue of placing the ACAMS in an air duct.

I found Dr. Matravers a very believable witness. I found his testimony sincere and credible. He was particularly persuasive in his testimony about Complainant's capacity to retain her CPRP or UAP after reviewing her ER medical records; the fact that she intentionally overdosed; the discrepancies in her listed medications maintained by the clinic; and that she should be permanently disqualified from the CPRP program.

I found Brian Scott, Sheila Vance and James Jensen who testified to safety and environmental standards to be credible regarding Respondent's encouragement of employees to voice concerns through the Condition Reporting System and to their

supervisors. Vance candidly testified about violations issued to Respondent. Each credibly testified about Respondent's actions to resolve issues of concern to employees.

I found Scott Sorenson to be a very credible witness, particularly since he was an adverse management witness who supported Complainant's complaints about environmental concerns.

I also credit the testimony of Max Wahlberg regarding the medical incident as related to him by Complainant and his concern that she was allowed to continue working under the CPRP program.

I credit the testimony of Gary McCloskey regarding the reasons for terminating Complainant as well as the testimony of Joe Majestic who sought clarity in the qualification status of Complainant following Wahlberg's expressed concerns about her continuation in the CPRP Program.

Although Complainant argues that the testimony and actions of Rothenberg and Ryba are inconsistent, I found both witnesses to be credible and not inconsistent. Contrary to Complainant's contention that Ryba falsely testified that Rothenberg made the decision or communicated to Ryba that he agreed with the decision to suspend Complainant a second time, Rothenberg testified he made the decision to permanently disqualify Complainant in May 2008. Both Ryba and Rothenberg credibly testified that they were not pressured by Respondent to disqualify Complainant from the CPRP Program. Ryba further testified that Respondent requested assistance from the Chemical Materials Agency in reviewing the processes and procedures within the local medical clinic regarding Complainant's return to duty. Ryba credibly testified that he and Major Parker decided the protocol and logistics of the three-doctor panel. Ryba thoroughly discussed his review of Complainant's rebuttal and the reasons for his conclusion to sustain the permanent disqualification.

Gomez was also very credible in his testimony regarding the UAP process of which Complainant was not a holder. He fully explained the surety process and why Complainant was not eligible for a UAP clearance. He had no pressure from Respondent or Rothenberg to deny Complainant UAP status.

## B. The Burden of Proof

To prevail in this adjudication, Complainant must demonstrate or prove her **prima facie** case by presenting evidence "sufficient to raise an inference, a rebuttable presumption, of discrimination." Morriss v. LG&E Power Services, LLC, ARB No. 05-047, Case No. 2004-CAA-14 (ARB Feb. 28, 2007); see also Schlager v. Dow Corning Corp., ARB No. 02-092, Case No. 01-CER-1, slip op. @ 5 (ARB Apr. 30, 2004). The Complainant can satisfy this burden by showing: (1) the Respondent is subject to the CAA and environmental statutory provisions; (2) the Complainant engaged in protected activity; (3) that the Respondent was aware of her protected activity; (4) the Complainant suffered an adverse employment action; and (5) the protected activity was a contributing factor to the adverse employment action. Id.; See also Jenkins v. United States Environmental Protection Agency, ARB No. 98-146, Case No. 1988-SWD-2, slip op. @ 17 (ARB Feb. 28, 2003).

After Complainant has established her **prima facie** case, the Respondent is then required to "simply produce evidence or articulate that it took adverse action for a legitimate, nondiscriminatory reason (a burden of production, as opposed to a burden of proof)." Morriss, supra @ 32. Respondent must clearly set forth, through the introduction of admissible evidence, the reasons for the adverse employment action. The explanation provided must be legally sufficient to justify a judgment for Respondent. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1981). However, the Respondent does not bear the burden of persuading the ALJ that it had convincing, objective reasons for the adverse employment action. Id.

If the Respondent successfully produces evidence of a legitimate, nondiscriminatory reason for the Complainant's adverse employment action, the presumption "drops from the case" and the Complainant is then required to prove intentional discrimination by a **preponderance of the evidence**. Id.

Once Respondent has produced evidence that Complainant was subjected to adverse action for a legitimate, nondiscriminatory reason, it no longer serves any analytical purpose to answer the question whether Complainant presented a **prima facie** case. Instead, the relevant inquiry is whether Complainant prevailed by a **preponderance of the evidence** on the ultimate question of whether she was discriminated against because of her protected activity. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-

511, 113 S.Ct. 2742 (1993); See Williams v. Baltimore City Pub. Schools Sys., ARB No. 01-021, Case No. 2000-CAA-15, slip op. @ 2 n.7 (ARB May 30, 2003); Carroll v. Bechtel Power Corp., ARB No. 1991-ERA-46, slip op. @ 11, n. 9 (Sec'y Feb. 15, 1995), aff'd sub nom.; Bechtel Power Corp. v. U.S. Department of Labor, 78 F.3d 352 (8<sup>th</sup> Cir. 1996); James v. Ketchikan Pulp Co., Case No. 1994-WPC-4 (Sec'y Mar. 15, 1996); Adjiri v. Emory University, Case No. 1997-ERA-36 @ 6 (ARB July 14, 1998); Schwartz v. Young's Commercial Transfer, Inc., ARB No. 02-122, Case No. 2001-STA-33, slip op. @ 9 n.9 (ARB Oct. 31, 2003); Kester v. Carolina Power & Light Co., ARB No. 02-007, Case No. 2000-ERA-31, slip op. @ 6 n.12 (ARB Sept. 30, 2003); Simpkins v. Rondy Co., Inc., ARB No. 02-097, Case No. 2001-STA-0059, slip op. @ 3 (ARB Sept. 24, 2003); Johnson v. Roadway Express, Inc., ARB No. 99-111, Case No. 1999-STA-5 (ARB Mar. 29, 2000).

**Preponderance of the evidence** is the greater weight of evidence or superior evidence, weight that though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. Brune v. Horizon Air Industries, Inc., ARB No. 04-037, Case No. 2002-AIR-8, slip. op. @ 13 (ARB Jan. 31, 2006).

A mixed or dual motive analysis is appropriate if Complainant is successful in proving her case by a **preponderance of the evidence** that the Complainant's protected activity played some part in or was a contributing/motivating factor in the adverse action. If so, the burden of proof then shifts to the Respondent who may avoid liability by demonstrating by a **preponderance of the evidence** that the adverse action would have occurred even if Complainant had not engaged in protected activity. Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989); Morriss, supra; Schlagel, supra.

Under the Environmental Acts, a complainant must have an actual, reasonable belief the environmental acts are being violated. A complainant's belief "must be scrutinized under both subjective and objective standards, i.e., [she] must have actually believed that the employer was in violation of [the relevant laws or regulations] and that belief must be reasonable." Melendez v. Exxon Chemicals Americas, ARB No. 96-051, Case No. 1993-ERA-6 (ARB July 14, 2000). The reasonableness of a complainant's belief regarding illegality of a respondent's conduct is to be determined on the basis of "the

knowledge available to a reasonable [person] in the circumstances with the employee's training and experience." Melendez, supra, (quoting Minard v. Nerco Delamar Co., Case No. 1992-SWD-1 (Sec'y Jan. 25, 1995), slip op. @ 7, n.5.

### **C. Did Complainant engage in protected activity?**

#### **Complainant's Concerns**

##### **1. Remote Alleged Protected Activity**

It is urged that Complainant has a history of whistleblowing activity which is publically known. In Mugleston v. EG&G Defense Materials, Inc., Case No. 2002-SDW-4 (ALJ Feb. 12, 2004), a formal hearing was held from April 14-23, 2003, based on a complaint filed by Complainant in which the administrative law judge issued a Decision and Order on February 12, 2004. Many of the concerns raised in the instant case were also raised before the prior ALJ and will be treated in this sub-section. Those concerns involved, inter alia, respiratory concerns in the Metal Parts Furnace cool down area, dust and ashes from the deactivation furnace system, ACAMS monitoring/functioning deficiencies, lack of proper protective clothing, and concerns about the LSS air hoses.

In the instant case, Complainant testified that from 1999 to 2005 she had concerns about the deactivation furnace system and heated discharge conveyor which emitted dust particulates and ashes into the outside environment. She raised concerns in late 1999 and from 2002-2003 to various supervisors including Jeff Hunt. In 2001-2003, Complainant expressed concerns about mercury vapors in the Metal Parts Furnace cool down area to various supervisors. Prior to 2003, Complainant testified in a proceeding held in Oregon about "lessons-learned" for a new demilitarized chemical weapons facility. She testified that she complained about the maintenance and testing of LSS air hoses beginning in 1999 to various supervisors including Scott Sorenson.

All of the foregoing complaints were found to constitute protected activity by the prior ALJ in his Decision and Order. See Case No. 2002-SDW-4 @ 40. However, it was determined by the prior ALJ that Respondent produced evidence that its adverse actions against Complainant were motivated by legitimate, nondiscriminatory reasons and thus her complaint was dismissed.

## **2. Proximate Alleged Protected Activity**

At the instant hearing, Complainant testified she allegedly raised seven issues to Respondent which formed the basis of Respondent's alleged retaliation against her. Respondent contends that Complainant's testimony about her concerns is vague, without foundation, without any support from any other witnesses and that the issues raised were already known and being resolved by Respondent.

Respondent further argues that Complainant takes credit for safety and environmental issues that arose while Respondent was in the process of resolving the problems with teams of employees and often with the assistance of the State of Utah regulators. Respondent asserts that during the time of Complainant's alleged protected activity, she was being trained for an alternate supervisor position and there is no evidence of any hostility directed at Complainant or anyone else for surfacing environmental and safety issues.

### **Red Dust**

Complainant testified that she first reported concerns about red dust to Max Wahlberg, her supervisor, six months before her termination and then again one month before her medical incident on April 12, 2008. Wahlberg arguably reported the concern on to Scott Sorenson. The State of Utah investigated the red dust issue two weeks after her complaints. She stated the red dust was on the ground outside and was treated as hazardous waste. She claims to have also reported the concern to "safety and environmental employees." She testified there was nothing to prevent air blowing the red dust or rain/snow coming in contact with the red dust. The red dust problem arguably constituted a violation of the RCRA permit maintained by Respondent.

Wahlberg testified that he was aware of the red dust issue in the Metal Parts Furnace cool down area, that "everybody knew about the red dust" and Respondent was trying to deal with it. He testified that Complainant did not raise a concern to him about the red dust. Sorenson testified that he was also aware of the red dust problem which was an environmental issue. He was aware the red dust was cadmium. He observed the red dust outside of the cool down area-"it was very apparent." Both the environmental people and the State of Utah environmental agency were extremely concerned. Sorenson testified that Complainant did not raise any concerns directly to him or her supervisors to his knowledge.

Brian Scott, a safety engineering technologist, testified he was aware of the red dust problem as the "whole plant is aware of it." He stated he observed the red dust in the cool down area and that it had the "potential" to escape into the open environment. He heard the red dust was later reported to be "on the outside." Jeff Hunt testified the red dust issue was raised by the environmental department-red dust was on the ground in the cool down area to the breezeway. Complainant never reported any complaints to Hunt.

Sheila Vance, an environmental manager, testified the red dust problem came from 155-millimeter projectiles with mustard agent in late 2007. Red stains were noticed on the cement in January 2008 and were treated as hazardous waste. The red dust was brought to her attention by operators and shift inspectors. Cadmium, a toxic metal, was discovered in the red dust above regulatory levels. In March 2008, senior management decided to shut down operations while attempting to manage the residue. The red dust made it out onto the ground and when the snow melted, cadmium was discovered in the soil which was removed and handled as waste. She testified TOCDF was never given a notice of violation for the red dust issue. Complainant never raised the red dust issue or any environmental or safety concerns directly to Vance.

James Jensen, an industrial hygiene supervisor, testified the red dust issue was raised through a condition report by John Patilla in January 2008. He was not aware of Complainant raising a concern about the red dust issue. He also stated the cadmium levels in the red dust were extremely low and not an employee exposure or health concern because of the low levels of cadmium. He testified the red dust issue began in January 2008 and ran through the Spring 2008, but Complainant was not employed in the Metal Parts Furnace cool down area during the time period, but as a DSA operator. Nevertheless, Complainant claimed to have raised the red dust issue in late 2007 or early 2008 while sitting in the back of one of Jensen's meetings.

I find that the preponderance of the record evidence does not support a finding that Complainant raised red dust as an environmental issue or, if she did, she would have been among many employees expressing concern which arguably would not have subjected her to retaliation.

### **Hazardous Waste in Air Locks**

Complainant testified that in 2007-2008 she complained to Wahlberg, Sorenson and Manager Pat Baker about excessive hazardous waste not being properly closed or bagged in the air locks. Such waste made it difficult to maneuver around in the air locks which was a violation of the Respondent's RCRA permit. She stated the waste issue remained an ongoing problem until her termination. Jeff Utley testified he observed bags of waste in the A air lock in 2006.

Wahlberg acknowledged that bags of waste accumulated and were left in the air locks by DSA operators. He stated all supervisors knew about the build-up of bags. He stated Complainant did not raise an issue with him about the bags of waste. Sorenson also acknowledged a build-up of bags of waste which were treated as hazardous waste. He did not hear of waste being left in the air locks without being bagged. Complainant did not raise the bags of waste issue to him.

Jeff Hunt testified that Complainant never raised any issues about bags of waste or handling bags of waste to him. Vance testified that bags of hazardous waste were accumulating in the air locks, which were considered a 90-day storage area approved by the State of Utah, and was not an environmental compliance issue as long as DEQ was able to do their weekly inspections.

Entry supervisor Ralston also acknowledged bags of waste build-up in the air locks from 1996 to 2001 and from 2003 to 2004, but not thereafter. He was not aware of any unbagged waste accumulating in the air locks.

I also find that, like the red dust issue, the preponderance of the evidence does not support a finding that Complainant raised the issue of bags of accumulated waste, but, that if she did, she would have been among many employees voicing a concern about an issue which Respondent already had knowledge and would not have been subjected to retaliation for having raised such concerns.

### **Inadequate Personal Protective Equipment (PPE)**

Complainant testified that as a DSA operator she raised concerns on numerous occasions in 2007 and 2008 about wearing a lesser level of protective clothing than DPE entrants and having to enter potentially toxic areas to perform her duties. She stated she complained to Ralston, Brian Scott, Wahlberg,

Sorenson and had a personal meeting with Operations General Manager Jeff Hunt about her concerns. She stated all emergency back-ups on all four shifts were concerned and wanted the situation resolved.

Scott testified that he did not recall Complainant raising complaints about the level of protective suits. Sorenson testified that all of the DSA back-up employees including Complainant raised concerns about not being adequately protected while performing their tasks in toxic areas. Hunt testified that Complainant never complained to him about inadequate protective clothing. Wahlberg also testified that Complainant never raised an issue to him about entering an air lock with a lower level of protective clothing.

In view of the foregoing, it is evident that Complainant raised complaints to Sorenson about wearing inadequate protective clothing in the performance of her tasks in the air locks, which I find constituted protected activity.

#### **ACAMS Wand in the Air Duct**

Complainant testified that in late 2007 or early 2008 she complained to Wahlberg, Sorenson and Hunt that the ACAMS wand used to measure the amount of agent present on DPE entrants in toxic areas was being placed in the air ducts to clean it out, and was left there, which yielded lower, inaccurate readings. As a result, Hunt issued a memorandum directing that the ACAMS wand not be placed in the air duct. DSA operators, who entered the same areas to replace the ACAMS in its holster, were "sometimes" told to remain outside of the area because the toxic readings were too high.

Scott testified he does not recall Complainant raising concerns about the ACAMS wand placed in the air ducts. Sorenson testified that leaving the ACAMS in an air duct would be "problematic," and would be a hazardous concern. He stated "a lot of people were concerned about the ACAMS wand issue and Complainant may have raised a concern." Sorenson acknowledged that Complainant had raised environmental and safety concerns from time to time. Complainant did not raise any concerns directly to Sorenson or to her supervisors about the ACAMS wand.

Hunt testified that a root cause analysis discovered the problem about the ACAMS wand being placed in the air duct which would dilute the reading since the ACAMS would read the contamination level in the air duct and not the area where an employee may be working. He did not recall a memorandum being

issued about the ACAMS wand being placed in its holster and not the air duct. Hunt testified that Complainant never raised any complaints to him about the ACAMS wand issue.

Wahlberg testified that he was aware of the ACAMS wand issue, but Complainant never brought up the issue to him nor was he aware of her concerns.

In view of Sorenson's testimony, I find it plausible that Complainant raised an issue about the ACAMS wand being left in the air duct which constituted protected activity.

### **Brine and Caustic Leaks**

Complainant testified that from 1999 to 2008 caustic caked on piping and leaking in the Brine Reduction Area. She also observed caustic caked on piping in the Pollution Abatement System. She complained to John Skinner, the PAS supervisor, Scott Vonhatten, plant shift manager, Jeff Earls, Max Wahlberg, Scott Sorenson and Irv Hillman. She recalled a meeting with Wahlberg and Sorenson in Sorenson's office in March 2008 about caustic piping. She claims that two weeks after her medical incident, the State of Utah regulators took pictures of the caustic and notified Respondent to resolve the issue.

Vance confirmed that as a result of HAZOP residue building up, caustic began to build up on piping in the BRA. State inspectors took pictures of the caustic build up in February 2008 and a notice of violation was issued to Respondent under its hazardous waste permit which resulted in a fine of \$138.00. Complainant did not raise caustic or brine concerns to Vance. She stated caustic is a decontamination solution product and is not hazardous waste whereas brine is hazardous waste created from the treatment process. Brine was discovered by a State regulator and an environmental inspector from Respondent.

Sorenson and Wahlberg testified that Complainant did not report caustic or brine concerns to them. Neither Wahlberg nor Sorenson denied meeting with Complainant in March 2008 in Sorenson's office to discuss the caustic and brine issues.

Based on the foregoing, I find Complainant raised concerns about caustic and brine in March 2008 during a meeting with Wahlberg and Sorenson. Such expressed concerns constituted protected activity.

## **Sulfur Dioxide**

Complainant testified that in 2006-2007, she observed white smoke and fumes in the BRA which she determined from her past experience from cutting munitions was likely sulfur dioxide. She stated "we" went clear up to the main manager and McCloskey and Majestic to complain that there was no monitoring and "we were" concerned that sulfur dioxide was being emitted when the munitions were cut. In 2007-2008, she personally complained to McCloskey and Majestic. She acknowledged that testing did **not** reveal sulfur dioxide. After her termination, she pushed the issue more and OSHA investigated and issued a notice of violation in late 2008.

Vance testified that she became aware of the sulfur dioxide problems in the Metal Parts Furnace cool down area and State and federal regulatory agencies were notified. In October 2006, the State of Utah Department of Air Quality determined the sulfur dioxide emissions were not a compliance issue or permitting issue. Respondent only needed to quantify the amount being released. Vance was not aware of Complainant raising concerns regarding sulfur dioxide. Wahlberg testified sulfur dioxide monitoring was done on ton containers exiting the Metal Parts Furnace cool down area and Complainant did not raise any issues about sulfur dioxide with him.

Majestic testified he attended meetings with employees who raised concerns about sulfur dioxide. He was aware that Complainant had raised environmental and safety concerns. He confirmed that every employee has a right to raise such concerns. He stated Complainant raised unspecified concerns with him, but he did not know if Complainant raised air monitoring issues with sulfur dioxide.

Jensen testified that sulfur dioxide was determined to be an issue at the onset of the processing of the ton containers for mustard agent in September 2006. He was the lead person in the investigation of the sulfur dioxide issue. He was not aware of Complainant raising an issue about sulfur dioxide-the BRA-RHA operators raised the concern over sulfur dioxide and Complainant was not employed in the BRA-RHA area at the time.

McCloskey testified that he was not aware of Complainant raising safety and environmental issues. Sorenson testified he was aware of the sulfur dioxide exposure concerns, but did not recall Complainant raising a concern.

Contrary to Complainant's assertions, I find the sulfur dioxide issue was well known to Respondent and further find that the preponderance of the evidence does not support a finding that she raised such a concern, or if she did, she would have been among many employees raising concerns and would not have been subjected to retaliation therefor.

### **LSS Air Hoses**

Complainant testified she complained about LSS air hoses that were cracked or corroded which contaminated the life support room. She raised concerns with various supervisors over a period from 1999 to 2008, including Scott Sorenson. Sorenson testified that although Complainant was pro-active in raising concerns, she did not raise any concerns directly with him or her supervisors to his knowledge. Wahlberg testified that Complainant did not raise any complaints to him about life support system air hoses.

Complainant's complaints about the LSS air hoses were found to constitute protected activity in 2003 in her prior formal hearing. I find no preponderance of the evidence that she continued to voice such concerns after 2003.

### **D. The Statutory Provisions**

The employee protective provisions of the CAA and the Environmental Acts prohibit discharge or discrimination of an employee because the employee has engaged in protected activity under these Acts. See Morriss v. LG&E Power Services, LLC, supra @ 29-30; Jenkins v. United States Environmental Protection Agency, supra @ 14.

The CAA is a comprehensive scheme for reducing atmospheric air pollution. Its purpose is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare" as well as "to encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(b) (2006). Under the CAA, an "air pollutant" is defined as "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters ambient air." 42 U.S.C. § 7602(g) (2006); Smith v. Western Sales & Testing, ARB No. 02-080, Case No. 2001-CAA-17 (ARB Mar. 31, 2004).

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(3)(2008). See, e.g., Kemp v. Volunteers of America of Pa., Inc., ARB No. 00-069, Case No. 2000-CAA-6 (ARB Dec. 18, 2000). It is undisputed that TOCDF has a CAA permit from the State of Utah which may arguably regulate issues about which Complainant raised concerns. However, I find that Complainant's alleged safety and environmental concerns involving inadequate personal protective equipment, the ACAMS wand and caustic and brine do not implicate the CAA and that her allegations in this regard are not properly before me pursuant to the retaliation provisions under the CAA.

Congress enacted the Safe Drinking Water Act of 1974 (SDWA) "to assure that water supply systems serving the public meet minimum national standards for protections of **public** health" and "to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste." H.R. Rep. No. 93-1185 (1974); National Wildlife Federation v. U.S. E.P.A., 980 F.2d 765, 768 (D.C. Cir. 1992). The SDWA requires **public water systems** to monitor levels of contaminants that carry the potential to be harmful to human health, to test the water for these contaminants to ensure that they are at acceptable levels, and to make the results available to the public." 42 U.S.C. § 300(f) (2006).

Although Complainant contends she raised concerns about chemical agent releases into the environment, there has been no record evidence indicating that these releases involve contamination of a public water system. Her theory is that agent releases at TOCDF, such as red dust, would eventually settle onto the ground, be transported into surface and ground waters via rain or snow runoff routes, and presumably and ultimately impact drinking water supplies. The proposition is mere conjecture, lacks evidentiary support and demands a broad interpretation of the SDWA and, thus, I find the SDWA does not apply to the instant case. See Chemical Weapons Working Group, Inc. v. U.S. Department of the Army, 111 F.3d 1485, 1490 (10<sup>th</sup> Cir. 1997).

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 (2006), et seq., is a broad remedial statute designed to enhance the authority of the EPA to respond effectively and promptly to toxic pollutant spills that threaten the environment and human health. Congress enacted CERCLA to promote two primary purposes: "the prompt

cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." See Pritkin v. Department of Energy, 254 F.3d 791, 794-95 (9<sup>th</sup> Cir. 2001). Reporting is generally required under CERCLA of releases, other than a federally permitted release, of a "hazardous substance" from a "facility," as those terms are defined under CERCLA. 42 U.S.C. § 9603 (2006). "Facility" in pertinent part includes "any site or area where a hazardous substance has been deposited, stored, disposed of or placed, or otherwise come to be loaded." 42 U.S.C. § 9601(9)(B) (2006). CERCLA defines "hazardous substance" as any substance so designated by the EPA pursuant to § 9602 of CERCLA or any substance designated as hazardous in referenced sections of the Clean Air Act, RCRA, and Toxic Substances Control Act. See 42 U.S.C. §§ 9601 and 9602 (2006); B.F. Goodrich Co. v. Murtha, 985 F.2d 1192, 1199-1200 (2<sup>nd</sup> Cir. 1992). Mercury is a hazardous substance under CERCLA. See 40 C.F.R. § 302.4 (2008). In view of the foregoing, I find CERCLA applies to the instant case since the TOCDF qualifies as a facility at which hazardous substances are stored and disposed of.

The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, et seq., also known as the Clean Water Act (CWA) prohibits discharge of any chemical warfare agent into **navigable waters**. 33 U.S.C. § 1311(f) (2006); Abdur-Rahman v. Dekalb County, ARB No. 08-003, Case Nos. 2006-WPC-002, 2006-WPC-003 (ARB May 18, 2010). The objective of CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," within which it lists as a specific goal the elimination of "**the discharge of pollutants into the navigable waters.**" 33 U.S.C. § 1251(a) (2006). The CWA, however, does not protect against contamination of all water in the United States. Instead, the water source allegedly affected and under which CWA protection is sought must have a "significant nexus" to navigable-in-fact waterways," which in turn requires that the water source "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" North Cal. River Watch v. City of Healdsburg, 457 F.3d 1023, 1029-30 (9<sup>th</sup> Cir. 2006).

Complainant contends that the CWA applies in this case based on her alleged disclosures about red dust releases into the atmosphere or open environment where it would eventually settle onto the ground, at which time rain or snow may cause the agent contamination to run off into arguably protected waters. The record is devoid of any facts supporting such a theory and I

find such an argument to be mere speculation. Her broad construction of the phrase "discharge . . . into the navigable waters" would result in regulation of any air emission which might eventually or possibly result in atmospheric deposition into navigable waters. Such a broad application of the CWA was not the intent of Congress. See Chemical Weapons Working Group, Inc. v. U.S. Department of the Army, supra, at 1490. Therefore, I find the CWA does not apply to the instant case.

The Solid Waste Disposal Act, 42 U.S.C. §§ 6901 (2006), et seq., also known as the Resource Conservation and Recovery Act (RCRA), regulates the disposal of hazardous waste through a permit program run by the Environmental Protection Agency (EPA), but subject to displacement by an adequate state counterpart. U.S. Department of Energy v. Ohio, 503 U.S. 607, 611, 112 S.Ct. 1627, 1631 (1992). It is undisputed that TOCDF has a RCRA permit from the State of Utah which arguably regulates several issues about which Complainant raised concerns, including ACAMS functioning and LSS air hoses. Therefore, I find that Complainant's alleged safety and environmental concerns do implicate the RCRA and that her allegations are properly before me pursuant to the retaliation provisions under the RCRA.

In enacting the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601 (2006), et seq., Congress found that human beings and the environment are exposed to a large number of chemical substances and mixtures whose manufacture, processing, distribution in commerce, use, or disposal may present an unreasonable risk or injury to health or the environment. The purpose of the TSCA is to regulate chemical substances and mixtures that present such risks and to take action against imminent hazards. Culligan v. Am. Heavy Lifting Shipping Co., ARB No. 03-046, Case Nos. 2000-CAA-020, 2001-CAA-009-011, slip op. @ 9 (ARB June 30, 2004). Sulfur dioxide is a chemical substance which the TSCA has listed as highly hazardous. 29 C.F.R § 1910.119, Appendix A. However, I have found Complainant did not establish by a preponderance of the evidence that she raised concerns about sulfur dioxide and, therefore, I conclude the TSCA does not apply in the extant circumstances.

### **Conclusions**

Based on the foregoing, I find Complainant engaged in protected activity when she voiced concerns about inadequate personal protective equipment, the ACAMS wand being left in the air duct, caustic and brine leaks, all of which Respondent had knowledge. Each of her complaints was raised in 2008 within temporal proximity to her employment termination. I find her

complaints about cracked and corroded LSS air hoses were too remote to her termination to constitute protected activity upon which retaliation may be based.

Nevertheless, although temporal proximity may support an inference of retaliation, the inference is not dispositive. Complainant must prove by a preponderance of the evidence that retaliation was a motivating factor in any adverse actions against her. In Tracanna v. Artic Slope Inspection Service, ARB No. 98-168, Case No. 1997-WPC-1, slip op. @ 8 (ARB July 31, 2001), cited by Respondent, the ARB observed:

Where 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 is compromised. Because the intervening cause reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action.

Id. (emphasis in original).

The foregoing applies in the instant case in view of Complainant medical incident of April 12, 2008, which I find constitutes an intervening cause which could, and did, independently cause adverse action.

#### **E. Respondent's alleged adverse actions**

Complainant contends that she was terminated on June 23, 2008, on the pretext that she lost her CPRP approval. She alleges that during her exit interview with Sweeting, she requested employment in other positions within Respondent's operation which did not require a CPRP approval, or to remain in her normal position because her duties did not require CPRP status, but her requests were denied. Moreover, Complainant applied for numerous job positions with Respondent for which she was allegedly qualified, but was not interviewed or hired.

Complainant avers that the foregoing adverse actions were taken against her in retaliation for her protected activities based on an extensive pattern of "persuasive circumstantial evidence."

Initially, Complainant claims that in the past Respondent reassigned non-whistle-blowing employees to positions not requiring CPRP approval after the employee lost or was unable to obtain CPRP approval. Specifically, she relies upon favorable treatment extended to employees Ford, Boswell and Johnson. Respondent argues there is no evidence that Respondent ever reassigned other employees to positions not requiring CPRP approval **if they were not eligible for UAP**. I find the record is devoid of any evidence that any employee who did not obtain or who lost CPRP approval, and who did not obtain UAP approval, remained employed in any job with Respondent.

In the instances of Ford and Johnson, Respondent asserts the Army determined they were eligible for a UAP after they were disqualified from the CPRP program. Thus, they were allowed to retain their jobs with Respondent with UAP approval. Boswell obtained a CPRP after he was hired, but it took time before the Army issued its decision that Boswell was qualified. Complainant did not submit any further cogent evidence that any other employee lost their CPRP and was allowed to continue working without UAP approval.

Complainant submitted CX-1 which is a list of employees who permanently lost their CPRP, but were not terminated by Respondent, in support of her disparate treatment argument. It is evident from CX-1 that of the 23 employees listed on CX-1, 16 were terminated from Respondent and not reassigned, like Complainant, while the Army found five employees eligible for UAP approval which allowed them to be reassigned to non-CPRP jobs, and two successfully appealed their CPRP disqualification. I find no showing of disparate treatment in CX-1.

Complainant acknowledges that without a UAP, she would be effectively precluded from consideration for non-CPRP jobs. Every job to which she applied after termination required either a CPRP or UAP status. She was terminated on June 23, 2008, and thereafter applied for other non-CPRP job positions. I find, based on Gomez's credible and uncontradicted testimony, that Complainant did not have UAP approval at the time of her termination. As a matter of regular course, Respondent sent an e-mail to the Army requesting the eligibility of Complainant and Chad Nelson for the UAP program, both of whom were applying for open positions with Respondent. On July 1, 2008, the Army determined Complainant and Nelson were not eligible for UAP approval. Both Complainant and Nelson remained unemployed by Respondent.

Moreover, there is no record evidence supporting a finding that Complainant's protected activities had a nexus to or motivated Respondent to retaliate against her or that Respondent held any hostility or animus towards Complainant. The record is devoid of any evidence that anyone from Respondent influenced the independent decision of the US Army to disqualify Complainant from the CPRP program and find her ineligible for UAP status. Thus, I find that her protected activities were not a contributing factor in any alleged adverse action taken against her by Respondent.

I find the record does not support a finding that Respondent refused to hire Complainant into any UAP position for disparate or retaliatory reasons associated with her protected activity.

Nevertheless, assuming **arguendo** that Complainant's protected activity was a contributing or motivating factor in Respondent's adverse actions, Complainant's termination is treated below.

**F. Did Respondent take adverse action against Complainant for legitimate business reasons?**

Respondent terminated Complainant on June 23, 2008. Her termination followed her disqualification from the CPRP Program. She was subsequently determined to be ineligible for the Unescorted Access Program by the US Army. The Army's disqualification actions were based, in major part, upon Complainant's medical incident of April 12, 2008.

**The April 12, 2008 Medical Incident**

Complainant testified that at the end of March 2008 or early April 2008, she began losing weight, felt good and was exercising. She decided to quit taking her medications consisting of Prozac, an anti-depressant, Fosinopril, a blood pressure medication, and Adderall, a stimulant, without consulting her physician. On April 12, 2008, she left work with a migraine headache, and after picking up her sons for the weekend, began to experience a "shocky feeling," such as, "when you are off your anti-depressant medication." She took her regular medication; she testified she took three 20 mg Prozac capsules, one 30 mg Adderall, two 50 mg Trazodone and one 5 mg Valium. She admitted she did not normally take Adderall, a stimulant, at night when she is going to bed.

She testified she could not remember if she took her blood pressure medication, so she took another one and may have taken an additional blood pressure medication. She could not remember if she took an Excedrin for her migraine. She told her son she was not feeling well and to call her brother. Her brother drove her to the emergency room during which ride she stated "everything went black . . . and she thought she was dying." Once at the emergency room, she was unable to answer any of the doctor's questions because she was going in and out of sleep constantly. She remained in the hospital until April 15, 2008, and then released to follow-up with her counselors. Complainant was on her seven-day off schedule and did not report back to work until April 18, 2008. Complainant has maintained that she suffered an accidental overdose.

Dr. Robert Gannon, who is board-certified in Emergency Medicine, deposed that Complainant's history of present illness is reflected on a Psychiatric Issues form with a chief complaint of depression, suicidal thought, suicide gesture and drug ingestion. His initial assessment was "Chief complaint-Overdose Intentional." He was only able to obtain minimal information from Complainant. Complainant's son reported that she was very depressed and had recently broken up with her boy friend. She "had taken a bunch of pills" 30 minutes before being brought to the ER. Dr. Gannon concluded that Complainant had made a gesture toward suicide having taken an overdose of medication. He noted on the Psychiatric Issues form that Complainant's "intent of ingestion/injury was to die." Dr. Gannon's judgment was based upon Complainant's presentation at the ER that she was trying to commit suicide. He opined that what he observed of Complainant's presentation was not consistent solely with Lisinopril (blood pressure medication) usage.

Dr. Gannon testified that Complainant's blood pressure decreased while in the ER to a level which was life threatening. She was admitted into Intensive Care. Dr. Gannon's impression and diagnoses of Complainant were suicidal ideation, suicide attempt, medication ingestion and hypotension or low blood pressure.

Dr. Gannon met with Complainant after her hospitalization on May 26, 2008, in her effort to change the medical records, but he maintained his impression that she had taken an overdose of medication to harm herself and to apparently take her life.

Dr. Jackson who treated Complainant during her hospitalization admitted her with a chief complaint of "overdose." He noted that Complainant had been told by her boy friend that he was leaving which was unbearable news to her and she made "a rash decision to take a drug overdose of essentially unknown drugs and quantities." She related to her brother that she felt bad "about this poor decision that she had made." After taking the medications, Complainant called her brother because she began "feeling remorse about the poor choice."

On April 14, 2008, Complainant reported to a psych social worker that she denied any previous suicidal acts/gestures and stated she was "very embarrassed and upset that she hurt her children by ODing," adding "I can't ever do this again I hurt my children and I am religious and do not want to go to hell like I believe I will if I kill myself."

It is noted that on February 2, 2007, Complainant presented to the Emergency Department of Mountain West Medical Center with severe depression with suicidal ideation. She requested voluntary hospitalization "to get her feelings under control." She was released to report to Valley Mental Health the following Monday, February 5, 2007. (RX-3, p. 66).

Dr. Gannon testified that Complainant tested positive for "ACE, TCA, benzo and meth." ACE is a blood pressure medication. Methamphetamines are all stimulants which would include Adderall. Benzodiazepines are the Valium family of drugs. A second substance which Dr. Gannon could not read was also positive as was TCA which is a tricyclic anti-depressant. He further testified that "benzos" are common drugs out on the street and was not on her list of medications. He added that "benzos" would not have been from an over-the-counter source, but would have been from the Valium family such as "Xanax, Ativan, Klonopin."

Dr. Gannon testified without medical intervention there was a good chance Complainant would have died or else had real problems because her blood pressure was very low.

On April 15, 2008, Complainant was discharged with a discharge summary indicating admission to ICU with hypotension secondary to Lisinopril overdose and with suicide attempt "took Lisinopril, Tylenol #3, Adderall, Prozac."

On April 18, 2008, Complainant reported back to work. She testified she told Wahlberg, Sorenson and Rothenberg that she had an accidental overdose.

Wahlberg testified that on April 18, 2008, Complainant informed him she had missed training classes for her alternate supervisory position because she left work upset over a conversation with her ex-husband and when she got home she tried committing suicide by taking some pills. She informed Wahlberg she was in the hospital for a few days and had to be revived with CPR. Rothenberg spoke with Complainant and memorialized their discussion in a memo to Dr. Matravers which indicated that on April 12, 2008, Complainant took an overdose of her anti-depressant medications and had to be hospitalized for a few days because of the life threatening nature of the overdose. He concluded that he was not sure Complainant was really convinced that "she wasn't trying to end her life."

On April 18, 2008, Steve Byrne recorded a chart note after speaking with Complainant which indicated she had an intentional overdose of medications, was hospitalized and admitted it was a "stupid gesture and can't ID a specific cause except generalized problems in her personal life."

On April 19, 2008, Dr. Matravers spoke with Complainant who denied that she had tried to commit suicide. On April 21, 2008, he met with Complainant who explained that she had taken more medication than prescribed and was brought to the hospital where she had to be resuscitated. Dr. Matravers testified that his assessment or diagnosis was intentional overdose of psychotropic medications. He determined it was an intentional overdose because Complainant told him she had intentionally taken the medication. She told Dr. Matravers that she had overdosed on Prozac and Adderall. Dr. Matravers requested she be evaluated by a mental health professional to determine if her actions represented a suicide attempt. His clinic note was sent to Complainant's certifying official as potentially disqualifying information (PDI).

On brief, Complainant tersely treats the medical incident in one sentence, contending she accidentally overdosed on her blood pressure medication.

Notwithstanding Complainant's position that she accidentally overdosed, the preponderance of the record evidence supports a finding that she intentionally overdosed and tried to commit suicide on April 12, 2008. I so find. My conclusion is based upon Dr. Gannon's impressions and diagnoses, Dr. Jackson's discharge diagnosis, the psyche social worker's notation that Complainant "can't do this again . . . I am religious and do not want to go to hell like I believe I will if I kill myself,"

Byrne's clinic chart notation that Complainant intentionally overdosed, Wahlberg's credible testimony that Complainant informed him she tried committing suicide, Rothenberg's memorandum that she overdosed on her anti-depressants and Dr. Matravers's opinion and impression that she intentionally overdosed.

### **Disqualification from the CPRP Program**

The CPRP program is regulated by AR 50-6 under the auspices of the US Army. The CPRP program requires a background investigation and evaluation of other personal information, such as medical information, work performance, police records and financial records. The purpose of the CPRP program is to ensure that each person who performs duties involving chemical agents meets the highest possible standards of reliability. Dr. Matravers observed that the CPRP program ensures "that individuals working around chemical agents are reliable, are healthy, are able to wear their personal protective equipment, are able to perform their job functions without—in a safe manner without endangering themselves or their fellow employees."

Ryba is the ultimate authority for administering the CPRP program. He is employed by the US Army and has four certifying officials at TOCDF who make decisions on qualifications of employees to enter and remain in the CPRP program. The certifying officials are also employed by the U.S. Army and are tasked with the duty to monitor employees' behavior and actions and to assure that they continue to meet their reliability standards.

Employees who enter the CPRP program are required to report potentially disqualifying information (PDI) to their certifying official, whether about themselves or other employees. Respondent is also required to report PDI on its employees whether from human resources or the medical clinic to include, inter alia, such issues as the use of medications, medical conditions, emotional stability, performance of duty, positive attitude and criminal matters.

AR 50-6 prescribes that "any suicide attempt, disclosed and considered after the date of this revision, will be cause for permanent disqualification." (RX-9, p. 285). The regulation permits consultation by the certifying officials with the CMA. Additional assistance may be requested from the MACOM, Major Army Command in this instance the Chemical Materials Agency. An "inadvertent overdose of prescription or over-the-counter

medication that does not result in a long-term side effect will not necessarily require the individual to be permanently disqualified." (RX-9, p. 284).

On April 18, 2008, Rothenberg issued a temporary disqualification of Complainant based on AR 50-6. Dr. Matravers recommended temporary reinstatement of Complainant's CPRP, but was later told Complainant had informed her supervisor, Max Wahlberg, that she had tried to commit suicide. Complainant was disqualified from the CPRP program a second time on April 23, 2008, about which Dr. Matravers agreed.

Wahlberg credibly testified he was concerned Complainant was allowed to return to work after admitting to him that she had tried to commit suicide and thought the CPRP program was "broke." He reported the information to Hunt and subsequently to Sweeting and Sorenson.

Majestic, Manager of risk management, had oversight of the medical clinic and Dr. Matravers. He became aware that Complainant had reported to her supervisor that she had intentionally overdosed and attempted suicide and that Dr. Matravers had given an opinion which lifted Complainant's first temporary disqualification. He did not think Dr. Matravers had done his due diligence and requested that he do so. He spoke with Ryba about whether the right thing was done and asked if he was comfortable with his certifying official's decision. Since there was no one on staff who could review Dr. Matravers's opinion, Majestic decided he wanted a second opinion on the correctness of Dr. Matravers's decision and asked for assistance from Ryba and the Chemical Materials Agency.

On April 24, 2008, Dr. Matravers met with Sweeting, Complainant and Clyde during which Complainant denied telling Wahlberg that she tried to commit suicide, but acknowledged she intentionally overdosed on anti-depressants. Dr. Matravers sought information from Complainant's mental health counselor, but was never informed that a mental health evaluation was performed.

Dr. Matravers reviewed the hospital records which revealed Complainant required resuscitation. He stated the TOCDF clinic records do not show Complainant reported the use of Tylenol #3 or her husband's Ambien medication. He testified the use of medication prescribed for someone other than the employee would have been grounds for permanent disqualification from the CPRP program in 2008.

Dr. Matravers testified he was in favor of outside medical advice. He was never told he was not medically competent to decide Complainant's CPRP status. He met with the three-doctor panel and reviewed Complainant's clinic chart and hospital records on May 13, 2008. (RX-28, p. 374). The panel consensus was to recommend Complainant be permanently disqualified from the CPRP program. On May 13, 2008, Dr. Matravers recommended Complainant's permanent disqualification from the CPRP program to her certifying official based on the consensus before receiving the written recommendation of the panel dated May 29, 2008. (RX-26, p. 371). Dr. Matravers testified he did not receive any suggestions from Respondent to recommend permanent disqualification. In his opinion, Complainant intentionally overdosed. He would also have had concerns or reservations about Complainant filling non-CPRP jobs based on the information he had reviewed.

Rothenberg issued a letter on May 16, 2008, permanently disqualifying Complainant from the CPRP program. Complainant filed a rebuttal (RX-32) which was reviewed by Ryba. Ryba testified he based his decision to sustain Rothenberg's permanent disqualification on his conclusion that: Complainant had attempted suicide based on the medical records she submitted with her rebuttal; Complainant's discontinuation of her medications without medical advice which indicated unreliability; and changes in the nature of her story overtime.

Complainant contends that her disqualification from the CPRP program was a pretext used by Respondent which occurred proximately to her medical incident to "take advantage of her overdose." She relies upon arguably irregular procedures in support of pretextual reasons for Respondent's adverse actions including: the initial disqualification from the CPRP program and the subsequent reinstatement by Rothenberg; a second suspension from the CPRP program without being interviewed by Ryba; the "unusual" action of suspending Complainant without the concurrence of Rothenberg; an inadequate investigation of Complainant's medical incident; the unprecedented appointment of a medical panel to review Complainant's medical and CPRP status without interviewing Complainant; the initiation of communications by Sweeting's staff to the US Army that "caused" "in some way" Complainant to be declared ineligible for the UAP program and which precluded Complainant from applying for non-CPRP job positions.

Prefatorily, I note that Complainant's reliance on the foregoing as pretextual reasons for her disqualification from the CPRP program and her ultimate termination is unpersuasive

and misplaced. Ryba testified, and AR 50-6 supports the conclusion, that in processing a disqualification from the CPRP program, an interview of the employee is not required. AR 50-6, Chemical Surety, controls the CPRP program to ensure that employees who work for Respondent and come in proximity to chemical weapons are reliable and trustworthy. AR 50-6 provides the certifying official with discretion to decide what information to use in an evaluation for disqualification. In view of Rothenberg's admission that he agreed with the second temporary disqualification issued by Hoy and that he decided to permanently disqualify Complainant, there is no "unusual" action in the permanent disqualification of Complainant from the CPRP program.

There is no record evidence that Respondent requested the appointment of an external medical panel to review Complainant's CPRP status, rather Respondent only requested "assistance" from the Chemical Materials Agency, the MACOM overseeing the surety program, which decided what form the assistance would take and how it would be accomplished. I find there is no precedence for the medical panel to fail to interview Complainant because there had never been another medical panel convened and AR 50-6 does not require an interview. There is no record evidence that Respondent influenced the form or manner of the decision of the Chemical Materials Agency.

Complainant's allegations that Sweeting's communication to the US Army "caused" her ineligibility from UAP status is totally baseless based on the instant record. Sweeting's staff requested a review by the Army of Complainant's eligibility for UAP status and nothing more in view of her application for non-CPRP jobs. There is no evidence to support a finding that Respondent attempted to influence the Army's decision about Complainant's CPRP or UAP status or did so with retaliatory animus. The Army solely decided Complainant was not eligible for the UAP program.

It must also be observed for the reasons which follow, that the actions of Rothenberg, Ryba and Gomez, as well as the actions of the US Army in relation to Complainant's CPRP and UAP status, are not subject to review by the undersigned for evidence of whether the action was legitimate, unprecedented, irregular, inadequate, and/or based on retaliation or hostility. In Hall v. U.S. Department of Labor, 476 F.3d 847, 849-50 (10<sup>th</sup> Cir. 2007), the ARB and the U.S. Court of Appeals for the Tenth Circuit, in whose jurisdiction this case arises, found CPRP status equivalent to a security clearance. In Hall, the ARB rejected allegations that Respondent, the US Army Dugway Proving

Ground, influenced the Army to revoke Hall's CPRP for reasons expressed by the U.S. Supreme Court in Department of the Navy v. Egan, 484 U.S. 518 (1988). See ARB Nos. 02-108 and 03-103, Case No. 1997-SDW-5 (ARB December 30, 2004).

In Department of the Navy v. Egan, the Supreme Court held that the Merit Systems Protection Board lacked the authority to review the substance of a decision denying or revoking a security clearance. The case involved a civilian employee of the Trident Naval Refit Facility, who lost his job when he was denied a security clearance by the Naval Civilian Personnel Command. Id. at 522. The employee sought review by the Merit Systems Protection Board under 5 U.S.C. § 7513, which allows an agency to remove an employee "only for such cause as will promote the efficiency of the service." The Court recognized that the power to grant a security clearance is "a sensitive and inherently discretionary judgment call" appropriately committed to the Executive Branch. Id. at 527. The Court noted that no one has a right to a security clearance, but rather a granted clearance "requires an affirmative act of discretion on the part of the granting official." Id. at 528. The Court opined that a denial may be based on past or present conduct or concerns "completely unrelated to conduct." Id. The Court found that experts in protecting classified information were best suited to make such determinations, making it "not reasonably possible" for a non-expert body to review the substance of such judgments. Id. at 529.

The Tenth Circuit found that Egan "stands for the proposition that decisions regarding the grant or denial of a security clearance are the province of the Executive Branch." Beattie v. The Boeing Company, 43 F.3d 559, 565 (10<sup>th</sup> Cir. 1994). The Tenth Circuit extended the reasoning of Egan to review by courts, not merely review by the Merit Systems Protection Board. Id. (citing Hill v. Department of Air Force, 844 F.2d 1407, 1411-13 (10th Cir. 1988), cert. denied, 488 U.S. 825 (1988)). In Beattie, the court noted that a private party rather than a government agency was involved. Id. at 566. However, the court declined to treat the decision made by the private company differently than a decision made by the Air Force, reasoning that both decisions are entitled to deference as they each represented an exercise of authority delegated by the Executive Branch. Id.

The Tenth Circuit also held that the Administrative Review Board lacked the authority to review security clearance determinations. Hall, supra. In Hall, like Complainant here, the petitioner argued that there was a retaliatory motive behind

his revoked security clearance. Id. at 852. However, the court upheld the ARB's conclusion that the petitioner's claim was not reviewable. Id. The court found that "the whistleblower protection laws passed by Congress do not alter the constitutional order, recognized by Egan, that gives the Executive Branch the responsibility to make national security determinations." Id.

The Court observed that "neither agencies nor courts have authority to review the merits of the denial of a security clearance absent clear statutory directive from Congress." Id. at 852. The court declined to review the circumstances under which the revocation of the security clearance (CPRP) was made for evidence of retaliation, finding that such a review would constitute a review of the basis of the determination. The Court specifically held that the environmental statutes upon which Hall based his claim, which are the same statutes at issue here, do not provide authority to scrutinize the Army's actions in denying CPRP status. Id. at 853. The Court noted that the statutory or regulatory procedures used by an agency in making a security clearance determination are reviewable, but the reviewing body may not probe into the legitimacy of the "merits or motives" of the agency's decision. Id. at 853-854.

The instant case is factually similar to Egan and Hall, in that without a CPRP clearance, Complainant was not eligible for the job which she held and, without UAP status, assignment to a non-CPRP position was not possible. In view of the foregoing, I find and conclude that Respondent's action to terminate Complainant was for a legitimate business reason. Complainant was enrolled in the CPRP program as a DSA operator. On April 12, 2008, she intentionally overdosed and attempted suicide which would warrant her disqualification from the CPRP program pursuant to AR 50-6. Complainant was permanently disqualified from the CPRP program by the US Army and was determined to be ineligible for the UAP program by the US Army. Based on Complainant's loss of her CPRP status, Respondent terminated her from employment. Based on her failure to achieve UAP status, Complainant was effectively precluded from employment for any non-CPRP positions. Respondent was faced with a **fait accompli** and its actions were for a legitimate, non-discriminatory business reason.

**G. Was Complainant discriminated against because of her protected activity?**

As noted above, the rebuttable presumption formed by Complainant's arguable **prima facie** presentation drops out of the case once Respondent produces evidence that Complainant was

subjected to adverse action for a legitimate, nondiscriminatory reason. The relevant inquiry remaining is whether Complainant prevails **by a preponderance of the evidence** on the ultimate question of whether she was intentionally discriminated against because of her protected activity. To meet this burden, Complainant may prove that the legitimate reasons proffered by Respondent were not the true reasons for its actions, but instead were only pretexts for discrimination.

In considering the issue of rebuttal of Respondent's proffered legitimate reasons for its actions, the undersigned considered the entire record, including Complainant's version of each specific adverse employment action and the asserted reasons why the actions occurred as discussed above. I find no record evidence of any intentional discrimination by Respondent against Complainant. The undersigned will also consider the environment and atmosphere in which Complainant's concerns were expressed and Respondent's attitude towards environmental and safety issues raised by its employees. After considering all of the record evidence of alleged discrimination, I find and conclude that Complainant has not demonstrated by a preponderance of the evidence that Respondent's adverse employment actions were in retaliation for her protected activities.

The TOCDF facility environment in which Complainant made her complaints, is owned by the Chemical Materials Agency (CMA), and consists of Respondent's 1250 employees, and 40 to 45 government and contract support personnel employed by the US Army in the CMA field office.

As previously noted, Respondent employs 29 employees in its environmental department, to include inspectors who attend entry meetings at DSA every time a worker enters into a toxic area. All areas where hazardous waste is managed are inspected once a week. Any violations are documented and the violation and non-compliance are reported to the shift manager and State and federal regulators. Furthermore, State regulators have offices on site and are present weekly. State regulators can monitor Respondent's furnaces and its parameters from their site offices. Inspections of the facility are performed weekly by the Utah State Department of Environmental Quality. The Army oversight group is also present on site and TOCDF receives regular visits from the Center of Disease Control and the National Research Council. CMA performs regular environmental inspections as well.

Respondent also employs 34 employees in its safety department consisting of a process hazard analysis group, work control safety group, a shift safety group, an industrial hygiene group and an emergency preparedness group. Shift safety specialists are assigned to each shift and cover the plant facility around the clock. There are safety-action teams on each shift composed of regular everyday employees. There are 60-65 safety action team members on the roster. The safety department is evaluated by OSHA and the Army. Surety management inspections are conducted by the Army every two years. In alternate years, a Chemical Surety Inspection is conducted.

There is a Condition Reporting System (CR) in place for employees to report improvements needed. The safety department receives about 60 items a month which are assigned for analysis and resolution.

In May 2009, OSHA recognized Respondent with the Voluntary Protection Program (VPP) which is a safety compliance award granted by OSHA when a company is compliant with all of their standards to a higher degree. (RX-67). It is an award with premiere recognition or status as a high-performing safety organization. OSHA randomly surveyed 146 employees of Respondent who reported "they have access to the CR reporting process and are encouraged to use it;" "employees consistently described an environment in which they truly feel their safety takes priority over any other concern. There is a true "Stop Work" culture at the site and employees have no fear of reprisal or retribution for stopping work or for participating in any safety-related activity." (RX-67, p. 1622).

The record demonstrates that Respondent has created an atmosphere in which employees are encouraged to voice environmental and safety concerns through the Condition Reporting System as well as to their immediate supervisors. Respondent self-reports violations observed by environmental and safety inspectors. Employees are encouraged to and are free to speak with State regulators on the site. Majestic, the manager of risk management, credibly testified that he views his job as keeping the people that Respondent has employed, healthy, reliable and at work. He testified he would "not allow an individual to be targeted for bringing forward concerns; it is not what [Respondent] stands for."

It is within this environment and atmosphere that Complainant's protected activity must be evaluated. Complainant, and other employees, complained about: inadequate

protective clothing in the performance of her DSA tasks; the ACAMS wand being left in an air duct; and brine and caustic leaks on piping.

The record is devoid of any direct evidence that Respondent harbored any animus or retaliatory intent or motive towards Complainant. My impression of the majority of witnesses in this case is that all genuinely liked Complainant. In fact, Wahlberg, her immediate supervisor, had recommended her for an alternate supervisory position. There is no record evidence of any overt hostility exhibited toward Complainant in the workplace or at the formal hearing. I found no record evidence of any animosity towards Complainant by Wahlberg, Rothenberg, Sweeting, Ryba or Gomez, all of whom were involved in decision-making which affected Complainant's retention of her CPRP status, her termination and failure to achieve UAP status.

The concerns raised by Complainant which have been credited were issues that other employees and Respondent were aware of and which Respondent was working to resolve. Sorenson testified that he believed "all of our people were concerned with that [inadequate protective clothing]." The ACAMS wand issue was a concern for "a lot of people" according to Sorenson, including Complainant. Respondent was aware of the ACAMS wand issue and discontinued the practice when a memo was distributed by Respondent that "we would not longer place the wand in the duct to clear the ACAMS." Vance testified that the piping issue was brine, and not caustic, which she became aware of when one of Respondent's environmental supervisors conducted an inspection with a State inspector. Respondent received a notice of violation and paid a fine of \$138.00.

Other issues about which Complainant claimed to be concerned were also responsibly handled by Respondent independent of Complainant raising the issue. The sulfur dioxide issue was voluntarily self-reported to State regulators on October 16, 2006. See Tab A to Respondent's Post-Hearing Brief (portion of brief submitted to the ARB in the Tomlinson case). Inadequate protective clothing, the ACAMS wand issue and waste accumulation in the air locks were concerns to many employees according to Ralston and were considered and resolved.

In view of the foregoing, I find and conclude that Complainant has failed to establish that Respondent singled her out for intentional discriminated for engaging in protected activities.

In so concluding, I am mindful Complainant contends that Respondent was found to have engaged in retaliatory adverse actions in two other Department of Labor cases involving Safety Manager Jones and more recently in Tomlinson. Complainant argues this constitutes a pattern of retaliatory behavior by Respondent. I find this argument specious. Respondent argues Jones was terminated in 1994, before the facility began agent operations, and has no similarity to Complainant's case. In 2001, the Jones case was settled while pending before the U.S. Tenth Circuit Court of Appeals. Settlements are not considered precedent for retaliatory actions since it is an amicable resolution of pending issues and arguably a non-admission clause may have exonerated Respondent. Although the Tomlinson case is presently pending appeal before the Administrative Review Board, the Administrative Law Judge dismissed the complaint concluding that Tomlinson did not engage in protected activity. As discussed above, Complainant prosecuted a complaint against Respondent in Case No. 2002-SDW-4 which was dismissed. I find no evidence based on this record that Respondent engaged in a retaliatory pattern of discrimination against employees who raised environmental or safety concerns. The probability of Respondent acting innocently, as Complainant argues, is reinforced by the foregoing.

**H. Would Respondent Have Implemented Adverse Action Against Complainant Regardless of Complainant's Protected Activity?**

Assuming **arguendo** that Complainant established her protected activity played some part in or was a contributing or motivating factor in Respondent's adverse action, thus creating a "dual motive case," which is completely belied by the instant record, Respondent may avoid liability by demonstrating that the adverse action would have occurred even if Complainant had not engaged in protected activity.

The instant record supports a finding and conclusion that Complainant's employment would have been terminated for the following legitimate business reasons: (1) the disqualification from the CPRP program because the US Army determined she had attempted suicide and was unreliable; and (2) Complainant was considered ineligible for UAP status by the US Army and could not be retained by Respondent in a non-CPRP job position. Neither decision by the Army can be scrutinized or reviewed by the undersigned as discussed above. Moreover, the record does not support a finding that Respondent influenced in any way the US Army in its decision-making role regarding Complainant's enrollment in the CPRP and UAP programs.

Accordingly, I find and conclude that Respondent would have implemented the same adverse actions against Complainant had she not engaged in protected activity given the US Army's decisions over which Respondent had no control.

## **VI. CONCLUSION**

Complainant has failed to show by a preponderance of the evidence that her protected activity in reporting any of her concerns to management or state or federal agencies was a contributing factor in the United States Army's decision to revoke her CPRP and find her ineligible for UAP status. Without a CPRP clearance Complainant could no longer remain in her DSA operator position and her employment was terminated. Although she applied for non-CPRP positions that required a UAP clearance, she was declared ineligible for the UAP program and thus was effectively precluded from consideration for any positions with Respondent.

## **VII. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I find and conclude Respondent did not unlawfully discriminate against Brenda Mugleston-Utley because of her protected activity and, accordingly, Brenda Mugleston-Utley's complaint is **DISMISSED** in its entirety.

**ORDERED** this 14<sup>th</sup> day of December, 2011, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge

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

delivery or other means, the petition is considered filed upon receipt.

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