

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 September 2013

CASE NO.: 2011-CAA-00002

In the Matter of:

LOUIS A. KEATING, JR.,
Complainant,

vs.

EG&G DEFENSE MATERIALS, INC.,
Respondent.

Appearances: Louis A. Keating, Jr., pro se,
For the Complainant

H. Douglas Owens, Esquire,
Cecelia M. Romero, Esquire,
For the Respondent

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This case arises out of a complaint filed by Louis A. Keating, Jr. ("Complainant") against his former employer, EG&G Defense Materials, Inc. ("Respondent" or "EG&G"), under the employee protection provisions of the Clean Air Act ("CAA"), 42 U.S.C. § 7622; and the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971. The Complainant alleged that the Respondent terminated his employment in retaliation for raising environmental and safety concerns covered by the CAA and the SWDA.

For the reasons stated below, I find that the Complainant is not entitled to relief under these acts and that his complaint should be DISMISSED.

PROCEDURAL BACKGROUND

On February 11, 2010, the Complainant filed a complaint with the U.S. Department of Labor alleging that the Respondent had discriminated against him in violation of the employee protection provisions of the CAA and the SWDA. This complaint alleged that the Complainant was terminated by the Respondent in retaliation for “bringing up OSHA and RCRA/Health issues” in his “area of responsibility,” relating to the “proper operation of the Sewage Treatment facility.” (Complaint.)

The Department of Labor’s Occupational Safety and Health Administration (“OSHA”) conducted an investigation of these claims. On January 25, 2011, the Secretary of Labor, through her agent the Regional Administrator of OSHA, dismissed the complaint, finding that there was no reasonable cause to believe that the Respondent had violated the CAA or the SWDA. (ALJX 1, p. 1.) Specifically, the Secretary concluded that there was no evidence that the Complainant expressed concerns about the sewage treatment facility before he was terminated and that a preponderance of the evidence supported the Respondent’s position that the Complainant’s alleged protected activity was not a contributing factor in his termination. (ALJX 1, p. 2.)

This matter was initiated with the Office of Administrative Law Judges (“OALJ”) on February 7, 2011, when the Complainant sent a letter to the Chief Administrative Law Judge objecting to the Secretary’s findings and requesting a hearing before an Administrative Law Judge. On March 3, 2011, I issued a Notice of Hearing and Pre-Hearing Schedule setting this case for hearing on June 22, 2011, in Salt Lake City, Utah. On March 29, 2011, after a joint conference call, I issued an order rescheduling the hearing for July 18, 2011.

Then, on May 26, 2011, the Respondent filed a motion for a protective order to prevent the Complainant from contacting EG&G managers except through the Respondent’s counsel and to stop the Complainant from telling potential witnesses that they were required to speak with him about the case. Before I ruled on that motion, on June 2, 2011, the Respondent filed another motion, this time requesting a pre-trial hearing, a continuance of the trial date, and other relief. On June 10, 2011, I conducted a conference call with the parties to discuss both motions. After the call, I issued an order granting the motion for a protective order and laying out clearly what contact the Complainant could have with current EG&G employees. This same order also granted the motion for a continuance, which by the time of the conference call was desired by both parties, and rescheduled the hearing for December 12, 2011.

Next, on December 1, 2011, OALJ received from the Respondent a motion for relief “based on discovery problem relating to damages.” This motion was discussed as part of the pre-hearing conference call with the parties on December 2, 2011. On December 5, 2011, I issued an order summarizing this discussion and rescheduling the hearing yet again, this time to February 13, 2012. Because of this delay, a second pre-hearing conference call was held on February 3, 2012. I issued an order on February 6, 2012, summarizing that conference and bifurcating the proceedings, reserving the issue of damages for a later hearing to take place only if I found the Complainant had been retaliated against by the Respondent.

The hearing began on February 13, 2012, in Salt Lake City, Utah, and continued through February 17, 2012. At the end of the first week of trial, however, additional hearing days were still required. The hearing was scheduled to resume in Salt Lake City on April 30, 2012. The parties reconvened on April 30, 2012, and the hearing continued from that day through May 4, 2012. During both weeks of the hearing, the Complainant represented himself, while the Respondent was represented by its attorneys, H. Douglas Owens and Cecelia M. Romero. Both parties were afforded a full opportunity to present testimony and offer documentary evidence.

At the hearings, I admitted into evidence the Complainant's Exhibits ("CX") 1 through 40, 40A, 41 through 49, and 51 through 53;¹ and the Respondent's Exhibits ("RX") 2, 5 through 8, 10, 11, 13 through 16, 18 through 23, 25 through 41, 43, 44, 46 through 50, 53 through 56, 58 through 70, 73, 75 through 77, 79 through 81, 83, 85 through 97, 99, 100, 102 through 106, 108 through 113, 115 through 119, 121, 123 through 163, and 165.² (HT, pp. 2125-27.) I additionally marked and admitted OSHA's administrative determination and the Complainant's request for a hearing as ALJ Exhibits ("ALJX") 1 and 2. (HT, pp. 10-11.)

According to the briefing schedule set at the hearing and confirmed by my order on July 13, 2012, closing briefs were due July 16, 2012, and reply briefs were due August 6, 2012, or three weeks after any late closing brief was received. (HT, p. 2184.) I received the Complainant's closing brief on July 13, 2012, and the Respondent's on July 17, 2013. The Respondent's reply brief arrived August 6, 2013, and the Complainant's reply came the next day.

STIPULATIONS

The parties agreed to the following stipulations at the hearing:

1. EG&G is a contractor operating at Tooele Chemical Demilitarization Facility ("TOCDF") located near Salt Lake City, Utah, in the Army's Deseret Chemical Depot ("DCD").
2. TOCDF's mission is to incinerate the Army's stockpile of chemical weapons stored at DCD, and to dispose of all hazardous and nonhazardous waste per the rules of the State of Utah.
3. The Complainant was hired by EG&G on January 14, 2008, as a systems engineer.
4. On May 7, 2009, the Complainant created a work order requesting installation of signs warning drivers to roll up their windows near the sewage lagoons.
5. In July of 2009, the Complainant was issued a performance improvement plan ("PIP") dated July 6, 2009.
6. On December 7, 2009, the Complainant was given a second PIP.
7. The Complainant's employment with EG&G was terminated on January 21, 2010.

(HT, pp. 6-10.)

¹ Complainant's Exhibit 50 was withdrawn and Complainant's Exhibit 54 was excluded. (Hearing Transcript ("HT"), pp. 2116, 2125.)

² The following Respondent's Exhibits were withdrawn: 1, 3, 4, 9, 12, 17, 24, 42, 45, 51, 52, 57, 71, 72, 74, 78, 82, 84, 98, 101, 107, 114, 120, 122, and 164. (HT, p. 2126.)

ISSUES

The issues to be decided are:

1. Did the Complainant engage in an activity that was protected under the employee protection provisions of the Clean Air Act or the Solid Waste Disposal Act?
2. If so, was the Respondent aware of that protected activity?
3. If so, was the protected activity a contributing factor in the Respondent's decision to terminate the Complainant?
4. If so, would the Complainant have been terminated even if he had not engaged in the protected activity?

(HT, pp. 5-6.)³

FACTUAL BACKGROUND⁴

The Complainant's Early Life: 1960–2000

The Complainant was born in 1960. (CX 1, p. 2.) He attended college at the University of New Mexico, graduating with a Bachelors of Science degree in Chemical Engineering in December of 1984. (*Id.* at 7.)

Immediately after graduating from college, the Complainant was hired by Alliant Techsystems Inc.,⁵ (“Alliant”) a Utah-based manufacturer of rocket motors. (CX 1, p. 5; RX 152, p. 2245.) The Complainant worked there as an engineer in various capacities for over 20 years. (CX 1, pp. 5-6; RX 152, p. 2245; RX 151, p. 2242.)

Performance Issues at Alliant: 2001–2006

According to the employment records provided, by 2001⁶ the Complainant's supervisors at Alliant were coaching him about work performance and interpersonal issues. (RX 151, p. 2238.) In an email sent to the Complainant on June 11, 2001, a manager reminded the

³ Since I bifurcated the hearing, issues of damages were reserved, pending my ruling on whether the Complainant was retaliated against.

⁴ Please note that the record in this case was both huge and very disorganized. Nearly 5,700 pages of evidence were submitted, including almost 2,200 pages of transcribed testimony from the two weeks of hearings. Further, this mass of evidence was poorly labeled and sorted, with related documents sometimes being found thousands of pages apart and few clues as to what some documents were. Neither side provided coherent explanations of the relevant individuals and events, let alone who did what when, thus, it took my law clerk three months of work to even reduce this confusion of rambling testimony and hodgepodge documents to some form of a timeline for me. Though I have put my utmost effort and a tremendous amount of time into analyzing this record, there remain gaps in the evidence. What follows is simply the best approximation of the true facts possible from such a flawed record.

⁵ Previously Hercules Aerospace, and now referred to as ATK as well. (RX 151, p. 2233; RX 152, p. 2245.)

⁶ These issues may have arisen earlier, but the first record I have of the Complainant being counseled by his supervisor is from 2001, and the second is from 2004. (RX 151, pp. 2237-38.) There were also two documents from 2005, and one from 2006. (*Id.* at 2234-35, 2240-42a.) Obviously this provides only a superficial view of the Complainant's work history at Alliant, focused on only the incidents that led to the Complainant leaving the company. On the other hand, those are the incidents most relevant to the current case.

Complainant that he needed “to have a logical path that others can follow” in his presentations and should “stay focused on what is important to your customers – and work the really cool/interesting stuff only after [the work for the customers] is complete.” (*Id.*) The Complainant was also told to keep his supervisors up to date on his work so that he could “get help” if he felt the customers were being unreasonable; that way, issues could be addressed before they became a “big deal.” (*Id.*)

Three years later, on September 8, 2004, this same manager sent another email to the Complainant and his supervisors, summarizing the actions she and the Complainant had agreed to during their discussion of “the SS port damage and ensuing issues.” (RX 151, p. 2237.) According to this plan, the Complainant was supposed to “thoroughly review” what he planned to present before meeting with his customers, including performing a final “dry run” of the presentation for his supervisors. (*Id.*) The Complainant was also directed to: go over his data carefully to make sure it was clear and supported his conclusion; to look at all the relevant information, but weed out the irrelevant; and to “[k]eep an open mind” with “no hidden agendas or looking only at data that fit[]” the conclusion he wanted to reach. (*Id.*) Further, the Complainant was warned that during these presentations, “If you don’t know – don’t speculate. Get the data first.” (*Id.*)

Next, April 29, 2005, management’s “ongoing issues” with the Complainant’s performance became the subject of a formal memo. (RX 151, p. 2235.) Many of the complaints were the same as those from the emails in 2001 and 2004: lack of organization and clarity in communication; conclusions not being supported by data; and not keeping supervisors informed, such as about changes in the Complainant’s work schedule. (*Id.*) He was also criticized for showing “little or no improvement,” despite “a significant amount of coaching and supervision.” (*Id.*) As a result of these problems, the Complainant was “not meeting the minimum expectations” for an engineer at Alliant. (*Id.*) This memo informed the Complainant that he had 60 days to make definite improvements or he would face additional discipline, potentially including termination. (*Id.*)

Over the following months, the Complainant’s managers kept having issues with his work. (RX 151, pp. 2240-42.) The Complainant’s lack of thoroughness remained a problem, as did his poor communication skills. (*Id.* at 2240, 2242a.) Criticisms included not having time to “re-write” the Complainant’s work for him and the Complainant presenting data that was “confusing and near worthless.” (*Id.* at 2241.) Management also expressed frustration about slow progress on the Complainant’s projects; that things took him more than twice the time they should have. (*Id.* at 2242.) One supervisor described an incident where he explained to the Complainant that a certain task was the “number one priority,” while another area might be looked at only as a secondary focus. (*Id.* at 2241.) According to this supervisor, “[w]e supposedly agreed to this and other strategies as well.” (*Id.*) Some time later, the supervisor was surprised to learn that the Complainant had instead “spent all of his time” gathering data on the lower priority task, putting little effort towards the priority task his supervisor had established. (*Id.* at 2241-42.) The Complainant was redirected to work on the high priority task, as he should have months before, but his supervisor believed that the important data “would never have been obtained if left up to” the Complainant. (*Id.* at 2242.) His coworkers felt that they could not rely on the Complainant, and his supervisor had to spend lots of time cleaning up the Complainant’s

work. (*Id.*) Even then, the Complainant would try to reintroduce the irrelevant data that his editors had taken out. (*Id.*)

Despite these issues, the 60-day time limit on the Complainant's improvement plan was not immediately acted on. (RX 151, p. 2241.) Apparently some of his managers had not been alerted to the plan, so it was not until November 3, 2006, that there was another formal discussion with the Complainant about his position at Alliant. (*Id.* at 2242.) At this, and a second meeting on November 11, 2006, supervisors informed the Complainant that his current assignment was not working and encouraged him to apply for reassignment to a different department, since he had already tried and been found unsuitable for the four positions available in his current division. (*Id.* at 2242-42a.) However, the Complainant did not take this advice, nor did he follow-up on internal resume solicitations. (*Id.*)

The next document in the file is a memo from November 20, 2005, stating that since formal counseling started, the Complainant's performance had "shown little to no improvement." (RX 151, p. 2234.) While acknowledging that the Complainant possessed "technical expertise" and could handle small issues, the continued necessity of "substantial coaching and oversight" to resolve larger issues was not acceptable. (*Id.*) Because of the lack of improvement in his "ability to apply [his] knowledge in an independent manner to provide timely and understandable technical solutions," management had decided that the Complainant could no longer be assigned challenging tasks or interaction with customers. (*Id.*) This left them with "no choice" but to remove him from his position as an engineer. (*Id.*) Still, the Complainant was allowed to remain at Alliant temporarily in a support role, essentially to look for other employment. (*Id.* at 2234, 2239.)

The Complainant appealed the decision to remove him from his job through Alliant's internal process. (RX 151, p. 2239.) A detailed review was performed; no reason to change the decision was found. (*Id.*) Rather, the review "indicated a consistent disconnect between the stated expectations of [the Complainant's] leaders and [the Complainant's] performance." (*Id.*) According to the Complainant's manager, the "bottom line is that an [engineer] with 20+ years of experience at this company ... should not require as much coaching, review, and support as [the Complainant] requires." (*Id.* at 2242a.) While Alliant had tried to accommodate him for "several years," he had not improved his performance and management was unable to find him "a position where his strengths are not overwhelmed by his weaknesses," particularly the Complainant's poor aptitude for technical communication. (*Id.*) The Complainant had been given the temporary support assignment in the hope that he would use that time and Alliant's career resources to find a new job that was a better match for him. (*Id.*) In the letter denying the Complainant's appeal, he was again encouraged to act on that opportunity. (*Id.* at 2239.) Alliant also offered to extend the temporary position through March 31, 2006. (*Id.*) The Complainant ended up staying in that capacity until April of 2006, later describing the circumstances of his leaving as "resigned with notice." (RX 152, p. 2245.)

Work for the Field Office: 2006–2008

Judging from the record before me, the Complainant was next employed by the Science Applications International Corporation (the "Field Office") as an engineer at the Deseret Chemical Depot ("DCD"). (CX 1, p. 5; RX 152, p. 2245.) Though the Field Office is a

government entity that oversees the actions of Army contractors, like EG&G, the Complainant's work for the Field Office involved developing decontamination procedures. (HT, pp. 72, 1257; CX 1, p. 5.) The Complainant worked there from August of 2006 until January of 2008. (CX 1, p. 5.) When he applied for a job at EG&G in September 2007, he reported wanting to leave the Field Office because he needed "more challenge, responsibility, and team achievement goals." (RX 152, p. 2245.)

Early Work at EG&G: January 14–March 20, 2008

The Respondent, EG&G, is a company contracted by the United States Army to run a facility dedicated to destruction of chemical weapon stockpiles, in compliance with an international treaty obligation. (See HT, pp. 1438, 1446, 1451.) The facility EG&G runs is called the Tooele Chemical Demilitarization Facility ("TOCDF"), and it is located on a portion of the Army's Deseret Chemical Depot in Utah. (*Id.* at 1257.) The Field Office where the Complainant first worked acts as the liaison between EG&G and the Army and oversees the contract EG&G performs. (*Id.* at 72.) TOCDF's furnaces are kept burning 24 hours a day, processing the chemical weapons, and hundreds of EG&G employees are necessary to keep the plant's systems running. (See *id.* at 583.) Given the nature of EG&G's work, it is highly regulated and every action taken at TOCDF is governed by a strict, all-encompassing series of written procedures, backed up by multiple layers of oversight to ensure compliance with environmental and safety rules. (*Id.* at 126-27, 152-53, 194.)

The Complainant was hired by EG&G on January 14, 2008. (HT, p. 8; RX 14, p. 127.) As part of his acceptance of the job, the Complainant signed an outside employment agreement, pledging to not perform any consultation or employment for any other "contractor, company, or agency" without written approval from EG&G's general manager. (RX 16, p. 132.) The Complainant was brought in as a basic engineer. When his direct supervisor, James Hunter, discovered that the Complainant had "extensive knowledge about water systems," Mr. Hunter put the Complainant in charge of the water systems at TOCDF. (*Id.*)

The Complainant's first major project at TOCDF was to evaluate the plant's water treatment system. (See HT, p. 152; RX 130, p. 1226.) According to the report the Complainant wrote March 17, 2008, Patrick Sean McClatchey, the Hazardous Waste Manager, had raised concerns that the water softening component of the system was generating more waste water than before. (RX 130, p. 1226; HT, p. 1281.) Other EG&G staff had recently filed similar reports, suggesting that major repairs and upgrades might be needed to prevent untreated "hard" water from leaving the water treatment system and damaging equipment further down the line. (RX 130, p. 1126.) A steady supply of soft water was crucial to operation of the plant, with shortages leading quickly to shutdowns, so getting the water treatment system working well was very important. (HT, pp. 1044-45, 1373, 1438.) The Complainant planned to walk down the system, collect objective data, and then use that to generate recommendations about how to optimize performance. (RX 130, pp. 1226-27.) This was discussed at a meeting with other engineers, the Environmental Department, and managers on March 20, 2008, and the Complainant was told to look into renting a backup water treatment unit that could be plugged into the current system in the meantime. (*Id.*) Initial bids, however, were quite costly. (*Id.*)

Brine Concentration Proposed and Tested for the First Time: March 24–31, 2008

While considering potential repairs to the water treatment system, the Complainant's mind turned to the large volume of waste water, or brine, produced by the current system. (*See* RX 165, pp. 2888-89; RX 131, p. 1289.) Each month, thousands of gallons of this salty water were being piped into holding tanks and EG&G was paying many thousands of dollars in labor and landfill fees to get rid of it. (RX 165, p. 2889; RX 44, p. 299; RX 8, p. 117.) The Complainant came up with the idea of instead increasing the brine's salt content so that it could be used on roads to suppress ice and dust. (RX 165, p. 2889.) This salinization would turn expensive waste into a useful product on the site, saving disposal costs and potentially even generating income if the concentrated brine were sold to local and state road maintenance organizations. (*Id.*)

The Complainant's first step in exploring this possibility seems to have been setting up a test of the concentration process next to the plant's brine holding tanks, called the "frac," at the end of March 2008. (RX 124, p. 1147; HT, p. 703.) For the experiment, the Complainant filled a swamp cooler with brine from the water treatment system and allowed the cooler to run for five days, adding new brine regularly as liquid evaporated. (HT, p. 704.) This process slowly concentrated the brine until it became salty enough to be used to prevent ice formation. (*See id.*; RX 165, p. 2889.)

Though no formal plans for this test appear in the record, the Complainant's supervisor, Mr. Hunter, and several safety and environmental employees were at least informally told about the experiment within a day or two of its start. (*See* RX 124, p. 1147; RX 86, p. 615.) On March 25, 2008, the Complainant sent an email to Mr. Hunter, Sheila Vance (the Environmental Manager), and Anthony Maestas (a safety monitor at TOCDF), among others, explaining his experiment and asking for safety advice. (RX 124, p. 1147.) Mr. Maestas replied that the Complainant should "label [his] drums and keep the spillage to a minimum," but needed to "also put the word out as to what [he was] doing" since people had been wondering and the supervisor in that area knew nothing about the test. (*Id.*) The Complainant took this exchange as an opportunity to expand on his idea for how the plant's waste heat could be harnessed to help concentrate the brine and his hope that the State would purchase some of the finished product, which "would be an environmental feather in [EG&G's] cap." (RX 86, p. 615.) Others on the email chain were less enthusiastic, as James "Mike" Jensen, the Industrial Hygiene Supervisor in the Safety Department, privately forwarded the information to Ryan Taylor, the Safety Supervisor in charge of work control, with the note: "Another engineering adventure that begs the question – under what work control/procedure/etc. are we performing this test?" (RX 86, p. 615; HT, pp. 582, 610.)

Regardless, the Complainant had the ball rolling on his brine-making plans and on March 31, 2008, he sent a sample of the concentrated liquid produced by his experiment to the Utah Department of Transportation for testing, to see if it was suitable for use on roads. (RX 130, p. 1227; HT, p. 926.)

Brine and Water Treatment Projects Advance in Tandem: April 1–August 6, 2008

Meanwhile, the Complainant continued analyzing the water treatment system's needs. One of the changes he made was having the system reprogrammed so the two regeneration beds could be used separately, which would make maintenance easier. (RX 130, p. 1227.) At the Complainant's direction, on April 1, 2008, water hardness monitors were also installed.⁷ (RX 124, pp. 1132-33.)

On April 2, 2008, the Plant Operating Readiness Committee ("PORC") met. (RX 165, p. 2888.) PORC is an important management committee at TOCDF, and its approval is necessary for nearly all major changes and new initiatives. (*E.g.*, RX 89, p. 622; RX 106, p. 1031.) At this meeting, the Complainant presented the outline of his plans for the water treatment system, both for efficiency improving upgrades and for recycling its waste brine. (RX 165, pp. 2888-89.) In the Complainant's assessment, the water treatment system badly needed a backup water softening bed to ensure demand could be met even if one of the beds was temporarily offline for repair. (*Id.* at 2889.) He also recommended replacing the resin in the two existing beds, since it was currently only performing at 50% efficiency, having exceeded its 7 to 10 year service life. (*Id.*) In addition, the Complainant believed that changing out various valves and piping, along with modifications to the controls on the system, would help cut down on the amount of hard water that escaped. (*Id.*) Last, the Complainant encouraged PORC to let him use space within the plant's filter farm to concentrate leftover brine. (*Id.*) If PORC made concentrating the softener brine an "environmental improvement initiative," the Complainant claimed that his proposal would save the plant over \$20,000.00 a month in disposal costs and would produce a dust and ice suppressant that TOCDF could use to maintain its roads. (*Id.*) Even the Utah Department of Transportation would want to buy it. (*Id.*)

PROC did authorize the Complainant to order new resin for the water treatment system on April 10, 2008. (RX 130, p. 1228.) That same day, after apparently discussing the proposal with Timothy Nielsen, the Complainant's manager, the Complainant also submitted a work order to begin concentrating the water softener brine in the manner he had proposed before PORC.⁸ (*Id.*; RX 131, p. 1289.) Over the next couple of weeks, the Complainant priced swamp coolers and cooling towers that would be compatible with concentrating salt brine. (RX 130, p. 1229.) Then, on April 26, 2008, the Complainant's proposal for concentrating brine for use on roads earned him the TOCDF "Condition of the Week" award. (RX 15, p. 130.)

Perhaps spurred on by this recognition, on April 28, 2008, the Complainant contacted DCD and the forest service, trying to obtain some extra-large storage tanks and volunteer labor to help him set up a prototype system for concentrating brine. (RX 130, p. 1229.) According to Mr. Nielsen, the Complainant went to these outside groups entirely on his own initiative and without discussing the plan with his supervisors. (HT, pp. 1957-59.) Mr. Nielsen did not approve of this method of developing a capital project. (*See id.*)

⁷ Though the Complainant failed to notice that he had listed the wrong chemical in the work order until the Maintenance team brought it to his attention. (RX 124, pp. 1132-33.)

⁸ The record does not mention if this was also officially approved by PORC.

The Complainant's enthusiasm was unabated, however. On May 8, 2008, he wrote a work order for the purchase and installation of three cooling towers for producing brine. (RX 165, p. 2422.) He also had a meeting with the Utah Department of Transportation about the project. (RX 130, p. 1229; RX 165, p. 2424.) By May 20, 2008, the Complainant had managed to get the excess equipment he needed from DCD to build his desired prototype. (RX 165, p. 2424.) According to the Complainant, this enthusiasm got him noticed, and in June of 2008, he was asked to represent the Engineering Department at monthly meetings about EG&G's environmental management system, where proposals for improving TOCDF's impact on the environment were considered. (HT, pp. 703, 1289.)

At this point, the Complainant was still spending at least some time repairing the water treatment system, such as by investigating supplies of spare parts. (RX 130, p. 1229.) On July 28, 2008, this work culminated in a new, more developed work order laying out a multi-stage plan for implementing the necessary system upgrades. (RX 165, p. 2411.) First, the Complainant planned to replace the resin in the two existing softening beds. (*Id.*) Next, new piping, valves, and controls would be installed. (*Id.*) The existing system had been put together with galvanized steel pipes, but these had not held up well over time, so the Complainant proposed changing the specifications so that more durable PVC pipes could be used instead. (*Id.*) He also wanted to add instruments that would allow greater monitoring and control over the system. (*Id.*)

The high point for the Complainant's brine concentration project came on August 1, 2008, when Ms. Vance, the Environmental Manager, emailed him to let him know that EG&G's General Manager, Gary McCloskey, had presented the Complainant's proposal to the Citizens Advisory Commission. (RX 18, p. 134.) The idea was "very well received" and Ms. Vance and Joseph R. Majestic, the Deputy General Manager, both congratulated the Complainant on coming up with a great idea and actually making it happen. (*Id.*)

As for the water treatment system, the Complainant, Mr. Hunter, and several engineers met to decide the direction of the project on August 6, 2008. (CX 10, p. 1.) The lateral piping on the water treatment beds had taken a lot of damage that would be difficult to repair, but was also causing significant leaks. (*Id.*) Ultimately, the engineers decided they could not afford to lose either of the two existing beds, since that meant risking a plant shutdown if they ran short of water. (*Id.*) Having three beds instead of two would create a much more reliable and flexible water supply, so the engineers at the meeting decided to expedite the acquisition of two new treatment beds from another chemical demilitarization facility that had extras. (*Id.*) By replacing the most broken of the current beds with two new ones, they could repair the system and improve it at the same time. (*Id.*) Also, modifying the current system to fit the other facility's excess tanks would save EG&G a lot of money, compared to the cost of purchasing a full replacement system, which the Complainant felt was wise since EG&G was only planning to operate TOCDF for another two years. (RX 44, p. 299.)

Tensions Rise over Awning: August 2008

At the end of July 2008, the Complainant decided that he wanted to bring in an awning from home to create a shaded outdoor spot at TOCDF where he could eat his lunch. (RX 87, p. 616.) His supervisor, Mr. Hunter, took issue with the Complainant trying to schedule the installation of this awning informally over email, rather than in accordance with EG&G's

procedures. (*Id.* at 617 (“Be aware that we don’t allow, do, or schedule work via email ... Please make sure we follow our procedures. I realize this may be overkill, but I just want to make sure we do everything by the book.”))

Though the record indicates only gentle prodding to use proper work control, in an email on August 13, 2008, the Complainant pushed back on those requests, explaining why he did not feel that a formal application to have the work done was “justified or needed.” (RX 87, p. 617.) He also began citing procedures back at Mr. Hunter and Mr. Jensen, a safety representative, for why his request to install the awning must be approved. (*Id.* at 616-17.) The Complainant’s language became forceful and one email included the following: “Some call me bull headed, stubborn, and aggressive. However – my parents taught me to not take the bull head on, hit the issue at all angles time & again, be professional & compete (don’t fight), and don’t take no for an answer from anyone who can’t say yes.” (*Id.* at 616.) There were also emotional references to his family history of cancer and the “silent killer” of high blood pressure. (*Id.* at 617.) It was clear that the Complainant felt very strongly about having his awning installed at TOCDF. (*Id.* at 616.)

On August 15, 2008, Mr. Jensen told the Complainant that he appreciated how frustrated he might be by the process, but explained that despite the initial denial, the Complainant should file a formal condition report in order for his “suggestion to receive the right attention from the right people.” (RX 87, p. 616.) The record does not indicate if the Complainant ever took that advice.⁹

Second Swamp Cooler Concentration Test: October 6, 2008

The Complainant spent late August through early October 2008, arranging for excess water softeners to be sent from the disposal facility in Alabama to TOCDF. (RX 130, p. 1230.) The current water treatment system was cut apart to make room to install the new beds and the Complainant detailed his ambitions for installing better controls, valves, and pipes. (RX 140, p. 1470; RX 165, p. 2426.)

It appears that around October 6, 2008, the Complainant also decided to run a second test of his idea for concentrating brine using swamp coolers. (*See* RX 124, p. 1163; HT, pp. 1077-78.) At the time, the cool down area, where disassembled munitions were placed to “cool down” after exiting the processing furnaces, had an issue with dangerous vapors. (HT, pp. 708, 1973.) Because the activities in the cool down area made it very hot, there were swamp coolers there to protect workers against the heat. (*Id.* at 711-12, 1973-74.) The Complainant believed that brine concentration would work well in the cool down area, using one of the existing coolers with the heat there speeding the evaporation process. (*See id.* at 708; RX 124, pp. 1161-62.) He also thought that the increased water vapor released by his coolers would neutralize the harmful vapors in the area, improving safety. (HT, p. 708; RX 124, pp. 1161-62.) The Complainant discussed his idea with senior engineers at EG&G, and they told him he needed a written test plan. (HT, pp. 708, 712.) According to the Complainant, he drafted a test plan and began the process of submitting it to all the necessary individuals for approval. (*Id.* at 712, 1077-78.)

⁹ For instance, the exhibits do not include a work order directing Maintenance to put up such an awning or a condition report about the lack of shaded outdoor seating.

Before his plan was authorized, however, the Complainant set the test up in the cool down area with the assistance of Patrick Sean McClatchey and Kyle Laine Russell, hazardous waste supervisors at EG&G, and the approval of the shift supervisor on duty in the building that day. (HT, pp. 710-13, 1078, 1080-82.) It appears that the Complainant's motivation to set up early may have been to allow safety workers to take a look at his test equipment. (*Id.* at 1080-84; RX 124, p. 1163.) Late in the day October 6, 2008, the Complainant called William Bacon, a supervising engineer in the Safety Department, to ask about potential hazards his test might create. (RX 124, p. 1163.) Mr. Bacon had two of his junior safety engineers, David Nelson and Katie Whited, go take a look at the set-up. (*Id.*) They returned to the Safety Department with serious concerns about the test, at least partially based on a misunderstanding that the Complainant would be concentrating brine from the pollution abatement system, which was hazardous waste, rather than brine from the water softeners, which was only salty water. (*Id.* at 1161-62.) Mr. Bacon emailed the Complainant and Sheila Vance, the Environmental Manager, about these concerns right away. (*Id.* at 1162.) Though the next morning the Complainant cleared up the mistake about the type of brine he would be using, by then, the safety engineers had discussed the matter further. (*Id.*) They determined that even if only salt water were concentrated, there was the possibility of harmful chemical reactions between the evaporating brine and other vapors in the cool down area. (*Id.*) Thus, the Complainant was informed that he needed to find a different location for his test. (*Id.*)

Immediately, the Complainant appealed this decision to Mr. Bacon's boss, James "Mike" Jensen, the Safety Department's Industrial Hygiene Supervisor. (RX 124, p. 1161; HT, p. 610.) Though the Complainant did not "claim to be any PHD chemist," he felt that he was a "can-do type guy (who asks a lot of questions)" and he said that there would be no chemical reactions,¹⁰ no discharge, and no jeopardy to any of the safeguards in the area. (RX 124, p. 1161.) The Complainant had discussed it with his "oldest sister" who was "an internal medicine doctor" with an undergraduate degree in chemical engineering, and she agreed with him that running the test in the cool down area was "the right thing to do" and would "do no harm to the environment or risk anyone's safety." (*Id.*) Despite these assurances, Ryan Taylor, a safety supervisor, and the Complainant's supervisor, Mr. Hunter, made the Complainant stop the test. (HT, pp. 169, 176, 582.) Mr. Hunter instructed the Complainant not just to move the test, but to shut it down completely. (*Id.* at 169.) Despite these words, the Complainant came away from his conversation with Mr. Hunter with the impression that he only needed to look for another location. (*See id.* at 713-14.)

Performance Review: October 15, 2008

Mr. Hunter delivered the Complainant's first performance review on October 15, 2008, assigning scores in a host of categories on a five-point scale, where a score of one meant failing to meet expectations and a four meant going above and beyond expectations. (RX 153, pp. 2249-50; HT, pp. 182-83.) These sub-scores were then averaged to provide an overall snapshot of the Complainant's performance, here, a score of 3.33, a third of a point above "meeting expectations." (RX 153, pp. 2249-50; HT, pp. 182-83.) As Mr. Hunter testified, this was a

¹⁰ Other than the creation of "a weak sulfuric acid," which the Complainant said would not be hazardous and indeed claimed would be a "safety improvement" because it would supposedly neutralize the cool down area's problematic vapors. (HT, p. 708; RX 124, p. 1161.)

“reasonable score,” reflecting the Complainant’s progress as a still relatively new engineer at EG&G. (HT, p. 184.) Compared to the other engineers in the Department, however, the Complainant’s score placed him in the bottom half or even the lowest quarter of performers. (*Id.*)

Water Treatment Work Turns Up Pressure Issues: October 23–December 3, 2008

Sometime in the fall of 2008, the replacement water treatment system arrived from the Alabama demilitarization facility. (*See* RX 130, p. 1230; RX 140, p. 1500.) On October 23, 2008, the Complainant wrote a work order to have this new system taken apart for pieces, or “cannibalize[d],” so its parts could be incorporated into TOCDF’s existing water treatment system. (RX 140, pp. 1497, 1500; HT, pp. 1431-32; RX 165, p. 2427.) Though other EG&G employees criticized this choice after the fact, saying that it would have made more sense to plug it in as a full new system, replacing the old system entirely, the Complainant and his supervisors believed that integrating the two systems would create a better design. (HT, pp. 1431-32; RX 165, p. 2427.)

The Complainant also continued to explore creating concentrated brine. In a work order written November 4, 2008, he reported that he was close to getting approval from a state environmental agency to use brine on the plant’s roads. (RX 165, p. 2431.) Now, as an alternative to concentrating the brine via evaporation, the Complainant proposed increasing the salt level by adding dry magnesium and calcium chloride to the liquid removed from the softeners. (*Id.*) His earlier appeals to DCD for equipment had been fruitful and the Complainant now had 3 tanks, each holding over 2,000 gallons, which could be used to mix brine in. (*Id.*; RX 130, p. 1229.) In this new work order, he sought funds for the equipment necessary to apply the finished brine to the roads and for authorization to begin making brine this way. (RX 165, p. 2431.) Some application equipment was eventually bought, but this work order was never approved by management. (*Id.* at 2432; RX 103, p. 745.)

While scrutinizing the water treatment system, however, the Complainant noticed that the water pressure was not what it should have been. (RX 165, p. 2559.) On November 6, 2008, he measured the pressure at 160 psi, “when it should never be over 100.” (*Id.*) He wanted someone to enter the vaults and check for leaks.¹¹ (*Id.*) A week later the Complainant wrote a new work order, requesting that maintenance workers open a particular valve and see if silt came out. (RX 140, p. 1462.) This was done within a day, and ruled out a leak in that area. (*Id.* at 1464.) The Complainant continued to pursue this issue, meeting with DCD’s maintenance staff in early December 2008 to investigate the pressure reducing vaults located along the water line that fed the TOCDF system. (RX 130, p. 1234.) According to the Complainant, new measurements indicated that the pipes leading from DCD and a water tank that had been abandoned in the late 1990’s, were “not balanced” in pressure. (*Id.*)

Brine Concentration Test Reprisals: December 2008

During the month of December 2008, the Complainant returned to his brine concentration testing project. Analysis of samples of the liquid had generated positive results, so on December 4, 2008, TOCDF was able to send shipments of it to Tooele County’s Road Department and was

¹¹ This request is confusing as the problem he recorded was that the pressure was too high, but a leak would decrease the pressure in the pipes. (*See* RX 165, p. 2559.)

also approved to continue testing the brine on the base's own roads. (RX 130, p. 1234.) At the same time, the Complainant was circulating a new version of his plan for concentrating brine in the cool down area, seeking authorization.¹² (*Id.*; RX 88, pp. 619-20.) The Safety Department reviewed a draft of this plan on December 5, 2008, criticizing its lack of a "step by step process of how the work is going to be done." (RX 88, pp. 619-20.) The Complainant was informed that citing to a procedure number was insufficient; he needed to give detailed directions about exactly how, when, and with what equipment Maintenance should make the test happen.¹³ (*Id.*)

But for the time being, the Complainant focused instead on the issue of installing the replacement water softening beds. After careful consultation about how to avoid interrupting water flow to the plant, the "rough" installation of the new bed was tentatively scheduled for December 12, 2008. (RX 130, p. 1234.) Though the Alabama bed had been taken apart and its components moved to several sites for storage or use in the system reconfiguration by December 11, 2008, actual installation got delayed. (RX 140, pp. 1465, 1467, 1500, 1528, 1530.) By the end of December, the Complainant was hoping to get it installed by "the end of February 2009," however.¹⁴ (RX 130, p. 1235.)

While waiting for that to happen, the Complainant switched back to seeking a potential location for his brine concentration tests. On December 16, 2008, he wrote a work order asking Maintenance to crawl out onto the roof of the furnace building to "quantify how much waste heat [wa]s exiting" an upper window. (RX 140, p. 1523.) The Complainant was interested in harnessing that heat to drive the evaporation of brine in swamp coolers during the winter months. (*Id.*; RX 165, p. 2422.) This work order was cancelled because though maintenance technicians could get up there, the effort and risk involved, even on a "no-ice day," was considered unreasonable. (RX 140, p. 1523; HT, p. 1433.)

The Complainant had not put all of his eggs in the swamp cooler basket: on December 16, 2008, he submitted a different work order, this one to test the possibility of concentrating the brine by mixing it with commercial ice melt products. (RX 140, pp. 1458-59.) The Complainant sought the Safety Department's approval to "mix ice melt in 55 to 2,000+ gallon batches," and requested that someone from Safety work with him to develop his testing procedure. (*Id.* at 1458.) Given that his plan called for transporting large volumes of water by forklift and exothermic chemical reactions, this was probably a wise request. (*Id.* at 1459; HT, p. 1221 (according to the Complainant, mixing the brine would raise the temperature of the liquid to 140 degrees Fahrenheit).) The Safety Department's response is not clear from the record.

¹² Though supposedly the Safety Department and the Complainant had reached an understanding back in October of 2008 that brine concentration should not be tested in the cool down area, neither mentioned this previous discussion in their December emails about the new test plan. (HT, pp. 713-14; RX 88, pp. 619-20; RX 124, p. 1162.)

¹³ The Complainant was even referred to another engineer who had recently implemented a test plan in the cool down area, whose work order the Complainant could potentially use as a model for what his needed to include. (RX 88, p. 619.)

¹⁴ This installation would be further delayed later, many times. (*E.g.*, RX 130, pp. 1241 (on April 28, 2009, "preparatory work" for this same installation was still in the planning stage, and the installation itself was tentatively scheduled for "the week of May 11th"), 1244 (by June 10, 2009, after further delays, 90% of the piping was complete), 1246 (still troubleshooting the installation on July 7, 2009), 1253 (Maintenance was still working on this same bed installation on September 21, 2009, when it was completed fully is not totally clear from the record).)

On December 31, 2008, the Complainant summed up the performance of EG&G's water treatment system during 2008. (RX 130, p. 1234.) Over that year, 33,000,000 gallons of water had been processed by the system and 118,000 pounds of calcium and magnesium carbonate were removed. (*Id.*) Though that water on average contained over 400 ppm of hard minerals when it entered processing, the water that passed through to TOCDF's systems that year contained only 9 ppm, despite 13 confirmed incidents where hardness spiked to over 30 ppm. (*Id.*) In 2008, TOCDF reportedly spent \$128,000.00 shipping loads of waste brine to a disposal facility, but after the Complainant's brine reuse plan started, 49 loads were instead sent for use on the County's roads, for a savings of \$47,000.00 on disposal costs. (*Id.*)

Brine Mixing Meeting: January 6, 2009

The Complainant's first project in the new year was organizing a cross-departmental meeting about his brine-reuse project. (CX 11, p. 1.) The objective was to define procedures for concentrating brine by mixing in dry chemicals and then applying the concentrated product to roads. (*Id.*) The Complainant wanted to get the process up and running as soon as possible. (Cf. RX 140, p. 1458.)

This meeting took place in the Safety Department office on January 6, 2009. (HT, p. 1213.) The Complainant and his supervisor, Mr. Hunter, attended,¹⁵ as did five safety and environmental employees: Darin Buys, an environmental engineer; Chris VanDall, a safety training officer; Ryan Taylor, the Work Control Supervisor; Kyle Russell, the Hazardous Waste Supervisor; and Sean McClatchey, the Hazardous Waste Manager.¹⁶ (*Id.*; RX 124, p. 1138.) Each of the attendees received tasks to complete after the meeting, mostly research on labeling requirements, safety procedures, and available equipment. (RX 124, p. 1138.) In addition, Mr. Buys and the Complainant were going to contact the County and DCD about their need for the brine and how it could be delivered. (*Id.*) However, it was Mr. VanDall who reportedly volunteered for the biggest assignment: locating an excess 500 gallon tank and beginning a test of the mixing procedures at a location on Stark Road. (*Id.*) According to the Complainant's hearing testimony, this could happen right away, as the group had discussed the procedural requirements for such a test and had decided it was acceptable to write a work order rather than drafting a full test plan and getting formal authorization.¹⁷ (HT, pp. 1203, 1213-15.)

¹⁵ Though the Complainant testified at the hearing that Mr. Hunter was at this meeting, the original invitation said Mr. Hunter's attendance was optional, and he was not included in email of the meeting minutes as one of the people who had met. (See HT, p. 1213; *but see* CX 11, p. 1; RX 124, p. 1138.) He was carbon copied on the email, however, so he presumably had at least some awareness of the event. (See RX 124, p. 1138.)

¹⁶ The two representatives from the Maintenance Department the Complainant had invited, John Skinner and Leon McKenzie, did not attend. (CX 11, p. 1.)

¹⁷ When pressed about whether Mr. Taylor, EG&G's Work Control Supervisor, had agreed that this was appropriate, the Complainant backpedaled somewhat, testifying that Mr. Taylor had not exactly authorized it, that the group had had "just a discussion to see which route we ought to go... I thought there was an agreement that we could just use a work order to mix." (HT, pp. 1203, 1213-15.) Or at least, that no one at the meeting had objected to that plan. (*Id.* at 1227.) It should also be noted though that in the email of the meeting minutes sent January 6, 2009, the Complainant himself said that he would be meeting with DCD to "develop a test plan" for the project. (RX 124, p. 1138.)

The day after the meeting, January 7, 2009, the Complainant sent an email, mostly to the meeting participants, to confirm that neither the water softener effluent nor the ice melt he planned to mix it with needed to be interferent tested.¹⁸ (RX 124, p. 1137.) Mr. Taylor quickly clarified that the Complainant could skip that process only if the ice melt was already a substance approved for use on the base; all new substances needed to pass through the regular testing procedures. (*Id.*) Thomas Hall, an industrial hygienist included on the email, added that for the concentrated brine to be given to anyone other than DCD, i.e., anyone outside of the base, federal regulations required them to provide formal data about its exact chemical composition. (*Id.* at 1148.) Also, even if the brine were given away, EG&G would assume liability by providing it to an outside group, and, thus, they should make sure EG&G was properly insured for that risk before proceeding. (*Id.*)

The final result of the brine meeting was that a further meeting was planned between the Complainant and representatives from DCD about how to coordinate use of the brine with regular snow removal work on the base.¹⁹ (RX 124, p. 1138; RX 130, p. 1235.)

Both High and Low Water Pressure Issues Crop Up: January 8–15, 2009

On January 8, 2009, the water pressure in the treatment system spiked again, twice. (RX 165, p. 2409.) The Complainant wrote a work order right away asking Maintenance to get him the plot of the system's discharge pressures since May 2008, as he needed to "show this to management." (*Id.*) By that afternoon, the Complainant had spoken with Tim Nielsen, his manager, about water pressure in the system, though apparently this conversation focused on issues with low water pressure. (RX 159, p. 2301.) The Complainant assured Mr. Nielsen that the issue was caused by a pressure regulator that needed to be replaced. (*Id.*) Mr. Nielsen was persuaded to speed up work to replace that valve, but he was also considering installing portable eyewashes if that fix did not work. (*Id.*)

Mr. Nielsen was skeptical of the Complainant's recommendations because he felt that the Complainant was not giving him straight answers, saying different things at different points in the discussion. (RX 159, p. 2301.) He counseled the Complainant that he needed "to put more effort into making sure the information is correct when it is communicated" and emphasized the utility of "correct simple answers" to management requests. (*Id.*) The Complainant reportedly agreed with Mr. Nielsen's criticisms and their meeting ended on good terms. (*Id.*)

A week later, on January 15, 2009, the Complainant wrote two work orders, one to address the water system's low pressure and the other its high pressure. (RX 165, pp. 2439-42.) In the first work order, the problem was presented as, "when the process tank is filling ... the line pressure to showers and eyewashes goes below target." (*Id.* at 2439.) The Complainant thought this was due to leaking valves, so he asked for new valves to be put in.²⁰ (*Id.*) In the second work order, the Complainant identified the failure of two ports for silt removal as the problem with the

¹⁸ Due to the risks of working with chemical weapons, virtually all chemicals brought into TOCDF had to be tested first to make sure that they did not interfere with the plant's systems for detecting dangerous contamination. (*See* HT, p. 1420; RX 124, p. 1137.)

¹⁹ I can find nothing more in the record about this meeting or whether it occurred.

²⁰ In a note the Complainant added to this work order on May 1, 2009, it turned out that the pressure reducing valves were not necessary after all. (RX 165, p. 2440.)

water line. (*Id.* at 2441.) He blamed DCD for not maintaining the line properly, which he claimed had resulted in at least “two pressure spikes exceeding 150 psi.” (*Id.*) These high pressures exceeded the softener’s rating and, in the Complainant’s “best engineering judgment,” had destroyed the lateral piping in the beds by creating a “water hammer” phenomenon. (*Id.*) He also believed that the lack of maintenance had resulted in “excessive silt buildup in the softener beds.” (*Id.*) The Complainant recommended that DCD make a number of alterations to their valves to protect the system from further buildup and hammering.²¹ (*Id.*)

Heated Argument about Water System: January 28, 2009

With all of this focus on water pressure and brine creation, however, the upgrade of the water treatment system languished.²² On January 28, 2009, the Complainant, Mr. Hunter, and Mr. Nielsen were called to a meeting with Mr. Skinner and Mr. McKenzie, a manager and supervisor in the Maintenance Department, as well as Mr. James Brewer, the Assistant Operations Manager, to discuss the status of the project.²³ (RX 130, p. 1236; HT, pp. 136, 1627.) It turned out that Maintenance was “not pleased at all” with the lack of progress repairing the water softeners. (HT, p. 178.) Mr. Skinner was “particularly upset that his [staff] were doing work that he didn’t perceive [to be] under a configuration management control.” (*Id.* at 136.) From his perspective, there was a lack of organization, control, and documentation of the upgrades, contributing to the unacceptably slow progress. (*Id.* at 178-79.) Mr. Hunter said Mr. Skinner and Mr. McKenzie were “very disgruntled” and thought that it had been unwise to incorporate this second-hand treatment bed to begin with, rather than buying a new system and hooking it up. (*Id.* at 179, 1374-75.)

The meeting became tense, as the Engineering Department countered that actually the problem lay with the Maintenance Department not performing the repairs the Complainant had requested. (HT, p. 2011.) In response, the maintenance men voiced pointed criticism of the Complainant’s work orders,²⁴ saying that they were of poor quality, hard to understand, and asked for unreasonable things. (*See id.* at 2010-11.) Mr. Nielsen rose to the Complainant’s defense, charging that Maintenance did not have the “luxury to choose whether they wanted to work on [the Complainant’s] work orders,” that it was their job to complete them anyway. (*Id.* at 2012.) Both sides became upset and started yelling at each other, until Jeffrey Hunt, the Operations Manager, intervened and calmed the meeting down. (*Id.*) Though the confrontation came to an end, it is not clear that anything had been resolved.

²¹ According to a note Mr. Nielsen added to this work order on December 7, 2009, the results of the ensuing investigation of the system did not bear out the Complainant’s recommendations. (RX 165, p. 2442.) An engineer who reviewed the work order six-months later, on May 3, 2010, was even blunter, stating that none of the Complainant’s proposed modifications were necessary and would have been “a waste of time, money and resources.” (*Id.*)

²² I could find no reference to work on the water treatment system upgrades between January 1, 2009, and January 28, 2009. (*See* RX 130, p. 1234 (last entry was December 31, 2008, where considering sources for PVC pipes).)

²³ The record made it difficult to pin down specifics about this meeting, and I have had to assume that several vague accounts refer to the same event. (*See* RX 130, p. 1236; HT, pp. 136, 178-79, 1627-28, 2010-13.)

²⁴ Mr. Nielsen testified that the criticism was not “personal,” only to do with the Complainant’s work product. (HT, p. 2012.)

Confusion over Interferent Testing: January 29–February 4, 2009

The next day, January 29, 2009, the email chain about brine mixing that had paused January 7, 2009, (when Mr. Taylor, a safety supervisor, told the Complainant he needed to get the ice melt interferent tested) sprang back to life. (RX 124, pp. 1136-37.) Mr. Russell, Hazardous Waste Supervisor, had apparently contacted the Complainant to find out if that testing was complete so he could resume spraying test applications of the brine on the base's roads. (*Id.* at 1136.) Mr. Hall, the industrial hygienist, reiterated that until testing showed there were no issues with the chemical, spraying needed to halt. (*Id.* at 1137.) The Complainant, however, had interpreted Mr. Taylor's January 7, 2009, email as an authorization to spray and took Mr. Hall's current caution as applying only to spraying within TOCDF's portion of the base; that spraying outside those confines was fine. (*Id.* at 1136.) It was from that perspective, on January 29, 2009, that the Complainant emailed Branden Wilson, the Deputy Safety Director, who supervised both Mr. Taylor and Mr. Hall, to clarify that it was ok to continue spraying. (*Id.*) Mr. Wilson, though, could not afford the time to untangle this mess of emails and told the Complainant flatly that he trusted Mr. Taylor and Mr. Hall to sort this out and that he, himself, should not be dragged into the discussion unless necessary. (*Id.* at 1137.)

The Complainant then called Mr. Hall to discuss the situation, following that with an email to confirm his understanding of the call: that he was authorized to continue applying the brine around Stark Road. (RX 89, p. 622.) Mr. Hall replied that he had no problem with that personally, but that he did not have the authority to grant the Complainant authorization himself. (*Id.* at 621-22.) If the ice melt had not yet been interferent tested, as Mr. Hall inferred it had not been, Mr. Hall was adamant that the Complainant should not apply any more to any part of the base until either the testing was complete or he got permission from the Plant Operating Readiness Committee to waive the testing requirement. (*Id.* at 622.) The Complainant's reply was that his understanding of the limits on application was different than Mr. Hall's; the Complainant insisted that while he needed to stop applying brine to the TOCDF parking lot, there were no restrictions for the Stark Road site. (*Id.* at 621.) He also urged Mr. Hall to get back to him about forms for interferent testing that he had requested a few days previously. (*Id.*) Mr. Hall shot back that he could not see where the previous discussions had given the Complainant any reason to draw distinctions between different areas of the base. (*Id.*) He reminded the Complainant too, that he had responded to the Complainant's paperwork days ago, informing the Complainant that his interferent forms could not "be generalized" and needed to include more detail before they could be processed. (*Id.*) He pointed out that the Complainant needed to say exactly which substances he would be using, rather than vaguely planning to test "a working range of 3%-40%" concentration. (*Id.*)

The next message in the e-mail thread came from Mr. Taylor himself, and his frustration was palpable. (RX 90, p. 623.) He told the Complainant that "[t]his game of tag is getting old. You are again taking different conversations out of context and using them to your benefit to try and bypass our systems." (*Id.*) Mr. Taylor pointed out that the Complainant already had specific instructions for what he needed to do, as well as emails from Mr. Taylor, Mr. Hall, and Mr. Hunt, saying that interferent testing was necessary. (*Id.*) Mr. Taylor stated that the Complainant had "now wasted much more time trying to get around the required testing and approval process, than it would have taken to do it right the first time." (*Id.*) In his opinion, the Complainant

needed to follow the directions he had been given and stop involving others in hopes of getting a different opinion. (*Id.*)

A few hours later, the Complainant sent Mr. Hall, Mr. Taylor, and Mr. Jensen, another safety supervisor, his updated forms for interferent testing. (RX 91, p. 625.) The next morning, January 30, 2009, Mr. Jensen promised to deliver the paperwork to the appropriate recipient and declared it no longer necessary to meet with the Complainant to work out the situation. (*Id.*) In a final email, the Complainant was quite apologetic, asking if he could still speak with Mr. Taylor and Mr. Jensen since he had gotten “off on the wrong foot with you guys on my activities in the water shed and these salt water initiatives (which is unfortunate).” (*Id.*) The Complainant expressed a belief that they were all “reasonable men” and a wish that his supervisor, Mr. Hunter, could have been there to mediate since he was “much more even keeled” than the Complainant. (*Id.*)

In his activity notes for January 30, 2009, the Complainant said that samples of “solid flake calcium chloride, solid sodium chloride, dilute [water softener] effluent, and concentrated [water softener] effluent” were all submitted for interferent testing and that he would not spray any more brine until authorized. (RX 130, p. 1237.) The testing took less than a week to do, and on February 4, 2009, the Complainant wrote in his activity log that he would be “expediting routing the form to resume spraying ... the roads” with DCD’s assistance. (*Id.*; RX 165, p. 2631.)

Water System Progress and Supervision Changes: February 2009

Despite this drama, the Complainant had been making some progress with the water treatment system upgrade. (See RX 159, p. 2303.) When he met with Mr. Nielsen on February 11, 2009, the Complainant reported that one side of the system was “currently working well.” (*Id.*) A second meeting between the two happened on February 13, 2009, and also involved Phillip Watts, an electrical engineer Mr. Nielsen had assigned to help the Complainant overhaul the dated controllers on the treatment system. (*Id.* at 2304; HT, pp. 1964-65.) Mr. Nielsen left this second meeting optimistic that things were “back on track.” (RX 159, p. 2304.)

The Complainant had these meetings with Mr. Nielsen, his manager, rather than his direct supervisor, likely at least partly because sometime in February 2009, his previous supervisor, Mr. Hunter, was reassigned.²⁵ The new supervisor in Utility Engineering was James Johnston, an electrical engineer. (HT, p. 464.)

²⁵ Neither Mr. Hunter nor Mr. Johnston could provide more than the vaguest estimate of when this transition occurred. (E.g., HT, pp. 124 (Mr. Hunter was reassigned in April of 2008, but thought he did not change jobs until about nine months later), 126 (possibly switched in January of 2009), 192 (Mr. Hunter was no longer the Complainant’s supervisor by February 19, 2009), 197 (Mr. Johnston said he started sometime in the spring of 2008, but meant spring of 2009), 202 (Mr. Hunter was the supervisor still in January of 2009), 465 (Mr. Johnston thought he supervised the Complainant for about a year and the Complainant was discharged in January of 2010).) Based on when each was mentioned in records or included on email chains, however, my best estimate is that this changeover occurred within the first two weeks of February 2009. (See RX 91, p. 625 (Mr. Hunter is still carbon-copied on the Complainant’s email January 29, 2009); HT, pp. 192, 1208 (Mr. Johnston was the Complainant’s supervisor by February 19, 2009, when the forklift incident occurred).)

The Forklift Incident: February 19, 2009

The Complainant apparently got authorization to resume applying his brine to the depot roads by mid-February 2009. (RX 130, p. 1237.) Eager to begin mixing concentrated brine, the Complainant planned to install an 1,800 gallon tank and rush ordered a truckload of “dry prill calcium chloride” to use in it. (*Id.* at 1237-38.) Delivery was scheduled for the week of February 16, 2009. (*Id.* at 1238.) However, when the Complainant called the TOCDF warehouse a week before the delivery to ask where he could unload the salt, he was told there was no room there. (HT, pp. 1064, 1206.) As a result, the Complainant called various people at DCD, trying to locate available storage space with a roof. (*Id.* at 1206-07; RX 103, pp. 743, 746.) Eventually he located a little-used building by one of the sewage treatment systems and confirmed over email with DCD staff that he could store his salt and tanks there. (HT, pp. 1206-07; RX 103, p. 743.)

Also in anticipation of the salt delivery, the Complainant called Mr. Wilson, EG&G’s Deputy Safety Director, for “safety approval for mixing a chemical with [the] effluent.” (RX 92, p. 627.) Mr. Wilson’s response was “of course not,” and he reminded the Complainant that he “needed to follow our established processes for receiving chemicals and performing work.” (*Id.*) The Complainant said that he would submit a work request for the project and that he planned to start mixing the next week, once his chemicals arrived. (*Id.*) At the end of this short conversation, Mr. Wilson sent an email to his employees Ryan Taylor, Mike Jensen, and Thomas Hall, alerting them to the Complainant’s plans. (*Id.*) According to Mr. Wilson, by February of 2009, his staff had become “very cautious in all their interactions with” the Complainant. (HT, p. 693.) He wanted to notify the primary safety supervisors about his conversation with the Complainant to head off the Complainant “trying to work around them” or “trying to get verbal communication from a safety employee to justify some of his behavior.” (*Id.* at 692.) Above all, Mr. Wilson did not want anything he had said to the Complainant to lead the Complainant to believe that he had been authorized to do something he had actually been told not to do. (*Id.* at 693.)

On February 18, 2009, 40,000 pounds of calcium chloride prill was delivered to TOCDF on a flatbed truck. (RX 130, p. 1238; RX 103, p. 743.) The Complainant had arranged to use a DCD forklift and workers to unload the salt at the building he had procured access to. (RX 103, p. 743.) To get from the truck to the storage space though, the forklift needed to go up a ramp. (*See id.* at 731.) The Complainant was concerned the ramp might not support the weight, and the group decided to test it by driving the unloaded forklift up first. (*Id.*; HT, pp. 1207, 1918.) The ramp proved to be hollow and the forklift broke through its surface. (HT, p. 1207; RX 103, p. 731.) Workers tried to shift it free and a larger forklift was summoned to assist, but before it could arrive, someone released the parking brake on the trapped forklift, causing it to fall further and tip over onto its side. (HT, p. 1207; RX 103, p. 731.) When the second forklift arrived, the Complainant claims that he tried to get the workers to stop and get better equipment and documentation before trying to move anything, and that he called his new supervisor, Mr. Johnston, with these concerns. (HT, pp. 1064-65, 1207.) Then, feeling he could not do anything to fix DCD’s damaged equipment, the Complainant and the truck driver left the scene to take the load of salt elsewhere. (*Id.* at 1064, 1918; RX 103, p. 744.) No one had been injured, but the property damage triggered a root cause investigation into what had gone wrong. (HT, p. 1064; RX 103, pp. 731, 739.)

Swamp Cooler Concept Expands to the Sewage Treatment Pond: February 2009

The Complainant also found time in February of 2009, to launch a new plan for using swamp coolers at TOCDF. It started with a work order the Complainant wrote about concentrating water treatment system brine in swamp coolers. (RX 165, pp. 2445-46.) In that order, he compared the relative costs and efficiencies of different evaporation technologies, arguing that for just \$16,000.00, 20 plastic swamp coolers could be purchased, 6 of which, at most, were needed produce the brine he wanted. (*Id.*) The Complainant planned to use the other 14 around the sewage treatment pond. (*Id.*) At the time, a repurposed snow-making machine, the “Polecat blower,”²⁶ was being used to spray water from the final settling pond up into the air to speed evaporation. (HT, pp. 1564-65, 2008.) Since the sewage treatment system was not set up to discharge any water, this evaporation allowed EG&G to maintain manageable water levels in the pond. (*Id.*) The Complainant, though, was concerned that atomizing the waste water posed a potential pathogen risk to people and the environment in the area. (RX 165, pp. 2445-46.) He believed that using the swamp coolers to passively evaporate the excess water would be more hygienic. (*Id.*) In his theory, concentrating the salts from the pond in this way would also remove “sludge buildup” that he thought was harmful to the system and would produce another type of concentrated salty brine to use on roads. (*Id.*)

By February 22, 2009, despite Mr. Nielsen having questions about the project,²⁷ the Complainant began to explore potential modifications to the sewage treatment pond more actively, asking the EG&G lab to test the pond water to establish its baseline qualities. (RX 165, p. 2447; RX 130, p. 1238.) He also reached out to other chemical demilitarization plants for advice and began contacting vendors of “biological bugs” used to regulate sewage breakdown in this type of treatment system. (RX 130, p. 1238.)

Side Project Progress: March 2009

From the available record, the Complainant seems to have spent most of March 2009, working on his various side projects involving swamp coolers and brine. His activity in March was as follows:

On March 4, 2009, the Complainant was touring the roads being considered for brine application at TOCDF when he backed the Engineering van into a sign, scratching it. (RX 159, p. 2305; RX 123, p. 1121.) Extensive paperwork had to be filled out as a result. (RX 123, p. 1121.)

On March 5, 2009, the Complainant wrote a work order requesting support for his brine mixing efforts. (RX 165, p. 2631.) He wanted to develop a “correct recipe” and written procedure for making ice melt brine and needed help moving his equipment and supplies to Stark Road where he planned to conduct testing. (*Id.*) This order also included instructions for how maintenance workers should mix the brine. (*Id.*) The Complainant wanted them to fill open-topped plastic drums or tanks with water from the water softeners, lift those containers with a forklift, and transport them to Stark Road. (*Id.*) The Complainant then directed Maintenance to

²⁶ Many different terms were used to refer to this equipment, including “evaporator,” “sprayer,” and “snow blower.” (*E.g.*, HT, pp. 219, 371, 481, 1543.)

²⁷ In fact, the work order the Complainant wrote was never approved and was instead cancelled at some point. (RX 165, p. 2445.)

add calcium chloride to each container until it reached “100% saturation,” which he said would be at “between 26% and 32%” calcium chloride by weight. (*Id.*) Finally, he warned that the exothermic reaction of the chemical with water would cause the mixture to “heat up a little.” (*Id.*)

The same day, the Complainant also created new parts numbers for the PVC piping and fittings for the water treatment system upgrade. (RX 130, p. 1238.) This, and an update to the operation procedure when only one resin bed was working, are the only evidence that the Complainant worked on the water treatment upgrade project in the month of March. (*Id.* at 1238-39.)

The water treatment system brine project was another matter. On March 10, 2009, the Complainant got authorization to apply the brine to dirt roads to control dust and “firm up the road base,” as well as to protect against ice. (RX 130, p. 1238.) By March 19, 2009, two loads of non-concentrated water treatment brine had been applied to DCD roads for dust control, with “good results,” despite its efficacy against ice still being “inconclusive.” (*Id.* at 1239.)

The Complainant also made progress on his plan to modify the sewage treatment ponds. On March 19, 2009, he got the Monitoring Department to come out and sample the water in the ponds, with results expected within a month. (RX 130, p. 1239.)

On March 23, 2009, the Complainant organized a “walk down” of the sewage ponds, where he could explain to the Environmental Department the problems he had with the sewage treatment system and how those issues might be addressed. (RX 130, p. 1239; CX 13, p. 1.) Sheila Vance, Janet Weyland, and Darin Buys attended, as did the Complainant’s supervisors, Timothy Nielsen and James Johnston, and possibly Patrick McClatchey, Kyle Russell, and representatives from DCD. (CX 13, p. 1; HT, pp. 741, 2009.) At this meeting, the Complainant presented a laundry list of complaints about both the ponds and brine application, including: that the current valve configuration of the ponds did not match the configuration shown in the manual; the results of pH, salinity, and fecal coliform testing were “potential problems”²⁸ that needed to be monitored weekly, or at least monthly, and reported to state agencies; non-concentrated brine would not work against ice and spraying it on dirt roads during rainy season was “environmentally flawed;” the sand filter should be taken out of commission because waste water leaked into it and caused an “unsanitary condition;” discharge into the ponds from the DCD laundry made it an industrial system that required more precautions; training for workers was inadequate; and running the Polecat blower with only spot checks on water quality and no chlorination was “risky” and not allowed by state guidelines.²⁹ (CX 15, p. 1; HT, pp. 722, 724.) The Complainant also wanted to start concentrating the brine from some of DCD’s water softeners. (CX 15, p. 1; HT, p. 863.) He saw all of these projects as part of the environmental management system initiative that he had been “chartered” to do. (HT, p. 2009.) Unless EG&G corrected the many problems the Complainant identified, he thought that EG&G should “give the

²⁸ Since Monitoring had not returned any sampling results yet, it is not clear what basis the Complainant had for suspecting problems. (See RX 130, p. 1239; CX 15, p. 1.) In fact, the only evidence of water quality problems in the sewage treatment ponds the Complainant ever cited, were two excess coliform levels from testing several years before, on July 27, 2005, and August 31, 2006. (RX 110, p. 1071.)

²⁹ These are simply the conditions the Complainant identified as issues. I am not taking any position on whether his perception was accurate.

ponds back to DCD,” to protect EG&G’s own record of compliance with environmental rules. (CX 15, p. 1; HT, p. 2173.)

The people at the meeting were actually quite receptive of the Complainant’s plans, with one exception. The managers in attendance authorized the Complainant to talk to DCD about recovering brine from its water softeners, to purchase new biological bugs and testing equipment for the treatment ponds, and to set up regular monitoring of that system. (HT, pp. 863-65.) The Complainant was also cleared to discuss the pond valves and sand filter configuration with Maintenance to see if there were issues. (*See id.* at 742, 744, 865.) The only project the Complainant was definitely told he could not pursue was purchasing plastic swamp coolers. (*Id.* at 769-70, 865, 2171-73.) Mr. Nielsen told the Complainant that the “last thing we want to do is use evaporators,” as there was not enough data to justify such a major purchase, but that the Complainant could look into the supposed problem and consider other options. (*Id.* at 742, 770, 2173.)

On March 27, 2009, the Complainant finished work on his projects for the month by writing a new minor work order “to tell the control room that they have a problem with the eye wash pressure.” (RX 165, p. 2651.) The Complainant wanted an alarm setting changed to alert staff to “a major water line break that could [a]ffect fire water,” since there needed to be a minimum of 60 psi in the system to effectively fire fight. (*Id.*) No meaningful further explanation was provided. (*See id.*)

Results of Investigation of Forklift Incident: March 25–31, 2009

After a month of investigation, on March 25, 2009, the Departmental Corrective Action Review Board published their findings about the root causes of the forklift incident. (RX 103, p. 739.) The goal was not to assign blame, but to examine the factors leading to the accident to improve procedures and avoid similar mishaps in the future. (HT, p. 1919.) The Committee found that the root cause of the incident was that the suitability of that building as a spot for a forklift to unload large sacks of salt, had not been considered enough ahead of time. (RX 103, pp. 745-46.) This was at least partially attributable to the Complainant procuring access to the space through informal channels, by email and phone, rather than through the formal property management procedures. (*Id.* at 745-47.) Also, because there were no formal work control documents in place for the project, the normal safety reviews where an issue like this might have been spotted had been skipped. (*Id.*) The corrective actions the Committee recommended included clarifying the procedure for using real property on the base and adding a formal step where a building would be evaluated before changing its intended use. (*Id.* at 746; RX 159, p. 2306.) They also wanted all work on the water treatment system brine mixing operations to stop and not continue until “approved work control documents” were implemented. (RX 103, p. 748.)

A meeting to discuss the Committee’s findings was held on March 31, 2009. (RX 159, p. 2306.) A group of primarily managers and other staff involved in the incident attended the review and verified its results. (HT, p. 1917.) Though both Mr. Nielsen and the Complainant were there, it was allegedly not until after the meeting was over that, out in the hall, the Complainant told Mr. Nielsen that the report was incorrect. (RX 159, p. 2306; HT, pp. 1919-20, 1965.) Mr. Nielsen could not remember what the Complainant thought the Committee had gotten

wrong, but he remembered feeling frustrated that the Complainant did not speak up and make that correction during the meeting. (HT, p. 1920.)

Struggle for Priorities: April 1–13, 2009

Shortly after the meeting about the forklift incident report, Mr. Nielsen and the Complainant had a one-on-one discussion about the Complainant's priorities. (HT, p. 741.) Mr. Nielsen wanted the Complainant to focus on the water treatment system upgrade. (*Id.*) He did not want the Complainant to keep bringing up new environmental projects, like the changes to the sewage treatment system and the swamp cooler initiatives that the Complainant had proposed at the March 23, 2009, meeting. (*See id.* at 718, 720, 741-42; CX 15, p. 1.) The Complainant told Mr. Nielsen that there was nothing else for him to do on the water treatment system, since he had written all the work orders necessary and there was nothing he could do to make Maintenance work on them any faster. (HT, pp. 741-42.) Mr. Nielsen encouraged the Complainant to fit the water treatment system in the field and get it running, one way or another. (*Id.* at 742.)

In the early part of April³⁰ 2009, the Complainant did get approval to buy PVC fittings for the water treatment system. (RX 130, p. 1240.) However, he also talked to the labs about starting monitoring of the sewage ponds and contacted facilities in other states about why they chlorinated their pond water before spraying it into the air to evaporate. (*Id.*; HT, pp. 742-43.)

Then, on April 7, 2009, the Complainant wrote a new work order for a "Lagoon Water Concentration Test," for "subscale testing of a 'concept' to concentrate large lagoon pond water and create a new product for TOCDF's use on the perimeter dirt roads," testing he said was approved by the Environmental Department. (RX 165, pp. 2656-57.) According to his plan, this concentration would remove salt from the ponds, improve the water quality, and produce a "cleaner air stream (minimizing the discharge ... toward public areas from the [Polecat] blower)." (*Id.* at 2656.) Through this order, Maintenance was instructed to remove one of the swamp coolers from the cool down area (according to the note, staff were not planning to use the cooler), and take it and a large tank down to outside the doors of the sewage treatment building. (*Id.*) While sitting on the dirt outside, the cooler could be plugged into an outlet inside that building, and then filled with "pond water" via a submersible pump and garden hoses connected to a storage drum. (*Id.* at 2656-57.) The Complainant did tell Maintenance to add bleach to the water in the drum to "shock kill all the bacteria," though his recommended process was to gradually add rough amounts of bleach, mixing, and then to conduct an "official sniffer test." (*Id.* at 2657.) Over the course of the next week, maintenance workers were then to continue filling the cooler with water from the pond to replace the water that had evaporated, and to keep track of these changes in a written log. (*Id.*) The end result of this concentration test would ultimately be a sample of concentrated brine that could be sent to the Utah Department of Transportation. (*Id.*)

³⁰ The Complainant's note has this event listed as happening on March 7, 2009, but looked at in context, this appears to be a mistake. (RX 130, p. 1240.) The Complainant's entries on this project had already gone through all the March events in sequence on an earlier page (*see id.* at 1238-39), and then continued to read "March" on the this page, even though the days listed were for the beginning of a month (*see id.* at 1240), and the dates suddenly change to days in late April on the next page (*see id.* at 1241). Also, some of the other events listed as "March" on the same page, definitely did not occur until April of 2009. (*See id.* at 1240 (says brine concentration work order written by "March 9"); RX 165, p. 2656 (copy of the brine concentration work order submitted April 7).)

Despite the work order for the concentration test not listing any management approval or review, Mr. Nielsen became aware at least generally that the Complainant was still pursuing changes to the sewage treatment ponds. (See RX 165, pp. 2656-57; RX 159, p. 2307; RX 14, p. 127.) On April 7, 2009, Mr. Nielsen told Mr. Johnston, the Complainant's direct supervisor, that he was "somewhat concerned about [the Complainant's] plans" for the sewage treatment system. (RX 159, p. 2307.) Mr. Nielsen asked Mr. Johnston to "get in the middle of this and figure out fast what needs to be done and to make sure [the Complainant] has a good plan for what he is going to do." (*Id.*) He was worried about the Complainant starting new projects while the crucial water treatment upgrade was still not finished and he was also not convinced that the sewage ponds actually needed major changes. (*Id.*; RX 14, p. 127.) Mr. Johnston met with the Complainant the same day to discuss these issues and emphasized the need for the water treatment system to "take priority." (RX 159, p. 2307; RX 14, p. 127.)

On April 13, 2009, the Complainant wrote a work order to have the first bed in the water treatment system "field fit." (RX 165, p. 2661.) This involved directing maintenance workers to simply fit the new bed into the old system by using their "craftsmanship to incorporate suitable couplings/unions." (*Id.*) This was necessarily a very loose plan and the drawings would be updated later to reflect how things ended up. (*Id.* at 2662.)

Meeting with Mr. Nielsen about Sewage Treatment Projects: April 16, 2009

The Complainant's plans for the sewage treatment system, however, continued undeterred. On April 16, 2009, he met with Mr. Nielsen to follow up on the progress he had made since the March 23, 2009, meeting with the Environmental Department. (HT, pp. 740, 742, 868.) The Complainant had left the March meeting believing that Mr. Nielsen wanted him to look into alternatives to buying the swamp coolers. (*Id.* at 742, 770.) Now, a few weeks later, the Complainant told Mr. Nielsen that he had investigated triple effect evaporators, but that that equipment would not work well and would be extremely expensive. (*Id.* at 742, 872, 2173.) He also said that the swamp coolers, his preferred option, could achieve the necessary evaporation with even less energy use than the Polecat blower. (*Id.* at 742.) Mr. Nielsen agreed that triple effect evaporators were cost inhibitive and should not be pursued. (*Id.* at 872-73.)

The Complainant and Mr. Nielsen have different memories of Mr. Nielsen's response beyond that point. According to the Complainant, Mr. Nielsen told him not to "blow this issue out of proportion," since EG&G would only be running the ponds for two more years. (HT, p. 742.) The Complainant remembered Mr. Nielsen telling him to concentrate on the water treatment system and nothing else, as the sewage treatment ponds were working fine, making altering them "low, low, low on the stack of priorities." (*Id.* at 742, 873, 876, 2173.) But the Complainant did believe he was still allowed to continue investigating brine concentration methods. (*Id.* at 876.)

In Mr. Nielsen's memory of this meeting, he communicated very clearly that he did not want the Complainant using evaporators of any kind to produce brine from sewage treatment pond water. (RX 14, p. 127; RX 159, p. 2308; HT, p. 1967.) Mr. Nielsen wrote in his work diary the night of their meeting that he and the Complainant had "Explicitly discussed the fact that we do not want to pursue the use of evaporators." (RX 159, p. 2308.) He expressed concern that the Complainant was "all over the place with his projects." (*Id.*)

Mr. Nielsen continued to support the Complainant's other changes to the ponds though. (HT, p. 865.) At the April 16, 2009, meeting, he reiterated that the Complainant could write a work order to get the sand filter capped and sanitized, correct the pond valves, and monitor the chemical properties of the pond water monthly. (*Id.* at 742-44, 865.) After this encounter, he and the Complainant also wrote a joint letter to DCD about capturing DCD's water softener brine before it entered the ponds. (*Id.* at 744-45.) The only project he did not authorize, both the Complainant and Mr. Nielsen agree, was the concentration of pond water into brine. (*Id.* at 865.)

Rural Water Class: April 22, 2009

On April 22, 2009, the Complainant and Darin Buys, from EG&G's Environmental Department, attended a class put on by the Rural Water Association. (RX 130, p. 1241; HT, p. 2164.) Two DCD employees, Don Anderson and Gary Hunter, also went. (HT, p. 2164.) The class was taught by Paul Croft, a representative of the Utah Department of Water Quality, and focused on sewer cleaning and water reuse permits. (RX 130, p. 1241; HT, p. 2164.)

During class, the Complainant was given some "literature from the State of Utah" and Army regulations that he thought EG&G's Polecat blower did not comply with, since he believed atomizing the waste water could spread pathogens. (HT, p. 2163; RX 165, pp. 2445-46.) Concerned, the Complainant asked Mr. Croft, in front of the whole class, whether using a Polecat blower in the way EG&G did was ok or if Utah required the water to be chlorinated to kill any germs first, as some other states did. (HT, p. 2164.) Mr. Croft said he did not know. (*Id.*)

The Complainant then asked about what he should be doing generally to run his sewage system well. (*Id.* at 726-27.) According to the Complainant, Mr. Croft recommended that, to "run your sewage lagoons in an environmentally friendly fiduciary way," the water quality should be tested at least monthly. (*Id.* at 728.) This was not required, it was just "recommended." (*Id.* at 729.) Since the Complainant indicated there was salt build-up in his lagoons, Mr. Croft suggested dipping the ponds to find out how much had accumulated at the bottom as well. (*Id.* at 728.)

Finally, when Mr. Croft mentioned that no one from the State had ever inspected any of the TOCDF lagoons, the Complainant invited him to "come visit the facility when he got a chance," as the Complainant wanted to make sure he was in "full compliance." (*Id.* at 2164.) Mr. Buys and the DCD staff taking the class overheard this invitation, and the Complainant said that he told Mr. Nielsen and Mr. Johnston about it on his return and that no one had any objection to it.³¹ (*Id.* at 2164-67.)

Flurry of Activity: April 23–May 6, 2009

After he returned from the Rural Water class, the Complainant attacked his many projects with renewed vigor. On April 23, 2009, the Complainant filled out forms for interferent testing of an enzyme for the sewage ponds and the disinfectant he had ordered for cleaning out the sand filter. (RX 124, p. 1131; RX 130, p. 1241.) He emailed these to Thomas Hall, the industrial hygienist, and explained that free vendor samples of the disinfectant, as both granules and

³¹ Though the Complainant did say that he was informed that the normal route for communicating with the State was to go through EG&G's Environmental Department, which would arrange it with the Field Office. (HT, pp. 2166-67.)

pellets, were being shipped to his house, but that he would bring them to the work storehouse the next week. (RX 124, p. 1131.) Mr. Hall told the Complainant to complete forms for both types of the disinfectant and the enzyme and that he could put the samples in the warehouse when they arrived, as long as they were properly labeled. (*Id.* at 1130.) He also cautioned the Complainant that if he had not followed EG&G's procurement procedures for "vendor supplied samples," he should talk to purchasing right away to get it straightened out. (*Id.*)

Meanwhile, the PVC parts the Complainant had ordered for the water treatment bed piping arrived. (RX 130, p. 1241.) On April 28, 2009, maintenance workers welded the replacement bed to the old system's frame. (*Id.*) "Preparatory work" was scheduled too, so installation of pipes could finally begin the week of May 11, 2009.³² (*Id.*)

Also on April 28, 2009, the Complainant submitted paperwork to have the sand filter in the sewage treatment system put into "Care-Taker status," sealed off, and sanitized. (RX 130, p. 1241.) He did more work on finding biological bugs to add to the sewage treatment ponds to better process the waste too. (*Id.*) The Complainant then emailed Mr. Hall again, to let him know that samples of bugs from two different companies would be delivered shortly to the Complainant's house, but that he would bring them into the warehouse for testing. (RX 93, p. 628.) Mr. Hall complained to a coworker that Mr. Jensen, his supervisor, had already told the Complainant over the phone that "he needed to have these samples delivered to [EG&G] Receiving, not to his house." (*Id.*)

On April 29, 2009, the Complainant submitted a request for a change to the piping specifications on the water treatment system. (RX 165, p. 2450.) Essentially he wanted permission to use any combination of PVC, galvanized iron, and ductile iron pipes that worked to install the new treatment beds, rather than only the types of pipe required by the formal Army guidelines. (*Id.*) This deviation was approved a week later, allowing field-fitting of the bed to be scheduled by Maintenance for May 11–14, 2009. (RX 130, p. 1242.)

The issue with water pressure that the Complainant had noticed earlier, continued to percolate, however. (*E.g.*, RX 165, pp. 2439, 2651.) On May 1, 2009, the Complainant noted that the eyewash stations were still not meeting the pressure expectations of the system design. (*Id.* at 2439.) Operations had worked on the problem though, and found that pressure reducing valves were not necessary. (*Id.* at 2440.)

On May 6, 2007, the Complainant took several EG&G employees on a tour of the sewage treatment lagoons to point out the changes he wanted to make to the sand filter and valves. (HT, pp. 755-56.) The Complainant had invited Mr. Johnston, his direct supervisor, to attend, but he did not. (*Id.* at 755.) During this tour, the Complainant also apparently showed his audience where he intended to set up a test of the swamp coolers' ability to concentrate brine. (*Id.*)

³² This was the same installation the Complainant had been planning in December of 2008, and had hoped to accomplish by the end of February 2009. (RX 130, p. 1235.)

Mr. Buys's Meeting about the Sewage Lagoons: May 7, 2009

Darin Buys, from Environmental, organized another group meeting to discuss the sewage lagoons on May 7, 2009. (CX 7, p. 1; HT, pp. 715-16.) Sheila Vance, the Environmental Manager, and Janet Weyland, the Permit Supervisor, came, as did the Complainant and both of his supervisors, Mr. Nielsen and Mr. Johnston. (CX 7, p. 1; HT, p. 715.) In essence, this was another chance to discuss the issues with the sewage treatment system that the Complainant had first raised at the meeting on March 23, 2009. (HT, pp. 774-75.) Though the Complainant's memory of this meeting in May is uncertain,³³ according to several contemporaneous notes by Mr. Nielsen, the focus of the meeting was to tell the Complainant that management did not want him to concentrate brine from the sewage lagoons with swamp coolers. (RX 14, p. 127; RX 159, p. 2309; RX 23, p. 181.) That was absolutely "the last thing" they wanted to do and the Complainant's purchase request for the coolers was denied. (RX 159, p. 2309; RX 23, p. 181; HT, p. 715.)

Polecat Blower Signage and Brine Work: May 7-20, 2009

The Complainant's work on the sewage treatment pond changes, other than those involving swamp coolers, continued apace, as did his work with the water treatment system brine.

On May 7, 2009, the Complainant submitted a work order for Maintenance to fabricate and install warning signs along the road past the sewage lagoons, warning drivers that they should roll up their car windows. (RX 21, pp. 176-77.) This was in case any of the wastewater the Polecat blower sprayed into the air went beyond the lagoon's containment area, since the Claimant was convinced that this spray posed a risk of transmitting pathogens. (*Id.*; RX 165, pp. 2445-46.)

The next day, May 8, 2009, the Complainant followed up with Mr. Hall and Mr. Jensen in industrial hygiene about getting the two strains of biological bugs interferent tested. (RX 94, p. 629.) The Complainant wanted to get both types cleared so that he could experiment and decide which worked better later, before ordering a full supply. (*Id.*) Mr. Jensen approved his forms, allowing the Complainant to turn in samples of the bugs for testing, but he warned the Complainant that until the bugs were approved, they needed to stay in the secure storage area. (*Id.*) The Complainant thanked Mr. Jensen for his help in correcting his procedural mistake on one set of the samples. (RX 124, p. 1134.)

³³ The Complainant testified that at this meeting, Mr. Nielsen at least definitely told him that "Using an evaporative swamp cooler [wa]s the last thing we want to do." (HT, pp. 715-16.) According to the Complainant, Mr. Buys also said he should not be concentrating the sewage lagoon brine. (*Id.* at 774.) Immediately after this testimony, the Complainant backtracked and said maybe Mr. Buys had just told him not to give brine to the Utah Department of Transportation. (*Id.*) Shortly after that, the Complainant again shifted his testimony and said he was not sure what Mr. Buys had said, that maybe it was that he should not give it to the State or that he should not buy the coolers or that he should not run concentration tests, *Id.* at 775., or maybe that the cooler test had been approved at the meeting. (*Id.* at 776.) The Complainant professed to have no idea, because the meeting was a long time ago. (*Id.*) Whatever Mr. Buys's message had been, the Complainant remembered thinking it was only an opinion and he would make the sample anyway. (*Id.* at 774-75.)

The Complainant spent much of the next week talking to different entities on the base. He met with the Environmental Department about the water quality test results from the sewage lagoons on May 11, 2009, and also with DCD about eliminating discharge of brine into the ponds while adding biological bugs. (RX 130, p. 1242.) In addition, the Complainant talked to the Waste Management Division about resuming delivery of non-concentrated brine from the water treatment system to the County for road repair work. (*Id.*) On May 14, 2009, the Complainant followed up with DCD about directing the effluent from their laundry system away from TOCDF's sewage ponds. (*Id.* at 1243.)

May 20, 2009, the Complainant got the results from the interferent testing of the sand filter disinfectants and both sets of biological bugs. (RX 130, p. 1243.) One of the forms of disinfectant had failed the analysis and needed to be presented to a committee for special approval before it could be used. (*Id.*)

Problems with Parts for the Water Treatment System: May 20–27, 2009

On May 20, 2009, the Complainant also delivered all the PVC parts needed for the water treatment system upgrade from the EG&G warehouse to the maintenance team who were field fitting the bed. (RX 130, p. 1243.) Unfortunately, when the Complainant ordered the parts, he had not considered the stack-up tolerances or the likely need to have extra parts on hand. (HT, pp. 912-14.) As the bed was field fitted, it was discovered that at least one set of flanges was not the right part and had to be exchanged for another type. (RX 130, p. 1243; RX 157, p. 2289; RX 14, p. 127.) This meant that the installation work was on hold until a replacement could be found. (RX 14, p. 127; RX 157, p. 2289 (maintenance worker “ran into trouble with fittings” on May 22, 2009, and was “[u]nable to work further” until the Complainant got new parts; the replacement flanges were not installed until June 21, 2009).)

When Mr. Nielsen found out on May 27, 2009, that the Complainant had ordered the wrong part, further delaying installation, he was frustrated. (RX 159, p. 2311.) He had been “under the impression that work was more or less complete” on the system upgrade and was displeased to discover that that was not even close to being the case. (*Id.*) There had already been “several issues” with the Complainant not coordinating work on the project well and with him irritating other departments. (*Id.*) Additionally, Mr. Nielsen felt that the Complainant's brine concentration “pet project” was a “constant distraction,” that the Complainant was spending much more time on instead of the water system repairs. (HT, p. 1971.) This, despite Mr. Nielsen telling the Complainant repeatedly that the water system should be his “number one priority” and that he should not pursue concentrating brine. (*Id.*) Since informal counseling had not been effective, Mr. Nielsen emailed Mr. Johnston to ask him when he planned to start the formal disciplinary process for the Complainant. (*Id.*; RX 159, p. 2311.)

The 50-Pound Sack of Peanuts: May 26–27, 2009

Perhaps adding to Mr. Nielsen's irritation was the fact that the day before, on May 26, 2009, he had discovered a 50-pound gunny sack of peanuts in the Complainant's office. (RX 14, p. 127; RX 159, p. 2310.) The office already had a rodent problem, so Mr. Nielsen told the Complainant that he needed to get rid of the bag before even more mice were attracted. (RX 20, p. 175; RX 14, p. 127; RX 159, p. 2310.) Instead, the Complainant moved the sack to another

area of the office, out of sight. (RX 14, p. 127.) When Mr. Nielsen found out, he told the Complainant that was unacceptable and had the Complainant remove the bag to his car under supervision. (*Id.*)

On May 27, 2009, the Complainant emailed Mr. Nielsen that the 50-pound bag of peanuts had been taken home and that he would take his bowl of peanuts home in the van pool that night. (RX 20, p. 175.) The Complainant added that, while it “might be difficult to gage,” he had been cleaning his office nearly every day since the last clean-up day. (*Id.*) Mr. Nielsen replied that he was not worried about the small bowl of peanuts; he knew the Complainant was “just trying to make our being here a little more pleasant.” (*Id.*) Perhaps Mr. Johnston had already talked to the Complainant about the possibility of formal discipline, because Mr. Nielsen also took the opportunity in this email to explain that he had not gone to Mr. Johnston about the nuts, but about the delays with the water treatment system upgrade. (*Id.*) He closed by saying that he was tired of being asked by other departments how much longer those upgrades were going to take; they needed to get done as soon as possible. (*Id.*)

Water, Brine, and Sewage: May 27–June 25, 2009

The Complainant’s own notes show that Maintenance was scheduled to complete the first bed replacement on the water treatment system that week. (RX 130, p. 1244.) So, despite Mr. Nielsen’s urging, the Complainant apparently mostly observed progress on his existing work orders for the water system, though he did write another such order on May 28, 2009, proposing tweaks to the controllers and flow rate. (RX 165, p. 2415; *see* RX 20, p. 175.) This order also described concerns about “periodic spikes” in pressure, which he thought were caused by a leak in the isolation valves. (RX 165, p. 2415.) Fixing the actual valves would risk a lengthy shutdown of the plant’s processing capacity, so the Complainant had identified some “missing safeguards” on the DCD side that he believed could be more easily corrected. (*Id.*)

The Complainant’s real focus was still on the sewage treatment system. He prepared purchase requests for the new biological bugs, scheduled regular monitoring of the pond water, and worked with Terry D. Thomas, EG&G’s Technical Services Manager, to draft a formal letter to DCD about the changes the Complainant wanted to make to the lagoon system. (RX 130, p. 1244.) This letter was sent on June 8, 2009, and warned DCD that recent analysis of the sewage treatment ponds had “revealed an excessive buildup of salts and incomplete waste digestion.” (RX 158, p. 2293.) EG&G assured DCD that a program of monthly sampling was underway to monitor the situation, but the letter requested DCD’s cooperation with several system alterations. (*Id.* at 2293-94.) First, EG&G wanted permission to install equipment to feed biological bugs into the supply lines on DCD’s property. (*Id.* at 2293.) These bugs would help clear the lines and break down waste in the lagoons more fully. (*Id.*) The letter also sought information about what chemicals DCD was currently feeding into the system and asked DCD to begin capturing the brine from its water softeners as well. (*Id.* at 2293-94.) The Complainant was the designated contact person for these projects. (*Id.* at 2294.)

While these plans for the sewage treatment ponds were maturing, maintenance workers had been making real progress on the upgraded pipes for the water treatment system. On June 9, 2009, the Complainant showed the workers where certain valves should go and wrote in his notes that he was pleased with the “professional job” that was being done, though he still thought

the workers could be more careful.³⁴ (RX 165, p. 2414.) By June 10, 2009, the Complainant said that 90% of the PVC piping on the replacement softener was done and completion of the upgrade was imminent. (RX 130, p. 1244.) Once the last parts were in place, pressure testing could be done and then new pea gravel, garnet, and resin loaded into the bed. (*Id.*) Instrument lines would still need to be installed and function tests run, but the project was getting somewhere. (*Id.*)

The sewage treatment system drew the Complainant's interest away, however. He spent June 12, 2009, updating the plans of the lagoons to show the valve orientation he believed was correct and marking the sand filter as out of service. (RX 130, p. 1245.) He was eager to drain the filter of sewage water and sanitize it, in conformance with his new drawings. (*Id.*) Brine delivery to the County road crews had also resumed. (*Id.*) Also, the letter to DCD led to meetings with their staff, starting June 16, 2009, to discuss the proposed modifications. (*Id.*) Old data on chemical purchases was being pulled in accordance with the Complainant's requests and the Complainant wrote that he was developing a "simple test plan" for DCD to prove the benefits of his proposal to capture the brine from DCD's water softeners. (*Id.*)

Flying under the radar over at Stark Road, the Complainant and Patrick McClatchy finally got a real batch of concentrated brine mixed.³⁵ (RX 140, p. 1537; RX 130, p. 1246; *see* RX 165, pp. 2631-33.) On June 23, 2009, they added prill calcium chloride to brine from the water treatment system until it was saturated. (RX 140, p. 1537; RX 130, pp. 1245-46.) This process was a first step towards developing an effective brine "recipe" that could be scaled up for use as a de-icing agent around the base. (RX 130, p. 1246.)

Meanwhile, the water treatment system was still making some progress. The replacement flange had finally arrived and was installed on June 21, 2009. (RX 157, p. 2289.) As of June 25, 2009, the first bed for the new hybrid treatment system was complete and scheduled for pressure testing that weekend. (RX 130, p. 1246.) If the results of the pressure test were acceptable, a one-week trial of the bed's functions would be run. (*Id.*) Moving on to replacing the second bed seemed within reach. (*See id.*)

Mr. Buys Objects to Sewage Lagoon Sampling: June 25–29, 2009

However, on June 25, 2009, the Complainant had also met with DCD about the sewage lagoons, requesting permission to conduct six months of sampling. (RX 130, p. 1246.) Word got back to Darin Buys in EG&G's Environmental Department that the Complainant had said the sampling was not just to monitor salt accumulation, but was a step towards his larger goal of getting rid of the pond's Polecat blower and replacing it with swamp coolers. (CX 16, p. 2.) After verifying this with the lab, on June 29, 2009, Mr. Buys emailed the Complainant, along

³⁴ For their part, the maintenance workers were frustrated with the glue the Complainant had provided them to put the pipes together with. (HT, p. 1420.) It apparently was not as strong as some other types and also took several hours to cure, which presumably did not help the speed of the installation. (*Id.*) The maintenance staff believed the Complainant chose to use that glue rather than one better suited to the task to avoid having to do interferent testing on a new substance. (*Id.* at 1420-21.)

³⁵ The work order for this test had been submitted March 5, 2009, but there is no sign that it was ever reviewed or authorized by anyone. (RX 165, pp. 2631-33.) The plan for mixing brine at Stark Road had been formed at the meeting way back on January 6, 2009. (CX 11, p. 1; RX 124, p. 1138; RX 140, p. 1458.) Though neither of the Complainant's supervisors (at the time, Mr. Nielsen and Mr. James Hunter) were at this meeting, both were copied on the emailed minutes which mentioned mixing brine at Stark Road. (RX 124, p. 1138.)

with both Environmental Managers and Mr. Nielsen, a reminder that his swamp cooler scheme had already been discussed at the group meeting May 7, 2009, and that management had decided it would not be pursued further. (*Id.*; see RX 14, p. 127; RX 23, p. 181.) Mr. Buys was blunt. He stated that further sampling to support the Complainant's swamp cooler idea was a "misuse of the lab's resources and [the Complainant's] time." (CX 16, p. 3.) Instead, any sampling should be focused on getting the lagoons running effectively. (*Id.*) Four minutes after this message was sent, Mr. Nielsen responded to the whole group to say that he enthusiastically concurred with Mr. Buys; no more resources should be expended trying to concentrate salt. (*Id.*; HT, p. 1593.)

These emails upset the Complainant greatly. (See CX 16, p. 1.) He forwarded them to Terry Thomas, who had oversight over the whole Engineering Department, including Mr. Nielsen. (*Id.*) The message the Complainant wrote Mr. Thomas read as follows:

I believe that I done a good to exceptional job on the water treatment and waste disposal issues for EG&G and the Army. However, it seems that every time I turn my head to address issues – someone pushes me off balance or lops a leg off my milking stool. Maybe I take things too seriously, but Darin Buys in Environmental is raising my blood pressure ... and making me look bad to my supervision. I ... feel that I am doing the right thing for EG&G, your Department, and the Army with my efforts. I also feel that I'm not being given suggestions ... or clear direction to manage my responsibilities & duties.

(*Id.*) The Complainant then asked Mr. Thomas to meet with him "to discuss my future with this company." (*Id.*) Mr. Thomas responded quickly that the Complainant should just let him know when he was available and they would "sit down and talk then." (*Id.*) Though Mr. Thomas briefly discussed the Complainant's request with Mr. Nielsen, who testified that he had no problem with the Complainant seeking Mr. Thomas's counsel, the Complainant never followed up on this offer to meet. (HT, pp. 1617-18.)

Discovery of the Third Swamp Cooler Concentration Test: June 28–30, 2009

Despite the increasingly forceful message from management to shut down his concentration project, unbeknownst to his supervisors, the Complainant had already kicked it into high gear.

Back in early April 2009, the Complainant had written a work order for "subscale testing of a 'concept' to concentrate the large lagoon pond water" into salt brine using swamp coolers. (RX 165, p. 2656.) This work order was not authorized by anyone, though on its face it claimed the project was "approved" by the Environmental Department and the Complainant felt it was part of the environmental management initiative he had been "chartered" to do. (*Id.*; HT, pp. 1395, 2009.) This was the same swamp cooler test the Complainant had outlined for some coworkers on his tour of the sewage lagoons, May 6, 2009, which his supervisor, Mr. Johnston, had opted not to join. (HT, p. 755.) In June 2009, the Complainant put his test into practice. (*Id.* at 756.)

On Sunday, June 28, 2009, the Complainant removed one of the swamp coolers from the cool down area with the assistance of Kyle Russell and Patrick McClatchy and had it trucked down to the sewage lagoons, right outside the sewage treatment building. (HT, pp. 714, 756-57.) The back door of this building was then propped open with a shovel and the cooler's power cord was run to a plug indoors. (*Id.* at 2157; RX 159, p. 2312.) Mr. McClatchy's technicians put a hose into the sewage lagoon and pumped its brine into a storage tank, from which the liquid was scooped into the swamp cooler with buckets. (HT, pp. 758, 1298, 2153.) Once inside the cooler, the brine evaporated, condensed, and recirculated, increasing in salt content each trip through. (*Id.* at 757.) This apparatus was run on Sunday and on Monday, June 29, 2009, and was turned off during the day, Tuesday, June 30, 2009.³⁶ (*Id.* at 758, 765.)

Meanwhile, Maintenance had noticed that one of their swamp coolers was missing from the cool down, a hazard for personnel in the area, given the temperature by the furnaces that summer. (RX 14, p. 127; HT, pp. 1387, 1974.) Mace McKinney, the Assistant Maintenance Manager, questioned his staff, but it was not until June 30, 2009, that the missing cooler was found, where the Complainant had put it, outside the sewage treatment building. (HT, pp. 756, 1387.) John A. Skinner, a maintenance supervisor, had stumbled upon the Complainant and the swamp cooler there that morning. (*Id.* at 1316.) Mr. Skinner, surprised, had asked the Complainant what he was doing and where his work permits were. (*Id.*) The Complainant explained that he was concentrating brine for use on the roads and that he had not filled out any formal paperwork for the test, just a work order. (*Id.* at 1316, 1329-30.) Mr. Skinner told the Complainant that he needed to follow procedures and then reported the situation to Robert Peterson, the Plant Manager. (*Id.* at 1316, 1330-31.) From Mr. Peterson, word passed quickly to Mr. McKinney and his boss, Jeffrey Hunt, the Maintenance Manager. (*Id.* at 1330, 1332, 1387.) Both then called Mr. Nielsen, "very upset" about what the Complainant had done. (*Id.* at 1390-91, 1961, 1973; RX 159, p. 2312.)

When Mr. McKinney and Mr. Nielsen arrived on the scene, down by the sewage lagoons, they found several buckets of sewage water standing around the swamp cooler, which was itself leaking onto the ground, requiring the filing an environmental spill report. (RX 159, p. 2312; HT, p. 1388.) Mr. Nielsen had photographs taken to document the "plethora of issues" with the test site, including being poorly roped off, lack of containment, cords running through propped open doors, and violations of many other safety rules. (HT, pp. 1962, 1980; RX 159, p. 2312.) Mr. McKinney arranged to have the swamp cooler cleaned and returned to its place in the cool down, while Mr. Nielsen looked for the Complainant. (HT, p. 1391.)

Confronted by Mr. Nielsen about the swamp cooler test, the Complainant was full of remorse and seemed "completely bewildered as to doing anything wrong." (HT, pp. 768, 1395, 1975, 2094; RX 159, p. 2312.) He also claimed that Mr. Johnston had been aware of the test, though when Mr. Nielsen asked, Mr. Johnston said he had had no idea.³⁷ (RX 159, p. 2312; HT,

³⁶ It appears this was because the Complainant was working nights, so presumably after his shift from Monday evening through Tuesday morning, the equipment was put on pause, with the plan of restarting it Tuesday night. (See CX 1, p. 11.) However, a possible alternative explanation is that the test was shut down as a result of Mr. Buys and Mr. Nielsen's emails. (See CX 16, p. 2.) The record is not clear.

³⁷ When cross-examined at the hearing about whether he had told Mr. Johnston about the swamp cooler test, the Complainant was very difficult to pin down, answering variously: "I told [Mr. Johnston] that I brought Safety around to look at the lagoons ... I invited [Mr. Johnston] to go along." (HT, p. 1002.) "I thought [Mr. Johnston] was

pp. 1974-75.) Mr. Nielsen listened to the Complainant's version of events, but his own perceptions of what had happened were different. (HT, p. 2095.) Despite the Complainant expressing a lot of remorse and shock, Mr. Nielsen was suspicious that the Complainant had switched himself to the night shift to conduct this test undetected. (*Id.* at 1962, 2094; RX 159, p. 2312.) They discussed what had happened and agreed that the test "should not have ever been done." (HT, p. 1976.) Because it had been a huge breach of procedure, Mr. Nielsen informed the Complainant that he would likely pursue putting the Complainant on a 45-day performance improvement plan. (*Id.* at 768, 1975; RX 159, p. 2312; RX 14, p. 127.)

The Flying Lid Incident: June 30, 2009

The disasters of June 30, 2009, were not yet over for the Complainant. Since the 500-gallon batch of mixed brine had worked a week earlier, on June 30, 2009, the Complainant had a 2,000-gallon tank moved to Stark Road to try scaling up the recipe for water softener brine saturated with calcium chloride. (RX 130, p. 1246; RX 140, p. 1537.) Again, though a work order for mixing brine at Stark Road had been submitted in March, based on discussions with coworkers January 6, 2009, the Complainant believed that no formal paperwork or authorization from management was necessary.³⁸ (See RX 165, pp. 2631-33; CX 11, p. 1; RX 124, p. 1138; RX 140, p. 1458.) In fact, the Complainant later admitted that he chose the parking lot at Stark Road for mixing brine to avoid the regulations that applied to most EG&G sites. (HT, pp. 1223-24.) This new round of mixing was not destined to stay under the radar for much longer, however.

The 2,000-gallon brine tank must have been at Stark Road for only a few hours when high winds caught the tank's lid, a dome eight feet in diameter and weighing over 150 pounds, and swept it away across the parking lot. (RX 102, p. 722; see RX 130, p. 1246.) Witnesses saw the lid become airborne, striking three cars as it went, leaving costly damage in its wake. (RX 102, p. 725.) Luckily no one was injured, but the Safety Department began an immediate investigation of the incident. (*Id.*)

When interviewed, the Complainant said that he had considered the risks before setting up the tank, calling the manufacturer and confirming that the tank was designed for outdoor use. (RX 102, p. 722; HT, p. 1205.) Though the tank vendor had told him to drill holes in the lid's edge to bolt it in place, he did not drill the recommended holes because he did not think it would be a problem since the lid had been in the yard at EG&G for years and never blown away. (HT, pp. 1205-06; RX 102, p. 722.) Also, he was in a rush and did not want to write the work orders necessary to drill those bolt holes. (HT, pp. 1216-18.) Ultimately, the Complainant admitted that he was responsible for the accident, as he should have sent the lid away, since he had not actually needed it in the first place. (*Id.* at 1203, 1216, 1219; RX 102, p. 722.)

aware... Because I discussed with [Mr. Johnston] doing the caretaker work and bringing the swamp cooler down. I don't know." (*Id.* at 1003.) "[The test] was in plain view. It wasn't hidden." (*Id.*)

³⁸ I can find minimal evidence that the Complainant's supervisors were even aware of the Complainant's plans to mix brine at Stark Road, and then, only that Mr. Nielsen and Mr. Hunter (the Complainant's supervisor before Mr. Johnston) had once been copied on an email of minutes from a meeting, back at the beginning of January 2009. (RX 124, p. 1138.)

The First Performance Improvement Plan: July 1–6, 2009

Because of the damage caused by the flying lid, the discovery of the unauthorized swamp cooler test, and the continuing delays in upgrading the water treatment system, on July 1, 2009, Mr. Nielsen instructed Mr. Johnston to design a 45-day performance improvement plan for the Complainant. (RX 14, p. 127.) A performance improvement plan (“PIP”) was essentially a written warning, the first formal step in EG&G’s progressive discipline system. (RX 23, p. 180; HT, pp. 98, 1977.) In design, PIPs had two parts: the first explained the problems with the employee’s behavior that had led to the PIP; the second laid out the actions the employee needed to complete within the timeline to avoid further disciplinary action. (HT, pp. 39, 97, 1782, 1977.) Ideally, these plans made expectations clear and the actions to be achieved were meant to be fair and measurable, since the goal was not to punish, but to improve employee effectiveness. (*Id.* at 46, 97; RX 23, p. 181.)

On July 6, 2009, the Complainant met with Mr. Nielsen and Mr. Johnston to go over the four-page PIP Mr. Johnston had written. (RX 23, p. 180; RX 14, p. 127; HT, pp. 780, 1063.) According to the PIP, this formal plan was necessary because, over the past six months, “several discussions regarding work performance” had failed to correct issues. (RX 23, p. 180.)

The first part of the PIP listed seven distinct performance problems Mr. Johnston and Mr. Nielsen had had with the Complainant in the last several months. (RX 23, pp. 180-81.) These included the Complainant’s failures in managing the water treatment system upgrades, which had resulted in many delays due to lack of organization, overlooked requirements, and the Complainant’s distraction by other projects. (*Id.*; HT, pp. 1573-76, 1976.) His supervisors also felt that he sometimes gave them only partial information about the problems with his systems and had ignored management instruction not to start other projects or pursue the use of swamp coolers. (RX 23, pp. 180-81.) The Complainant was additionally criticized for not taking proper safety and hygiene precautions when handling the sewage treatment pond water in his swamp cooler test and leaving the test area in an unacceptable condition. (*Id.* at 181.) Also, there were issues with the Complainant not cleaning his office work area and using that space to conduct unauthorized laboratory experiments that had sometimes spilled onto government equipment. (*Id.*) Lastly, the “very serious safety issue” of the flying lid incident was mentioned.³⁹ (*Id.*) Mr. Nielsen and Mr. Johnston considered these continuing problems evidence that the many informal performance discussions they had already had with the Complainant had not been productive. (*Id.*)

To get the Complainant’s performance back on track, part two of the PIP listed 18 objectives the Complainant needed to accomplish to successfully complete his 45-day plan. (RX 23, pp. 181-83.) These included things like reviewing all of EG&G’s engineering procedures and only performing work in compliance with those procedures. (*Id.* at 182.) The Complainant was instructed to improve his verbal and written communication with his coworkers too, and to particularly focus on working with Operations to support their maintenance of the water system. (*Id.*) This included writing work orders that adequately defined the work the Complainant needed

³⁹ The PIP originally included a reference to the forklift incident, but when the Complainant objected, his supervisors agreed to drop that from the list. (*See* HT, pp. 1063-64.) Mr. Nielsen said this was because starting a PIP from a place of mutual agreement was more important than listing every single problem the Complainant had in the past. (*See id.* at 1977-78.)

done and gave the maintenance workers enough detail so that they could complete the projects satisfactorily. (*Id.*) The Complainant was also told to increase the amount of time he spent monitoring the water system, to complete formal walk downs of his system, and to outline for management the remaining issues. (*Id.*) Also, he was instructed to start tracking water system performance to demonstrate that his changes were actually improvements. (*Id.*)

The PIP additionally forbid the Complainant from implementing any improvements to the water system unless those changes were approved ahead of time by management. (RX 23, p. 182.) In fact, the Complainant was to take on no new projects of any kind without authorization from his supervisor. (*Id.*) To facilitate the Complainant and his supervisor being on the same page, the Complainant was directed to meet with Mr. Johnston every day to update him on his work and to start keeping a written time log for review purposes. (*Id.*) In addition, the Complainant was required to “develop and maintain a comprehensive systems notebook that identify[ed] and track[ed] issues” with the water system and the Complainant’s daily efforts to improve that system. (*Id.*) Finally, the Complainant needed to: prepare a “comprehensive plan” for addressing spare parts issues for the water system within six months; plan and schedule resolution of all of his open work orders; and refrain from doing any more testing either in his cubicle or without an approved test plan and work orders. (*Id.* at 182-83.) The PIP closed with a reminder that, while his supervisors would support the Complainant’s efforts, he had the “ultimate responsibility for improvement” and failure to “show immediate and sustained improvement” would lead to further discipline, including potential termination. (*Id.* at 183.)

According to the Complainant and Mr. Nielsen, this meeting went well and both sides agreed on the PIP’s final list of problems and the initiatives to address them. (RX 159, p. 2313; HT, pp. 1063, 1999.) The Complainant wrote that he concurred with the assessment and would have the listed actions completed by the review date. (HT, p. 1977.) The Complainant and Mr. Johnston both signed the PIP a few days later, and the Complainant did not exercise his appeal rights. (*Id.* at 76, 780; RX 23, p. 183.)

Valve Failure and Vendors: July 7–9, 2009

The Complainant’s 45-day improvement period did not get off to an auspicious start. When Maintenance began trouble-shooting the long-awaited first bed of the water treatment system on July 7, 2009, it experienced valve failure on its very first regeneration cycle. (RX 130, p. 1247.) Other than observing this misfire, the Complainant recorded only work on the sewage treatment system on July 7 and 8, 2009. (*See id.* at 1246-47.) He secured purchasing approval for the biological bugs, updated drawings of the lagoons and sand filter, and submitted a work order to get the sand filter taken out of commission. (*Id.*)

When the Complainant met with Mr. Johnston, as the PIP required, on July 9, 2009, it was discovered that they were already on different pages. (HT, pp. 779-80; RX 23, p. 182.) The Complainant told Mr. Johnston that he had been talking to a vendor of chlorine tablets who was arriving that day to tour the sewage treatment system. (HT, p. 779.) Mr. Johnston asked who had authorized the Complainant to start this new chlorination initiative and to bring in an outside vendor. (*Id.* at 779-80.) The Complainant started to explain his concerns about other states chlorinating their lagoons before using a Polecat blower due to pathogen risks, but Mr. Johnston

cut him off and was firm that management did not want the Complainant doing this. (*Id.* at 780.) The vendor was sent home. (*Id.*)

Alarms Raised About Water Pressure: July 9–15, 2009

On July 9, 2009, the Complainant wrote a work order about his concerns that recent changes in water pressure might indicate that there was “a water leak someplace in the [water supply] line.” (RX 165, p. 2715.) The Complainant followed this with another work order July 13, 2009,⁴⁰ asking to be allowed to enter some of DCD’s water vaults to clean screens, check for sediment buildup, and bypass the water meters to see if any of that would improve water flow to TOCDF. (*Id.* at 2718.) A low pressure alarm on the plant water supply had recently gone off. The water should have entered TOCDF at 100 psi, but now it was at only 45 psi. (RX 130, p. 1247.) Making adjustments to the pressure regulator on the TOCDF side had not had much effect, so the Complainant wanted DCD to help from its end. (*Id.* at 1248.) The Complainant asserted that the purge of a fire hydrant made it “apparent” that there was a restriction of the water flow before it got to TOCDF, and he thought it was either from “sediment buildup in the low spots” or “debris in the screens.” (*Id.*) Thus, the Complainant wanted DCD to start investigating the vaults from one end of the supply line and EG&G from the other. (*Id.*) The DCD Fire Department obliged, and spent July 13–15, 2009, checking hydrant flows for the Complainant. (RX 140, p. 1505.)

Though the Complainant had been periodically writing work orders about water pressure issues since November of 2008,⁴¹ in July 2009, these warnings suddenly began to get attention.⁴² July 14, 2009, Jeffrey Hunt, the Operations Manager for all of TOCDF, stopped Mr. Nielsen after the morning meeting. (RX 159, p. 2314.) Mr. Hunt was “quite upset” that the Complainant had known that the plant’s water pressure was dropping for the past few weeks, but that no one had informed Mr. Hunt until pressure was so low it threatened to shut down the plant. (*Id.*; HT, p. 1979.) Mr. Nielsen quickly got Mr. Hunt up to speed about the Complainant’s efforts to address the problem, emailing Mr. Hunt the outline of the trouble-shooting plan. (RX 26, p. 234.)

⁴⁰ Strangely, the first part of this work order, explaining issues the Complainant had observed with the water pressure, was identical to the work order the Complainant had submitted November 6, 2008. (*Compare* RX 165, p. 2559; *with* RX 165, p. 2718.)

⁴¹ See RX 165, p. 2559 (November 6, 2008: 160 psi, when should not be over 100 psi and hydrants at 60 psi); RX 140, pp. 1462-64 (November 13, 2008: flush line to investigate pressure); RX 130, p. 1234 (December 3, 2008: met with DCD to inspect the pressure reducing vaults); RX 165, p. 2409 (January 8, 2009: pulled data on water pressure because of pressure spike, wanted to show management); RX 165, pp. 2439-42 (January 15, 2009: wrote two work orders about pressure issues with fire water supply and eye wash stations); RX 165, p. 2651 (March 27, 2009: note to warn of problem with pressure for eye wash and fire hydrants). In fact, the Complainant even mentioned all the way back on April 2, 2008, that the plant water pressure was 100 psi, yet should only have been 60 psi according to drawings. (RX 165, pp. 2888-89.)

⁴² It is not totally clear from the record why these concerns received so much more attention in July of 2009. It seems likely that the problem had gotten worse in some way, but it may have been that the Complainant communicated his concerns more effectively. Testimony about the plant’s water pressure was both conflicting and confusing (there were both high and low pressure problems; witnesses became technical; incomplete explanations; etc.). Thankfully, as I repeatedly told the Complainant during the hearing, proving that there were technical problems at the plant is not part of this legal case. (*E.g.*, HT, p. 2181 (Judge Gee: “I will repeat again that you [the Complainant] do not have to prove that there was a violation. You only need to prove that you had a good faith belief that there was a violation. ...I do not need an explanation from you as to why you think [there was a violation]. All I need to know is you had a good faith belief. And believe me, I know you had a good faith belief.”).)

However, Mr. Nielsen cautioned that it was not yet clear where the problem was or whether DCD or EG&G owned the equipment that might be the source of the difficulties. (*Id.*) Mr. Nielsen was “80% confident” that the problem was on the DCD side though, and he had already talked to DCD management, warning them that their cooperation might be urgently needed to address the issue.⁴³ (*Id.*; HT, pp. 1833-34, 1843, 2026, 2028-29, 2035-36.)

Immediate Response and Reprieve from the 45-Day Deadline: Mid-July 2009

Because a lack of water pressure could compromise EG&G’s ability to fight a fire in the munitions processing area and force a shutdown of the plant, news of the problem spread quickly to all the effected departments. (HT, pp. 475, 574, 578, 658-61, 1053-54, 1833-35, 2026.) Investigating and correcting the issue became an immediate priority for EG&G. (*Id.* at 658-661, 667, 1052.) An analysis of the hazard was done right away and the Engineering Department, along with the Safety Office and management, quickly identified some ways of mitigating the risks. (*Id.* at 574, 578, 658-59.) Since the sprinkler system and the fire hydrants would not work at the same time if the pressure was too low, one of the best temporary fixes was for the Fire Department to plan to connect their pumper truck if there was a fire. (*Id.* at 660, 1142-43, 1145, 1148.) This truck would boost the pressure in the system and allow both sprinklers and hydrants to run at their full capacity at once. (*Id.* at 1145.) EG&G’s other immediate response was to take increased precautions against a fire starting in the first place. (HT, p. 661.) Packaging and other combustible material were scrupulously removed from the affected areas and fire patrols increased. (*Id.*) Within days of the issue becoming known, these counter-measures were presented to the PORC, which agreed that it was safe to continue operating with these protections in place. (*Id.* at 667.)

The emergency concerns addressed, EG&G then began to investigate the source of the problem. Since the Complainant was taking the lead on tracking down the cause of the pressure fluctuations, his supervisors decided that his focus needed to be on this new crisis and, as a result, the Complainant was realistically not going to be able to meet the requirements of his PIP on time. (RX 14, p. 127; HT, pp. 1859, 1998.) After discussion, the Complainant was told he would no longer be held to the PIP’s 45-day deadline so he could work on the water pressure issue without distraction. (RX 14, p. 127; HT, pp. 1859, 1998.) While there would be no formal review in six weeks, the Complainant was still supposed to work on the improvement items identified in his PIP to the extent he had time. (RX 14, p. 127; HT, p. 1998.)

⁴³ Doryl M. Lish, DCD’s Director of Public Works, who had oversight over the supply of water to TOCDF, however, testified that he remembered it differently. (See HT, pp. 268-69, 271, 281.) According to him, he learned about the water pressure issue on July 15, 2009, from an email sent by Mr. Johnston. (*Id.* at 268.) Mr. Lish claimed that that first email was shortly followed by a second that said EG&G had determined that at least part of the problem was on EG&G’s end, so that, other than help from the DCD Fire Department in flushing some hydrants for a few days, EG&G did not need DCD’s help. (*Id.* at 268-69.) Based on these two emails, Mr. Lish felt the water pressure was not an emergency and because he heard nothing more, he assumed any problem had been addressed. (*Id.* at 269, 271, 281.)

Investigation of Water Pressure Fluctuations: July 20–August 17, 2009

From the end of July through August 2009, the Complainant worked with Maintenance trying to track down where the water flow was restricted. (*E.g.*, RX 130, pp. 1248-50; RX 165, p. 2727.) Lines were flushed, gauges adjusted, vaults inspected, air bled, pressures reset, and vendors contacted for information about the components they had supplied. (RX 130, pp. 1248-50; RX 165, p. 2727.) An eroded valve was found and replaced, but despite all adjustments, pressure remained low. (RX 130, p. 1249; RX 128, p. 1201.) The Complainant had many theories about the potential source of the trouble, but testing and calculations did not clearly support any specific explanation. (*See* HT, pp. 268 (the Complainant said it was a blockage, then an air bubble, then a pressure regulator; could not prove any of these causes), 1141-42 (the Complainant “identified some issues that ... might be the cause, and concluded that those were the cause before there was sufficient evidence,” investigation did not bear him out), 1858 (considered possibility of mud in the lines, an air pocket, or a broken valve), 1915 (there were trends in historical data that evidence “could not really explain” or testing duplicate); RX 130, p. 1248-49; RX 128, p. 1201.)

As the Complainant’s explorations took him outside TOCDF and onto DCD’s property, tensions between the two groups rose. For his part, the Complainant observed what he saw as increasing evidence that DCD was not properly maintaining its end of the water supply system and he seemed frustrated at needing DCD’s cooperation to make changes in areas under DCD control. (*See* RX 124, pp. 1153-54 (the Complainant wanted immediate entry permits for DCD vaults, irritated that he was “scolded” for entering without a permit before, alleged photos proved DCD was not maintaining its vaults sufficiently); RX 128, p. 1201 (not able to get DCD to assist with “needed repairs”); CX 24, p. 1.) Others, including the Complainant’s supervisors, did not see the Complainant blaming DCD, EG&G’s customer essentially, as diplomatic or necessarily helpful for resolving the situation. (HT, pp. 1858, 1980.) How and how frequently the Complainant contacted DCD staff to ask them to do things for him also began to raise hackles. (*See id.* at 268 (DCD “felt like we had done what we could”), 282; RX 140, p. 1505 (August 10, 2009: felt the Fire Department had already done more than enough to help EG&G).)

Mr. Nielsen Kills the Brine Project: August 17–18, 2009

Despite the urgency of the pressure investigation and the directives of his PIP, the Complainant was still indulging in side projects. (*See* RX 23, p. 182 (PIP: “You will focus your work to complete current projects and not start any new projects without the approval of your current supervisor.”; “Any process testing will require an approved operational test plan, and approved work orders as required.”).) Back on August 12, 2009, the Complainant had quietly added a note to one of his primary work orders for concentrating brine. (RX 131, p. 1289.) In it, he said that he had been unable to implement concentration by evaporation for the water treatment system brine, but was “now attempting to incorporate a system with the sewage treatment ponds.” (*Id.*) Therefore, he recommended closing an old work order, since he would be approaching the brine project “from a different direction.” (*Id.*)

The next day, August 13, 2009, the Complainant, with assistance from Maintenance, “prepared a 2,000-gallon batch” of brine using water system brine, prill calcium chloride, and a “bucket brigade.” (RX 130, p. 1250; RX 140, p. 1537.) The Complainant evidently considered

this project successful, as he planned to prepare a similar mixture the following week using “super sacks” as the mixing vessel. (RX 130, p. 1250.) The Complainant also intended to have a safety officer audit that process so as to complete the effort to “develop a safe procedure for next winter’s ice prevention.” (*Id.*; RX 140, p. 1537.)

On August 17, 2009, Mr. Nielsen found the Complainant’s note from August 12 about taking a “different direction” to make brine.⁴⁴ (RX 131, p. 1290; HT, p. 1986.) Frustrated that the Complainant kept going “on and on and on” despite being told in a “number of different ways” by management that he should not pursue the brine initiative, Mr. Nielsen decided to make himself crystal clear. (HT, pp. 1987-88.) Right below the Complainant’s August 12, 2009, note, Mr. Nielsen wrote his own entry: “This project has been killed.” (*Id.* at 1986, 1988; RX 131, p. 1290.) His note explained that while the original idea was useful for preventing ice and suppressing dust, the project had grown over time to involve too much equipment and effort. (RX 131, p. 1290.) Especially given the multiple incidents of damage to property (the forklift tipping over, the lid hitting the cars, etc.), he was now officially terminating all attempts to concentrate brine from the water treatment system or the sewage treatment ponds. (*Id.*; RX 14, p. 128.) To make sure his message was heard, Mr. Nielsen met with the Complainant on August 17, 2009, and told him in person that all brine concentration was cancelled and that it was unacceptable to disregard direct instructions from management. (RX 14, p. 128; RX 159, p. 2318; HT, p. 1989.)

That did not end the matter though. On August 18, 2009, the Complainant added a new entry to the brine concentration work order, right below Mr. Nielsen’s from the day before. (RX 131, p. 1290.) In it, the Complainant declared that the brine mixing project was “a cost savings and an environmental initiative that needs to be pursued further (besides a safety initiative).” (*Id.*) Mr. Nielsen interpreted this as insubordination and told the Complainant again that the project was cancelled and he needed to stop working on it. (RX 14, p. 128; RX 25, pp. 229-30; HT, p. 1989.) In his own notes, Mr. Nielsen wrote that the incident made him believe that the Complainant had “no regards for following instructions even when communicated from the highest levels of engineering management.” (RX 25, p. 230.)

Fire Protection System Work Order: August 18, 2009

Following up on EG&G’s initial response to the concerns about water pressure affecting the fire protection system, on August 18, 2009, Donald Rogers, a senior engineer and chair of a key EG&G design committee wrote a condition report. (RX 28, p. 238.) Titled “Fire Protection Water Supply Requirements Evaluation,” the document said that currently, a demand for water flow of 150 gallons per minute caused water pressure at TOCDF to drop from around 115 psi to 95 psi, a much greater decrease than expected for so modest a flow. (*Id.*) In addition, testing of fire hydrants identified two that produced only 1,060 gallons per minute with between 40 and 50 psi, when 2,000 gallons per minute should have been generated at closer to 60 psi. (*Id.*) Based on these results it appeared to Mr. Rogers that the water supply system could not “provide the identified system demand,” and so he recommended further evaluation to ensure that all risks were being appropriately addressed. (*Id.*) Though the Complainant had written about the water

⁴⁴ It is unclear if Mr. Nielsen was ever aware of the Complainant’s actual brine mixing activities on August 13, 2009.

pressure situation before, such as in his work orders in July, Mr. Rogers wrote his own report to “make sure that it was not an issue that got dropped.” (HT, p. 1125; *e.g.*, RX 128, p. 1201; RX 165, p. 2718.)

Disagreement about Source of Pressure Fluctuations: August 18–September 2, 2009

By mid-August 2009, the Complainant’s demands on behalf of the pressure investigation had definitely gotten under the skin of some of the DCD employees. (*See* RX 163, p. 2376; HT, pp. 11262-63, 1860-61, 1912.) For one thing, on the DCD side of the fence, not everyone was convinced that there was an emergency to address, since they could detect “no changes in water system flow” and the facility DCD supplied water to downstream of TOCDF was not having pressure issues. (RX 140, p. 1505; HT, pp. 1241-42, 1260, 1274.) In addition, according to DCD records, nothing had been altered in the system since EG&G removed a water tank nearly 10 years earlier, thus, some at DCD thought that tank removal was the source of the issue and the multi-year delay in discovering the problem, proof that it was not serious. (RX 140, p. 1505; HT, pp. 267, 271, 280, 1241-42, 1260.)

Also, the Complainant’s enthusiasm in pursuing the project at times conflicted with the other priorities of DCD’s staff. The Complainant apparently would phone or email DCD employees “at least weekly ... but often times daily” about what he wanted them to do. (HT, pp. 1258, 1912.) This frequent, direct “pestering” made some DCD employees even less willing to help the Complainant, particularly when he, a contractor, was already demanding that they, the client, do inconvenient or unfunded things. (*Id.* at 1262-63, 1266, 1861, 1912.) For instance, when the Complainant emailed that he would get historical pressure data from Daniel W. Dow, DCD’s deputy fire chief, the response was quite terse. (*See* RX 163, pp. 2376-77.) Mr. Dow informed that Complainant that he had “other work to do that need[ed] [his] attention first.” (*Id.* at 2376.) Further, he was “not sitting around waiting for time-lines to be set” by the Complainant. (*Id.*) When Mr. Dow completed his part of the analysis August 21, 2009, he identified EG&G’s removal of the auxiliary tank in 1999, as the likely source of the pressure shortfall. (RX 140, p. 1506.) Even with reduced supply though, Mr. Dow pointed out that there was still enough water “under the principle that not all systems are operating at full flow capacity at the same time.”⁴⁵ (*Id.*) By August 28, 2009, DCD had informed the Complainant that its staff would not be able to support any trouble-shooting efforts on its portion of the base due to “priority mission support efforts.”⁴⁶ (RX 130, p. 1251.)

The Complainant, undeterred, thought that since DCD did not have the resources to assist him, EG&G’s own maintenance staff should gather the information he felt was needed from the equipment DCD maintained. (RX 165, p. 2744.) On September 1, 2009, the Complainant emailed DCD’s fire inspector, John Alverson, to “coordinate” with him on a vault inspection on

⁴⁵ That is, if there was a fire at the plant, processing would stop, so the water treatment tanks would not be refilling and there would be no need for water at the eyewash stations or safety showers while the sprinklers and hydrants were running. (HT, pp. 1863-65, 1868.) The Complainant was comparing the water supply with the demands for all of those systems running at the same time. (*See id.* at 836, 842, 844; RX 165, pp. 2459-60.)

⁴⁶ As Doryl M. Lish, the Director of Public Works at DCD, explained in an email September 3, 2009, “TOCDF made the decision to live with the DCD water supply for [its] fire suppression systems” 10 years earlier when it opted not to repair the auxiliary water tank and nothing had changed since that he could see. (RX 140, p. 1508.) Thus, DCD intended to take no further action to investigate what Mr. Lish saw as EG&G’s internal issues. (*Id.*)

DCD's property he was trying to arrange for the next day. (RX 163, pp. 2371-72.) The Complainant warned that he would need to cut insulation and banding wire on the pipes, but that he just needed a spotter and felt that minimal safety equipment would be fine. (*Id.*) Mr. Alverson wrote back that he wanted to personally observe the work if the Complainant going into that type of vault and complained that the last time the Complainant had removed insulation from pipes, he had not replaced it. (*Id.* at 2372.) In the end though, the Complainant was allowed to inspect the area. (RX 130, p. 1252.)

Performance Review: September 2, 2009

On September 2, 2009, Mr. Johnston gave the Complainant his second EG&G performance review. (RX 153, pp. 2248-49.) The Complainant's average score across all categories was a 2.92,⁴⁷ down from the 3.33 he had been given in November of 2008 by Mr. Hunter, his previous supervisor. (*Id.* at 2248-50.) This lower average reflected decreased scores for "knows and follows work control documents," "follows procedures," and "maintains clean office area." (*Id.*) According to Mr. Johnston, the Complainant's overall score was the lowest among the 15 utility system engineers in the group he supervised. (HT, p. 530.) On the review sheet though, the Complainant's only written comment was that Mr. Johnston was "a great boss."⁴⁸ (RX 153, p. 2248.)

EG&G and DCD's Water Pressure Meeting: September 22, 2009

Throughout September 2009, the Complainant continued to gather information about the plant's water supply pressure.⁴⁹ (*See* RX 130, pp. 1252-53.) Then, he organized a meeting between EG&G and DCD, along with the supervising Field Office, to "review the available data, discuss options, and plan a path forward" for addressing the issue. (*Id.* at 1253.)

At this meeting on September 22, 2009, the sprinkler vendor explained that EG&G's system had been installed under the assumption that the auxiliary tank that had been taken out of service in 1999 was still in place. (CX 51, p. 1.) Next, the DCD Fire Department gave a report about how the historical data on water flow for the last decade showed little or no change. (*Id.*) A computer model of the system that EG&G's engineers had developed was also discussed. (*Id.*) Everyone agreed that the current flow numbers did not meet the levels the system had been designed to reach, but despite this, many thought that the system might still comply with the regulatory and contract requirements. (*Id.*) Thaddeus A. Ryba, the head of the Field Office, demanded a clear answer from EG&G about whether it was safe to keep the plant operating. (HT, pp. 807, 820.) An EG&G representative⁵⁰ said that the fire system functioned at a reduced pressure, yet as long as the system was tested yearly and had some water supply, it probably

⁴⁷ On EG&G's performance scale, a 3 is equivalent to fully meeting job expectations, while a 2 indicates that an employee is not living up to expectations. (HT, pp. 182-83.)

⁴⁸ Despite this, two years later the Complainant complained about this review, saying that Mr. Johnston had given him no leads on how to correct his performance issues and had told the Complainant only that he was "the most worthless engineer in his group." (RX 79, p. 580.)

⁴⁹ The Complainant also oversaw some continuing work on upgrading the water treatment system: the first bed was still failing tests unfortunately. (RX 130, p. 1253.)

⁵⁰ The record does not identify who from EG&G said this. (*See* HT, pp. 807, 820.) However, it seems possible that the Complainant himself did. (*See* RX 29, p. 241 (the Complainant: "I told Ted Ryba, Joe Majestic, and Terry [Thomas] that we had a functional fire suppression system").)

complied with the site's permit. (*Id.*) However, all agreed that better information about system performance was needed. (CX 51, p. 1.) EG&G agreed to write a formal plan for testing the pressure of the plant's water supply and the Complainant was assigned the task of drafting that plan. (HT, p. 838.)

After the meeting on September 22, 2009, the Complainant was summoned to meet with Joseph R. Majestic, EG&G's Deputy General Manager, and Terry D. Thomas, the Technical Services Manager. (HT, p. 808.) They told the Complainant that they appreciated him investigating the water pressure problem, that it was an important issue, and that he should come to them right away if he had any problems getting it resolved. (*Id.* at 808, 826-27.) The Complainant testified that he was also encouraged to keep the investigation within EG&G, without bringing in DCD or the Field Office any more than necessary. (*Id.*) The Complainant thought that these managers were displeased that there had been a meeting with the head of the Field Office before they themselves were briefed on the water pressure issue. (*Id.* at 826.)

The Complainant's Frustration Mounts: September 23–30, 2009

After the September 22, 2009, meeting with DCD and the Field Office, EG&G's investigation of the water pressure issue focused in on whether the reduced functioning of its fire protection systems put it in violation of the conditions required to operate the facility. (RX 160, p. 2326; RX 130, p. 1254.) The Complainant sought information about the requirements at other chemical demilitarization plants, since he did not think that DCD, particularly, the DCD Fire Department, understood the "ramifications" of the situation or were taking the problem seriously enough. (CX 52, pp. 1, 9.)

On September 24, 2009, Fred Lopez, the water system engineer at a demilitarization facility in Oregon, sent the Complainant the requirements for his plant's fire suppression system. (RX 29, p. 243.) The next day, the Complainant forwarded the email to the engineering team at TOCDF, telling them that he found it so "damning" that he had already talked to the DCD Fire Department about boosting system pressure with the pumper truck. (*Id.* at 242.) The Oregon plant's rules said that sprinkler systems were critical in areas where chemicals were processed, so if the sprinkler system was "INOPERABLE, the safety of Depot co-located workers and the public **cannot** be assured," and processing needed to be suspended immediately. (*Id.* (emphasis in original).) The Complainant added that while this was another plant's rules and he did not know how they compared to the rules at TOCDF, he "speculate[d] they are identical." (*Id.*)

Mr. Nielsen's reply to the group was much more cautious. (RX 29, p. 241.) Though TOCDF did indeed have a similar rule he said,⁵¹ the key was that it required the plant to shut down only when the sprinkler system was "inoperable," or had completely failed. (*Id.* at 242.) Right now, Mr. Nielsen pointed out, the testing and modeling of the system were incomplete, but seemed to indicate pressure levels that were at least close to adequate most of the time. (*Id.* at 241.) In addition, the team was still working out what rules applied to the facility and whether any of them actually listed firm requirements for water pressure. (*Id.* at 241-42.) Thus far, it was only the design criteria that the system definitely failed to meet and those criteria were based on

⁵¹ Mr. Nielsen also criticized the Complainant for not looking that rule up before speculating about it. (RX 29, p. 241.)

use of a tank that had not actually been used for 10 years, so no one knew if the system had ever performed at design levels or if doing so was required. (*Id.*) Mr. Nielsen wanted the issues considered carefully. He felt the risk presented was low since the system appeared to have been at this level of pressure for a long time. (*Id.* at 242.) Also, the government had approved the removal of that tank, and the current system configuration. (*Id.*) Until it was clear that something was definitely wrong, Mr. Nielsen asked the team to “limit the speculation to within the working group as to what the problem is and what the possible corrections are.” (*Id.*) He also asked Mr. Johnston to coordinate and make sure the Field Office got a consistent message from EG&G. (*Id.*) Mr. Nielsen closed his email by asking the engineers to “make sure that we have our ducks in a row before we start saying the sky is falling.” (*Id.*)

The Complainant then emailed the group his draft of the test plan for TOCDF’s water supply. (RX 29, p. 241.) He hoped that the data from the test would help explain the “high variability” in that water pressure data the hydrant testing had produced. (*Id.*) Mr. Nielsen replied and asked the Complainant if he agreed with one of EG&G’s senior engineers who thought that if one part of the piping was changed, the design requirements could be met? (*Id.*) The Complainant seemed to give a qualified agreement at first, but his response quickly became more of an airing of grievances with DCD. (*Id.* at 240-41.) The Complainant alleged that DCD did not “want to get off the dime” and do the things the Complainant wanted its staff to do for his pressure investigation. (*Id.* at 241.) He complained that “I have been brow beat by these guys in front of the bosses and management. I was also instructed not to perform any work on their vaults and if I ever enter a vault for inspection – one of them has to be present.” (*Id.*) The Complainant charged that DCD was not taking care of the water supply adequately and “could care less.” (*Id.*) He wanted Mr. Nielsen, and his boss, Mr. Thomas, to “take this topic up the chain of command and ask the [DCD] Commander to allocate resources ... to address the issue in a timely fashion.” (*Id.*)

At the end of the day, September 25, 2009, Mr. Nielsen responded to the Complainant individually. (RX 29, p. 240.) He told the Complainant that he had already discussed things with the Deputy General Manager, but they were not sure “how far up the org chart it is going to go,” at least until he could get a solid answer from the engineering team about exactly what the status of the system was. (*Id.*) After all, it was “difficult to tell the Commander to fix his system when you cannot prove it’s broken.” (*Id.*) Mr. Nielsen said that “[s]o far there are only a few facts, tons of speculation being communicated as facts, incomplete analysis and very poor communication (if I ask 3 people involved, I get 3 different answers), and Field Office reps are communicating back to their boss a story based on what they think is wrong rather than what the facts are.” (*Id.*)

He pointed out that the Complainant was contributing to the problem by throwing around statements like that TOCDF’s system was identical to the one in Oregon, when how the water is delivered to those systems “differ[s] significantly.” (*Id.*) Mr. Nielsen added that he understood the Complainant’s frustration; Mr. Nielsen had been asking his own supervisors if DCD could be prodded. (*Id.*) However, EG&G’s position was that DCD was working with it and cooperation should continue, even if the results had not been impressive so far. (*Id.*) Mr. Nielsen also pointed out to the Complainant that if they got aggressive with DCD about fixing some specific thing: “what is the recourse when we find out we are wrong (this seems to happen quite frequently) ... how do we expect them to respond when we say well, I’m not sure but I think the problem is...?” (*Id.*)

On a personal note, Mr. Nielsen's email also pointed out that "[t]here is a propensity in each of us to find someone or something outside ourselves to blame when things go wrong." (RX 29, p. 240.) He knew the Complainant was "trying [his] guts out" at work, but the Complainant needed "to look at how [he did] things and make changes in order to accomplish [his] duties." (*Id.*) Mr. Nielsen observed that there were a lot of newer engineers in the Department who were not having the same issues the Complainant was as far as working with others and following procedures. (*Id.*) He wanted the Complainant to think about how he could change his own actions to become more successful, because at the moment, despite having problems with every department, the Complainant's attitude seemed to be that it was always everyone else's fault.⁵² (*Id.*) Mr. Nielsen asked the Complainant to think about what he had said and then meet with him so they could talk about how to make things go more smoothly for the Complainant at TOCDF.⁵³ (*Id.*)

Work on Other Systems: October 2009

While the Complainant's efforts were focused on the water pressure investigation, during the month of October 2009, he did find a little time to work on other systems as well. For instance, the Complainant talked with both Mr. Johnston and maintenance workers about changing the valves on the sewage treatment ponds to match the set-up in the manual. (RX 160, p. 2327.) On October 24, 2009, though, Maintenance cancelled the Complainant's work order to decommission the sand filter. (HT, p. 886.) The water treatment system upgrade was also still in difficulties, requiring troubleshooting and reconfiguration to avoid leaks, but still releasing too much hard water. (RX 160, p. 2327; CX 33, p. 1; RX 130, p. 1255.) Despite this, on October 27, 2009, the Complainant was finally able to submit the work order for Maintenance to begin field-fitting the second water treatment bed with PVC pipe. (RX 165, p. 2795.) His only instruction was for Maintenance to use its "craftsmanship to incorporate suitable pieces." (*Id.*) As for the brine concentration project, when on October 28, 2009, a training representative asked if brine was still going to be used to control ice, the Complainant wrote back that his supervisors had said to focus exclusively on the water treatment system upgrade and not work on brine anymore. (*Id.* at 2432; RX 131, p. 1291.)

Drafting the Water Pressure Test Plan: October 15–30, 2009

As part of the water pressure investigation discussed at the meeting on September 22, 2009, the Complainant had been asked to write up a formal plan for testing the system flow. (HT, p. 838.) The Complainant wrote an initial outline for the test plan very quickly (*see* RX 29, p. 241 (draft of plan supposedly attached to email three days after the Complainant was asked to write it); RX 130, p. 1254), but it was not until October 15, 2009, that all of the parties to the intended test met and discussed what needed to be included (RX 130, p. 1255). Always

⁵² A few minutes after this email, Mr. Nielsen sent the Complainant a second one, pointing out to the Complainant that the Engineering Department had been giving him a lot of extra help by reassigning people from other projects to help investigate the pressure issues. (RX 30, p. 244.) Since the Complainant was still having so many problems despite this, the time had come for the Complainant to tell Mr. Nielsen what he thought needed to be done differently for the Complainant to succeed. (RX 29, p. 240.)

⁵³ This meeting did take place, on October 12, 2009. (RX 159, p. 2319.) The Complainant and Mr. Nielsen spoke for a half-hour about how the Complainant should work on "how he interact[ed] with people so that he [would get] more support," and Mr. Nielsen recommended some leadership development reading. (*Id.*)

enthusiastic, the Complainant took those decisions, wrote a first draft of the test plan for the “TOCDF Water Supply Fire Hydrant Test,” and submitted it to management for signatures on October 26, 2009, hoping to schedule the test before the end of the month. (RX 28, p. 239; CX 32, p. 1.)

Other engineers thought that the Complainant’s test plan required some changes, however, including Mr. Rogers, one of EG&G’s senior engineers. (RX 160, p. 2327.) Because the Complainant resisted incorporating Mr. Rogers’s edits, on October 29, 2009, his supervisor, Mr. Johnston, instructed the Complainant to collaborate with Mr. Rogers on improving the draft. (*Id.*) Then EG&G’s team would meet and finalize the document before sending it on to DCD. (*Id.* at 2328.) There was a misunderstanding though, as the next day the Complainant sent DCD his draft of the plan and invited DCD to the editing meeting. (*Id.*) The Complainant had to be reminded that Mr. Johnston and Mr. Nielsen wanted to reach an internal consensus before involving outside agencies in the investigation. (*Id.*)

When Mr. Johnston reviewed the Complainant’s draft of the test plan on October 30, 2009, ahead of the planned EG&G meeting, he agreed with Mr. Rogers that significant editing was needed. (RX 31, p. 246.) In Mr. Johnston’s opinion, the Complainant’s draft plan was too ambiguous, creating the potential for real confusion that could prolong the testing process and undermine the value of any test results. (*Id.*) In an email, Mr. Johnston told the Complainant that the plan needed “clear goals, precise steps, and clear documentation.” (*Id.*) The purpose of the test needed to be declared up front – to determine the fire suppression system’s current capacity – and then stuck to. (*Id.*) Whether any adjustments to the water system needed to be made and how, were questions EG&G needed to leave to DCD, since the water supply was outside of TOCDF’s control. (*Id.*) Mr. Johnston also criticized the Complainant for not incorporating Mr. Rogers’s comments as he had been asked to, particularly since those comments were targeted at clarifying the plan’s ambiguities, precisely what was needed. (*Id.*; RX 160, p. 2328.) However, Mr. Johnston said that the EG&G group could help shape a new version of the plan at their meeting. (RX 31, p. 246.) Finally, he again reminded the Complainant not to send any drafts outside of TOCDF until the internal group agreed to do so. (*Id.*)

Building the Case for Dismissal: November 2009

Mr. Nielsen had been keeping an eye on the Complainant and noticed his continued resistance to direction from his supervisors. (*See* RX 159, p. 2320.) On October 30, 2009, Mr. Johnston told Mr. Nielsen that he was “getting frustrated” with the Complainant agreeing to do one thing and then actually doing something else, ignoring instructions from management. (*Id.*) Mr. Nielsen asked Mr. Johnston how much longer he was going to “nurse maid [the Complainant] through his job,” and Mr. Johnston agreed that he should “start putting a dismissal case together.” (*Id.*) Though they had given the Complainant a reprieve from formal review on his first PIP, both were frustrated that the Complainant had not followed through on even the plan’s most basic directives. (*Id.*) After this discussion with Mr. Nielsen, Mr. Johnston began to keep his own notes on the Complainant’s performance issues. (*Id.* at 2321.)

Over the next month, November 2009, the Complainant failed to meet his managers’ expectations repeatedly. On November 2, 2009, Mr. Nielsen observed that once more, the Complainant was performing laboratory experiments in his cubicle, an industrial hygiene issue.

(RX 159, p. 2321.) That same day, the Complainant ignored the instructions to keep discussion of the test plan internal, meeting with DCD to go over a draft. (RX 130, p. 1256.) Again, Mr. Johnston counseled that Complainant that that was not appropriate at this stage and encouraged him to make further changes on his own to organize the draft plan better. (RX 160, p. 2328.) Yet, just two days later, the Complainant was again routing plan changes to DCD and jumping ahead with a work order to modify the water supply system even before the test was run. (RX 130, p. 1256; RX 140, p. 1531.) This work order included many statements about the system that were phrased as certainties and demanded that DCD make lots of alterations to the equipment it controlled without offering more evidence to support those proposals.⁵⁴ (RX 140, pp. 1531-32.) Meanwhile, Mr. Johnston met with EG&G's Human Resources Department and was advised to write the Complainant a final written warning about his behavior and the measurable and specific ways he needed to improve. (RX 160, p. 2328.)

The Complainant continued to provide fresh violations for Mr. Johnston to write about. On November 5, 2009, the Complainant used maintenance workers and a forklift to mix 2,000 new gallons of brine. (RX 140, p. 1537.) Almost as soon as he entered that accomplishment into the work records, management directed him to stop working on this project and to close the work order. (*Id.* at 1538.) The Complainant also received additional written instruction by email that he needed to clean and organize his cubicle, remove all foreign substances from it, and stop conducting laboratory tests in his workspace. (RX 96, p. 634.) The Complainant's blithe response was that his testing was fine, that he had gotten permission from a safety worker a while ago and just needed to keep it away from where he ate lunch. (*Id.* at 633.) Besides, the Complainant said that official lab tests took a long time, making "quick and dirty test[s]" preferable. (*Id.*) The Complainant emailed Mr. Johnston that instead of stopping the testing, as instructed, he would "stow the [testing equipment] in [his] file cabinet (out of site-out-of-mind) [sic]." (*Id.* at 633-34.) Mr. Johnston's efforts to improve the test plan the Complainant was writing were not getting results either. (*See* RX 159, p. 2322.) Mr. Nielsen told Mr. Johnston that he was concerned that Mr. Johnston was ending up doing the Complainant's job for him, which he warned could leave Mr. Johnston "stand[ing] in the soup line with him" too. (*Id.*)

On November 12, 2009, the Complainant submitted a request for EG&G funding to get training in the "Six Sigma" process. (RX 40, pp. 289, 293-94.) The request was a form filled out by hand with typewritten sheets attached that explained two alternate projects the Complainant might pursue through the training.⁵⁵ (*Id.*) After reviewing the forms, Mr. Nielsen told Mr. Johnston to have the Complainant redo the paperwork since he considered it "sloppy" and a "good example of [the Complainant's] poor performance." (*Id.* at 288; HT, p. 1639.) Further,

⁵⁴ A senior engineer at EG&G later commented that the order was "inaccurate and confusing," including many statements not borne out by the facts or that conflated the issues. (RX 140, p. 1532.) Ultimately only one of the changes the Complainant said needed to be made was ever performed. (*Id.*)

⁵⁵ The two projects the Complainant proposed were for additional monitoring of the water treatment and sewage treatment systems. (RX 40, pp. 293-94.) It was the Complainant's plan to use the classes to "highlight" the problems he thought TOCDF's systems had, essentially by making fixing those perceived issues a class project. (*See* HT, pp. 888-89, 902.) In his written explanations and later through marking chapters in a book he gave to Mr. Nielsen with his redone paperwork, the Complainant asserted that his projects were necessary because EG&G was not in compliance with "Army Regulation 200-1" and "Utah State Regulation 317-6." (*Id.* at 886, 888, 896; RX 40, pp. 293-94.) Mr. Nielsen asked Mr. Johnston to look into these regulations to see if EG&G was actually out of compliance. (HT, p. 888; RX 40, pp. 291-92.) Both citations are to very general, precatory statements that entities should essentially try to consider the environmental impact of their actions. Army Reg. §200-1; Utah Reg. §317-6.

Mr. Nielsen noted that the Complainant actually needed approval from a different EG&G committee to do some of the training he was asking for and that that committee had already made its decisions for that round of courses. (RX 40, p. 291.) When the Complainant resubmitted a typed application, along with a book of regulations marked with the pertinent sections he wanted to investigate, Mr. Nielsen did sign off on the class request though. (HT, pp. 888, 893, 896, 1644.)

The Complainant also was still pushing for exemptions from EG&G's chemical testing and approval procedures at every opportunity.⁵⁶ (See RX 124, pp. 1139, 1144-46.) In a series of emails on November 16 and 17, 2009, the Complainant again tried to minimize the differences between the chemicals he was using, trying to just do paperwork for one instead of both. (*Id.*) The industrial hygienists were patient but firm: the Complainant had to follow the set procedures and fill out the appropriate forms. (*Id.*) Throughout November 2009 the Complainant kept soliciting feedback from DCD on his draft of the test plan as well, regardless of the repeated instructions from his managers to keep the project in-house until it was finalized. (See RX 130, pp. 1256-57; RX 28, p. 239; RX 160, pp. 2327-28.) Thus, the problems with the Complainant's performance continued, unabated.

EG&G Committee Meeting on Water Pressure: December 2, 2009

On December 2, 2009, Mr. Nielsen presented the engineering team's findings about the water pressure problem to EG&G's Plant Operating Readiness Committee. (RX 106, p. 1031; RX 108, pp. 1045-58.) Mr. Nielsen explained to the Committee that his team had determined that the plant was allowed to keep running in its current condition, but that, based on hydrant testing from July 2009, the pressure did appear to be short of the design requirements. (RX 106, p. 1031; RX 108, pp. 1045, 1048.) After reviewing records, the engineering team had found no major changes in the annual hydrant testing data and no alterations to the water supply system since a tank was removed in the late 1990's with government approval. (RX 108, pp. 1045-46.) Ultimately, Mr. Nielsen said that he suspected EG&G and DCD would "need to increase the pressure to the plant from 100 psi to 130 psi to provide the required residual pressure," for the sprinklers to operate as designed. (*Id.* at 1051.) Flow testing was being planned to evaluate this hypothesis to measure system capacity and to check for malfunctioning components. (RX 106, p. 1031.) The engineering team intended to run the flow test on a Friday, tentatively sometime in January. (*Id.*) Though the test plan was still being drafted, Mr. Nielsen promised to bring the complete version back to the committee for approval and to then run it by DCD's representatives. (*Id.*)

Pond Sampling Safety Issues: December 2-7, 2009

In early December, the monitoring technicians began resisting the Complainant's monthly sampling of the sewage treatment ponds. (RX 130, p. 1257; RX 97, p. 637.) Because of the cold weather, the areas around the ponds were icy and muddy and the technicians had safety concerns about continuing to collect samples in those conditions, particularly when the ponds were frozen over. (RX 97, p. 637.) The Complainant's response, on December 4, 2009, was to

⁵⁶ Just as the Complainant had in earlier rounds of testing in January-May 2009. (See RX 89, pp. 621-22; RX 90, p. 623; RX 91, p. 625; RX 93, p. 628; RX 94, p. 629; RX 124, pp. 1130-31, 1136-37.)

insist that “monthly sampling [wa]s a bare minimum,” but that he was comfortable collecting the samples himself, under the technicians’ direction and supervision, if they did not want to approach the ice themselves. (*Id.*) He also offered “two loafs of homemade banana bread” to sweeten the deal. (*Id.*)

A monitoring representative responded on December 7, 2009, that safety concerns like this one really called for a formal safety evaluation and supervision. (R 97, pp. 636-37.) Also, since the Complainant was not a “certified sampler,” his collecting samples himself would “potentially compromise the sample integrity.” (*Id.*) Once again, the Complainant took the concerns of others very lightly; while he agreed that having a safety person supervise might be good, he was “just going to fill the gallon jug of bulk water” himself, using “an ice auger, a 6 ft pry bar, and a scoop for the ice chips.” (*Id.* at 636.) The monitoring representative replied that her point was that if “someone feels that it is unsafe for them to perform the sampling, it is probably unsafe for [the Complainant] as well” so he should not “take matters into [his] own hands.” (*Id.*) She reminded the Complainant that safety was supposed to be the top priority at TOCDF. (*Id.*)

The Complainant, however, was still not convinced. He shot back that he had visited the ponds that morning and thought it would be fine to walk to the edge of the bank carefully to get the samples. (RX 97, pp. 635-36.) Also, he was now offering cookies as well as the banana bread in exchange for the safety technicians’ input and assistance with collecting the samples. (*Id.*) A more senior sampler chimed in at this point to request a formal safety review of the procedure, then questioned why these samples were being taken at all during the winter when the Polecat blower was not running. (*Id.* at 635.) The Deputy Safety Director, Branden Wilson, emailed next that he agreed with his technicians that there needed to be a detailed safety plan for this sampling work order. (*Id.*) For the time being, the Complainant did not press the issue further.

The Second Performance Improvement Plan: December 7, 2009

Because the Complainant’s managers thought his performance was deteriorating and no progress had been made towards the requirements of the first PIP, on December 7, 2009, the Complainant was given a second PIP focused on many of the same issues. (RX 14, p. 128; HT, p. 2000.) Mr. Nielsen and Mr. Johnston hoped this would drive home to the Complainant the importance of changing the way he worked, as so far all the other counseling had not been effective. (RX 33, p. 250.)

Specific problems the second PIP identified with the Complainant’s recent performance included: having a messy office; “storage of unacceptable items” in his work space; not always shaving before work so his escape mask could seal effectively in an emergency; and failing to complete even the basic tasks listed in his first PIP, like walking down his systems, reviewing parts levels, and keeping a comprehensive systems notebook. (RX 33, p. 249.) Mr. Johnston also said he had “received several complaints from individuals who would prefer not to work with [the Complainant] because of [his] difficulty in communicating and getting along with others.” (*Id.* at 250.) Similarly, the Maintenance Department reported that the Complainant’s work orders were still “often non-comprehensible,” making completing them a struggle. (*Id.*) In terms of project-related problems, the water treatment system upgrade was still not complete, despite over a year of work, which was completely “unacceptable.” (*Id.* at 249.) Most problematic though

were the Complainant's repeated failures to "comply with specific instructions from [his] supervisor." (*Id.* at 250.) Particularly in writing the test plan, the Complainant kept resisting the incorporation of changes and persisted in prematurely forwarding drafts to DCD. (*Id.*) After almost two years at EG&G, the Complainant was still not following EG&G's procedures and that needed to change. (*Id.*)

This second PIP gave the Complainant 30 days to achieve a list of specific improvements in his performance, or to at least demonstrate concrete progress towards those objectives. (RX 33, pp. 250-51; HT, p. 91.) The required changes explicitly included everything the first PIP had asked the Complainant to do, but many of the individual items were listed in the second PIP, for emphasis, as well. (*See* RX 33, pp. 250-51; RX 23, pp. 181-82.) The Complainant needed to accomplish the following: review the water system parts, note this review on a spreadsheet, and prepare a "comprehensive plan" to address all spare parts issues within six months; improve written and verbal communication with coworkers, who at the end of the plan would be asked if they had noticed any improvement; give daily updates to supervisors; keep a time log and comprehensive systems notebook of all daily activities; plan how to address open work orders; write all work orders necessary for repairs with sufficient detail for them to be completed; review all continuous improvement plans; remove all testing and clutter from his cubicle; and remain clean-shaven at all times. (RX 33, pp. 250-51.) In addition, the Complainant again needed to focus his work on completing his current projects and was forbidden from starting any new projects without supervisor approval. (*Id.* at 251.) On the most basic level, the PIP also required the Complainant to follow all work instructions issued by his supervisors. (*Id.*) Failure to do these things would result in further disciplinary action, up to and including termination. (*Id.*)

After reviewing the PIP document with Mr. Johnston and Mr. Nielsen, under the supervision of Joshua Hancey, a human resources representative, the Complainant signed the PIP on December 7, 2009. (RX 159, p. 2323; RX 33, p. 252.) His only written comment was that he concurred with the assessment and would "have the actions complete in 30 days."⁵⁷ (RX 33, pp. 251-52.)

Moonlighting, Time Cards, Spills, Drills, and Other Problems: December 7–16, 2009

After the second PIP meeting, things started out fine. The same day the Complainant received his second PIP, December 7, 2009, he actually won a small award for having written the "peer observation of the week" at TOCDF for submitting a short report about his concerns that some recently installed tarps could become a hazard in high winds. (RX 136, p. 1334.) (*Id.*) Then, on December 8, 2009, the Complainant noted some progress on the piping of the second water treatment bed, which was now ready for testing, and he also did a little review of the system's spare parts. (RX 130, p. 1258.) Additionally, the Complainant's most recent draft of the

⁵⁷ Several days later, the Complainant did email Mr. Hancey because he could not figure out how to access EG&G's written procedure for how to appeal a PIP. (RX 35, p. 254; HT, p. 82; RX 55, p. 361.) In this email, the Complainant expressed surprise that he had been given a second PIP: "In all honesty (as a gentleman), I felt that I ... had done everything on [the first PIP], ever since." (RX 35, p. 254.) He claimed to have reviewed the first PIP multiple times a week since receiving it. (*Id.*) However, the Complainant added that he had "accepted [the second PIP] warning letter in its entirety" and that he just wanted the policy about PIP procedure so he could "fully understand and comply" with it. (*Id.*) This policy was available on the company intranet, with all of EG&G's other procedures, and Mr. Hancey's reply, if there was one, was to look for it there. (HT, pp. 77, 84; RX 55, p. 361.)

flow testing plan had been reviewed by Mr. Nielsen. (RX 149, p. 2133.) Unfortunately, Mr. Nielsen still considered the draft to be “pretty rough,” but on December 9, 2009, the Complainant thanked Mr. Nielsen for his edits and modified the test plan so the pressure would be increased more incrementally to 130 psi. (*Id.*; RX 140, pp. 1531-32.) They believed this change would fix the issues with the water supply, while avoiding any damage to the system. (RX 140, p. 1532.) That same day, the Complainant was also informed that his application for educational funding from EG&G had been approved.⁵⁸ (CX 53, pp. 1-2.)

Any improvement in the Complainant’s performance though was extremely temporary. Just days after the second PIP put the Complainant on notice that his job depended on starting to follow EG&G’s rules and his supervisors’ instructions, the Complainant engaged in an action his manager saw as “Blatant Defiance.” (RX 33, pp. 249-52; RX 34, p. 253.) On December 9, 2009, the Complainant added a note to one of the brine concentration work orders that said: “My supervisor has directed me to not pursue the brine application initiative ... Therefore, I have convinced DCD to try out this [brine mixing] system with their resources and I will volunteer my time (off the clock) to see it through to completion. I firmly believe this is a good safety recommendation and a wise environmental one.”⁵⁹ (RX 34, p. 253.)

Mr. Nielsen saw this comment and the Complainant was immediately summoned to his office for a discussion about why this was unacceptable. (RX 14, p. 128; HT, p. 1581.) Together, they went over the Complainant’s second PIP again, as well as EG&G’s rules about conflicts of interest and forbidding moonlighting (which the Complainant had recently completed his annual training about). (HT, p. 1581; RX 25, p. 230.) Under the employment agreement the Complainant had signed when he started work for EG&G, he was not allowed to pursue any sort of work with EG&G clients such as DCD. (RX 25, p. 230.) Also, even if the work was “volunteer,” it was still a source of potential liability to EG&G and would have involved using the Complainant’s EG&G access privileges to accomplish work that his supervisors had specifically and repeatedly forbidden him from pursuing. (*Id.*; HT, pp. 527, 529, 1581-82.)

⁵⁸ After getting this approval, the Complainant wrote an email to Janet Weyland, the Environmental Permitting Supervisor, asking for her “buy-in” on his class project of modifying TOCDF’s sewage ponds. (CX 53, p. 1.) He asserted that Mr. Nielsen and Mr. Johnston knew what he was planning from his class request paperwork, but that he wanted to make sure everyone understood his plans before he committed any money or time on the project. (*Id.*) In his own words, this was because the Complainant was a “can-do guy, but I don’t want to get shot down after making a commitment. ... If I don’t get a commitment from everyone, I’m also a lazy guy and will drop the environmental initiative for EG&G ... Just ask my wife ... how long it takes me to get jobs done. It will bring a smile to your face.” (*Id.*) This planned meeting was likely the one that had been scheduled for January 12, 2010, and was cancelled after the Complainant’s second PIP review was unsatisfactory and Mr. Nielsen decided to begin the termination process (since once fired, there would be no class project to discuss). (*See* HT, pp. 2161-62; CX 46, p. 1; RX 41, p. 295; RX 14, p. 129; RX 44, p. 302 (termination meeting originally scheduled for January 14, 2010, thus, by the time Mr. Johnston cancelled the meeting on January 12, he knew the Complainant would be fired shortly).)

⁵⁹ At the hearing, the Complainant claimed that he had been called by someone at DCD who wanted to know about the brine project. (HT, pp. 1073-74.) Since DCD was apparently still interested and EG&G was no longer pursuing the project, the Complainant thought it would be good to let DCD have the leftover materials and for him to teach DCD quickly how to make the brine sometime when he was not at work for EG&G. (*Id.* at 1074.) The Complainant testified that the problem was the phrasing of his entry in the work order. (*Id.* at 1075 (he could see why Mr. Nielsen got mad the way the note was written, but that was “not how it happened,” as if Mr. Nielsen would have been fine with the Complainant volunteering if he knew all the details).)

After this counseling, the Complainant deleted his comment from the work order and substituted a new statement that “Applicat[ion] of the [water treatment system] liquid brine for winter ice prevention has been dropped.” (HT, p. 1580; RX 131, p. 1291.) Mr. Johnston met with the Complainant about the problem as well and made sure that the Complainant knew he could “no longer be involved” in anything related to brine. (RX 160, p. 2330.)

In more positive news, on December 10, 2009, the Complainant also reached an important benchmark for the water treatment system upgrade: both treatment beds were back in operation.⁶⁰ (RX 160, p. 2330.) In addition, he did some more work on parts inventory and made some changes to his test plan draft before sending it to Mr. Nielsen and Mr. Johnston for approval. (RX 130, p. 1258; RX 28, p. 239.) Since the flow test was now not scheduled to happen until sometime in the spring, due to the cold weather, there was probably no longer any urgency about these revisions.⁶¹ (RX 28, p. 239; HT, pp. 1146-47, 1175; RX 46, p. 307.)

Now that the Complainant’s performance was under close scrutiny, new rules violations and other problems seemed to be noticed nearly every day. For instance, on December 11, 2009, Mr. Nielsen saw the Complainant at work, but then could not find him a few hours later. (RX 25, p. 231.) After asking coworkers, Mr. Nielsen discovered that the Complainant decided to leave work and review procedures from home, filling out his time card to indicate that he had worked for nine hours, four on site and five from home. (*Id.*; RX 14, p. 128.) The problem was that the Complainant had not asked his supervisor for permission to do this and had not even notified Mr. Johnston that he was leaving. (RX 25, p. 231.) Because EG&G’s work records are open to government audit, the rules require prior written approval to work from home. (*Id.*; HT, p. 95.) Thus, Mr. Nielsen had to have yet another discussion with the Complainant about the need to follow procedures.⁶² (RX 25, p. 231.)

The Complainant got in trouble again on December 14, 2009. Over the weekend he had submitted a shift order for some changes to the water treatment program. (RX 129, p. 1219; RX 159, p. 2324; RX 25, p. 231.) Because the Complainant wrote the work order on a Saturday when normal supervisors were not at the plant, he instead got approval over the phone to make the changes he wanted. (HT, pp. 2062, 2176; RX 129, p. 1219.) While doing the installation though, technicians noticed that the safety switch did not have the appropriate rating and asked the Complainant for clarification. (RX 25, p. 232.) Over email, he told them to proceed without the switch, despite noting that it was possible that the tank could overflow as a result. (RX 129, p. 1219.) In the Complainant’s mind, this risk was “minor.” (*Id.*)

⁶⁰ Of course, this meant that nearly two years of work had achieved only a return to the original configuration: the plan to increase to three independent treatment beds, rather than just two, had been canceled, perhaps due to the delays. (*See* RX 160, p. 2330; CX 10, p. 1.) Additional work on the system was still required as well, such as upgrades to the programming and control lines, etc., and would not be completed until after the Complainant left EG&G. (*See* RX 165, p. 2411; HT, pp. 1314-15.)

⁶¹ The Complainant and Mr. Nielsen continued to work on this draft of the test plan until December 23, 2009, when it was submitted (with management’s permission) to DCD for its approval. (RX 28, p. 239; HT, p. 1761.) However, ultimately an entirely new test plan was written by Mr. Nielsen and a group of senior engineers for the flow test that was performed in the spring of 2010, since even the final version of the Complainant’s test plan did not follow certain national guidelines. (HT, pp. 1762, 1941-42.)

⁶² Despite this warning about the importance of properly completing his time cards, and later follow-up reminders, the Complainant failed floor checks of time cards (where the entire Department’s cards were examined) on both December 22, 2009, and January 5, 2010. (RX 135, pp. 1331-32; RX 25, p. 231.)

When the Maintenance Department Managers, Mr. Hunt and Mr. Brewer, arrived at work Monday, they did not agree. Both managers called Mr. Nielsen to complain that the Complainant's order was "completely incomprehensible," had been changed in the field, did not notify operators about the switch being removed, and cavalierly ran the risk of a tank spill. (RX 25, pp. 231-32; RX 159, p. 2324; HT, p. 1924-25, 1947-48.) While only salty water would be spilled, to identify such a risk ahead of time and proceed anyway, without precautions or monitoring, "[flew] in the face of TOCDF's principles" and was unacceptable. (RX 25, p. 232.) Mr. Nielsen tried to communicate the seriousness of this to the Complainant, but apparently the Complainant could not understand why he was being criticized.⁶³ (RX 159, p. 2324; *see* HT, pp. 2176-79.)

Next, on December 15, 2009, the Complainant called the Field Office and told them to have DCD increase the pressure in the water supply to 120 psi as soon as possible, since the flow test had been delayed until spring. (RX 129, p. 1225.) The Field Office responded to senior management at EG&G, asking them to submit a formal letter requesting such a change and detailing why the change was necessary. (*Id.*) When Mr. Nielsen found out, he was frustrated that the Complainant had again ignored procedures and tried to do something this significant with an informal phone call. (HT, pp. 1950-52.) A full letter to the government explaining the requested change was dispatched the next day. (RX 133, p. 1327.)

Then, on December 16, 2009, the Complainant decided to once more start pressuring the monitoring technicians to sample the frozen sewage ponds for him, despite their safety concerns.⁶⁴ (RX 129, p. 1212.) This time, the Complainant said that the technicians should use a cordless drill to break through the ice and get samples, since he "bet" that the ice was "only 3-4 inches thick." (*Id.*) In his plan, the technicians would wear life vests and reach out at arms-length from either a boat placed on top of the ice or from a prone position on the icy bank, drill through to the liquid below the ice, and get the samples. (*Id.*) One of the safety representatives pushed back on this request, saying that the Complainant's procedure would take two of his men all day to complete and was still unreasonably dangerous. (*Id.* at 1211.) He could not see why these samples would be worth the hassle and risk. (*Id.*) A monitoring technician chimed in that planning something this complicated required a face-to-face meeting and could not be accomplished by email. (*Id.*)

However, the Deputy Safety Director, Mr. Wilson, did not think a meeting would be necessary because it was absolutely unreasonable for an EG&G employee to suggest performing work that involved such "significant safety hazards." (HT, pp. 687-88.) He thought this was a situation of a "rogue employee who was just trying to operate on his own without following [EG&G] processes," so he forwarded the message string to Mr. Nielsen and Mr. Johnston thinking they "might be interested" in the Complainant's behavior. (*Id.* at 689; RX 129, p. 1211.) Mr. Johnston immediately emailed the Complainant and the rest of the group, directing them to

⁶³ The Complainant insisted that phone approval for his order from Mr. Brewer and Mr. Johnston, along with speaking to the shift supervisor when that order was changed, should have isolated him from this criticism. (HT, p. 2176.) Though he admitted that a spill of the salt water would require a written report, in his mind that was "an acceptable risk" and not a big deal since he estimated the spill would only be of "a couple hundred gallons." (*Id.* at 2178-79.)

⁶⁴ Also despite being told on December 7, 2009, by the Deputy Safety Director that there needed to be a written work order and detailed hazard evaluation for these tests, given the concerns that had been raised. (RX 97, p. 635.)

cease all testing because there were “way too many hazards to attempt to drill holes on the pond.” (RX 36, p. 256.) The Complainant was to suspend all work on the project until he got direct permission to continue. (*Id.*) Apparently both Mr. Johnston and Mr. Nielsen had been unaware that the Complainant was trying to collect samples when the ponds were iced over. (*See* HT, pp. 1741-42.) Since these monthly samples were only to show trends in water quality (Utah required only annual testing), they considered it a “no brainer” that sampling should have been skipped in the winter, or that, at a minimum, the Complainant should have followed EG&G’s rules for operating in ice and snow. (*Id.* at 1646, 1742, 2007.)

Mr. Nielsen Attempts to Resolve Repeated Issues: December 16–21, 2009

At this point, Mr. Nielsen was “greatly concerned” with the number of issues with the Complainant’s behavior that had come up in just the “little more than a week” since the second PIP was implemented. (RX 37, pp. 257, 259.) At the end of the day December 16, 2009, Mr. Nielsen wrote the Complainant an email with a long list of questions about why the Complainant had done the things he had recently. (*Id.* at 257-59.) He asked the Complainant to respond with justifications by the next morning so they could discuss how to avoid continuing problems. (*Id.* at 257.)

The Complainant did not reply until mid-day on December 17, 2009, admitting he had not even opened Mr. Nielsen’s email until Mr. Nielsen stopped by his office to check on him around 10:00 a.m. (RX 37, p. 257.) The Complainant did type responses to Mr. Nielsen’s many questions, but his answers were frequently non-responsive to the question actually asked. (*E.g.*, *Id.* at 257 (Mr. Nielsen asked why the plan had changed to include winter sampling; the Complainant responded with the sample request form he filled out to get samples and a spreadsheet of sampling results to date), 258 (Mr. Nielsen asked why the Complainant volunteered for DCD despite training on EG&G’s moonlighting policy; the Complainant replied that he was not looking for a new job with DCD and cited EG&G’s contract, the pond owner’s manual, and state water quality guidelines, his justifications for the brine initiatives), 259 (Mr. Nielsen asked why the Complainant did not get permission to work at home; the Complainant said he was working off-site on reading the procedures).) Clearly, these problems would not get resolved through written communication.

Therefore, Mr. Nielsen met with the Complainant in person on December 18, 2009, to discuss the performance problems that had been noticed since the second PIP was put in place. (RX 14, p. 128.) After this discussion, Mr. Nielsen feared that the message was not getting through to the Complainant at all and expressed doubt that the Complainant had even read the second PIP, let alone understood it, despite his supervisors going over it with him twice now. (RX 159, p. 2325; RX 25, p. 229.) At the meeting, Mr. Nielsen had emphasized again that the Complainant needed his approval to work on new things and asked the Complainant to meet with him again on Monday, December 21, 2009, to go over his current projects. (RX 25, p. 229.) However, the Complainant never showed up for that meeting. (*Id.*; RX 14, p. 128.) Worse, according to Mr. Nielsen, the Complainant “continued to work on projects not specifically approved.” (RX 25, p. 229.) This repeated failure to meet even the basic expectations of the Complainant’s PIPs was not viewed favorably. (*Id.*)

Review of Personal Improvement Plan and Termination: January 7–21, 2010

On January 7, 2010, the Complainant met with Mr. Nielsen and Mr. Johnston to do the 30-day review of the Complainant's progress on the objectives of his second PIP. (RX 25, p. 233; RX 14, p. 129.) The Complainant arrived at the meeting with a couple of three-ring binders and some drawings to present, but he did not have much of substance to show for himself. (HT, pp. 1749-50.) While some progress had been made, many of the objectives of the second PIP had definitely not been accomplished satisfactorily. (RX 25, p. 233.)

The Complainant was supposed to have developed a plan for dealing with the supply of spare parts for the water system. (See RX 33, p. 250.) Though the Complainant had printed out a list of various parts, there was no spreadsheet showing what he had reviewed and the Complainant's "plan" consisted only of a single page of rather sloppily handwritten notes. (*Id.*; RX 25, p. 233; HT, pp. 1750, 1785-86; RX 134, p. 1329.) Since entering the second PIP, the Complainant had also been rebuked for not shaving on several occasions,⁶⁵ his "activity log" was only a few scattered entries, and the water treatment system upgrade was, even in the Complainant's estimation, still only 80% complete. (RX 25, p. 233; HT, p. 1790.)

After looking at the paperwork the Complainant brought to the meeting, Mr. Nielsen could see little progress on written communication, and Maintenance was still having difficulty with the Complainant's work orders. (RX 25, p. 233; HT, p. 1780.) The Complainant's coworkers had noticed no change for the better in the Complainant's verbal communication skills either. (RX 25, p. 233; HT, p. 1787.) When the Complainant was asked about his progress on closing work orders, an objective that had been included in both of his PIPs, the Complainant did not even seem to know what his managers were talking about. (RX 25, p. 233.)

After spending an hour looking at everything the Complainant had to show, Mr. Nielsen did not feel that the Complainant had put much work into completing the PIP. (HT, pp. 1749-50.) He told the Complainant that he had not made a decision about what the next step would be, but that he would let him know. (*Id.* at 326.) According to the Complainant, Mr. Nielsen then asked him if he had "anything to say to beg or plead for [his] job."⁶⁶ (*Id.* at 2161.)

Based on the Complainant's lack of progress and continued noncompliance with supervisor direction, Mr. Nielsen recommended to EG&G's senior management that the Complainant be terminated. (RX 14, p. 129; RX 43, p. 298.) At EG&G all such personnel decisions had to be approved by senior management, so Mr. Nielsen presented his reasons to an executive board, they reviewed the evidence, and then unanimously supported the decision to terminate the Complainant. (HT, pp. 48, 78.) In fact, according to the Human Resources Manager, Debbie N. Sweeting, she and many of the other executives were surprised that the Complainant had been given so many chances to improve and had not been terminated much more quickly. (*Id.* at 48, 51, 79.) Ms. Sweeting testified that she concluded that the Complainant

⁶⁵ Apparently during the PIP review, the Complainant admitted to shaving at night, meaning that he came to work with "five o'clock shadow." (RX 25, p. 233.) Mr. Nielsen considered this evidence that the Complainant did not "understand the importance of being clean shaven to ensure a tight seal on his escape mask" as the procedure required. (*Id.*)

⁶⁶ Mr. Johnston does not remember this happening, and Mr. Nielsen denied that anything like this was ever said. (HT, pp. 326, 1536, 1583, 1930.)

had been insubordinate repeatedly by not working on what he was directed to focus on and continuing to pursue his preferred side projects like making brine. (*Id.* at 53.) The termination decision was also approved by officers in EG&G's corporate office and EG&G's Labor Relations Director before Mr. Nielsen was given the go-ahead to notify the Complainant. (*Id.* at 49, 78, 98, 2008.) This review process took about a week to complete. (*See* RX 44, p. 302.)

At the end of the day on January 14, 2010, the Complainant's supervisors told him to come to the main office the next morning to discuss the outcome of his PIP. The discussion was deferred until January 21, 2010, after he returned from a week-long family vacation. (RX 44, p. 302.)

The meeting on January 21, 2010, was brief and meant to be one of notification, not rebuttal. (HT, pp. 87, 519.) The Complainant was given a termination notice, effective immediately, because of his "continued failure to meet the expectations outlined" in his PIPs and his ignoring "specific instructions" from his supervisors. (RX 43, p. 298.) Though the meeting was unemotional and both the Complainant and Mr. Nielsen signed the termination notice, Mr. Johnston got the impression that the Complainant was somewhat surprised at being fired. (HT, pp. 519-20; RX 43, p. 298.)

Post-Termination Appeals: February 5–19, 2010

After he was terminated, the Complainant asked Joshua Hancey how he could appeal the decision. (HT, pp. 87-88.) Mr. Hancey was confused, as the decision to end the Complainant's employment had already been made at that point and EG&G had no further appeal process.⁶⁷ (*Id.* at 88.) However, EG&G's managers decided to deviate from standard procedure and allow the Complainant to write a letter to Gary McCloskey, the General Manager. (*Id.*)

The Complainant's appeal letter was dated February 5, 2010. (RX 44, p. 299.) In it, the Complainant said that he believed his termination was unfair and unfounded because, in his own assessment, he had been working "thoroughly and aggressively" to correct the water supply and sewage treatment issues. (*Id.* at 303.) He also claimed to have been a "good steward" of company and taxpayer resources and the environment. (*Id.*) The Complainant argued that the delays in upgrading the water treatment system had been "largely" out of his control, instead blaming the complex procedures of the base and the Maintenance Department's supposedly divergent priorities for how long the project took. (*Id.*) Finally, the Complainant stated that it was his perception that he had been "singled out as a 'troublemaker'" by EG&G for "following [his] professional responsibilities in identifying safety and environmental issues." (*Id.*) He wanted permission to talk to Mr. McCloskey in person about his termination and the ways in which he believed his supervisors had violated company ethics and "core values." (*Id.*) Though TOCDF was in the process of gradually closing, the Complainant wanted to be reinstated so he could finish his service, collect his bonus award,⁶⁸ and "repair [his] reputation." (*Id.*)

When EG&G received the Complainant's appeal letter, Mr. McCloskey, Mr. Nielsen, and Ms. Sweeting, the Human Resources Manager, discussed how to respond. (HT, p. 27.) In the

⁶⁷ The Complainant's opportunity to appeal was when the PIPs were given. (*See* HT, p. 76.)

⁶⁸ Apparently all employees who worked for EG&G until the mission was completed and the facility closed were promised a bonus equivalent to one year's salary as an incentive.

end, Mr. McCloskey and Mr. Nielsen drafted a reply letter, which Ms. Sweeting reviewed before dispatching it on February 19, 2010. (*Id.*; RX 117, p. 1095.)

In his letter, Mr. McCloskey reassured the Complainant that his performance highlights at EG&G had been given fair consideration in the termination review process and that “no one refute[d] the fact [the Complainant] had contributed in some positive regards while employed at EG&G.” (RX 117, p. 1095.) However, he also pointed out the many persistent and unacceptable performance issues the Complainant had had. (*Id.*) Two PIPs had been administered to give the Complainant specific guidance on what he needed to do to keep his job and he had not done those things. (*Id.*) These failures were repeated consistently over time and were well-documented for at least the nine months leading up to the Complainant’s termination. (*Id.*) Also, the Complainant’s supervisors had even given him extra chances to improve by not holding him to his first PIP when other issues arose that needed the Complainant’s immediate attention. (*Id.* at 1095-96.) Mr. McCloskey pointed out that “[i]f it were not for engineering management’s decision to treat [the Complainant] fairly” by giving him a reprieve from the review deadline on the first PIP, “termination at the end of [the Complainant’s] first PIP would have been likely.” (*Id.* at 1096.) In the end, after seven months of PIP-based guidance had produced no effect on the Complainant’s behavior, a holistic review of the Complainant’s performance at EG&G was performed and management decided to “proceed with termination based on documented performance issues.” (*Id.*) With regret, Mr. McCloskey informed the Complainant that he still stood by that decision. (*Id.*)

ANALYSIS AND FINDINGS

I. Existence of Retaliation

a. Prima Facie Case

In cases where retaliation for making safety or environmental complaints is alleged, there is a multi-part burden-shifting structure to decision making. First a complainant establishes a *prima facie* case that 1) the complainant engaged in activity protected under that statute; 2) the respondent was aware of that activity; 3) the complainant suffered an adverse employment action; and 4) the complainant’s protected activity was at least partially the reason for the adverse action. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46, slip op. at 11 n.9 (Sec’y Feb. 15, 1995), *aff’d sub nom.*, *Carroll v. United States Dep’t of Labor*, 78 F.3d 352, 356 (8th Cir. 1996).

If a *prima facie* case is made, it raises an inference of discrimination, shifting the burden to the respondent to produce a legitimate reason for the adverse action against the complainant. *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). A non-retaliatory reason rebuts the inference of discrimination, shifting the burden back to the complainant to prove, by a preponderance of the evidence, that retaliatory discrimination at least partly motivated the adverse action. *Adornetto v. Perry Nuclear Power Plant*, Case No. 1997-ERA-16, slip op. at 4 (ARB Mar. 31, 1999). This can be shown directly with evidence that the respondent had a retaliatory motive or indirectly with evidence that the “legitimate” motivation offered for the respondent’s action is not credible. *Shusterman v. Ebasco Servs., Inc.*, Case No. 87-ERA-27

(Sec’y Jan. 6, 1992). If the complainant makes that case successfully, the burden of proof shifts one final time onto the respondent, to prove, by a preponderance of the evidence, the same adverse action would have been taken, even if the complainant had not engaged in any protected activity. *Cox v. Lockheed Martin Energy Sys., Inc.*, ARB No. 99-040, ALJ No. 97-ERA-17, slip op. at 4 n.7 (ARB Mar. 30, 2001).

When a case has already been given a full trial on the merits, however, “it no longer serves any analytical purpose to address the question of whether the complainant presented a *prima facie* case. Instead, the relevant inquiry is whether the complainant prevailed by a preponderance of the evidence on the ultimate question of liability.” *Carroll*, Case No. 1991-ERA-46, slip op. at 9-11; *Pickett v. Tennessee Valley Auth.*, ARB Nos. 02-056, 02-059, ALJ No. 01-CAA-18, at 8 n.10 (ARB Nov. 28, 2003); *Hobby v. United States Dep’t of Labor*, Case No. 01-10916 (11th Cir. Sept. 30, 2002) (unpublished) (case below ARB No. 98 166, ALJ No. 1990-ERA-30) (citing *United States Postal Serv. v. Aikens*, 460 U.S. 711 (1983)). The reasoning is that to find a retaliatory nexus between a complainant’s protected activity and the respondent’s adverse action, the existence of protected activity, awareness of that activity, and the fact of adverse action implicitly must be established. See *Hobby*, Case No. 01-10916. Likewise, if no retaliatory nexus is found, the failure of any of the other *prima facie* elements is immaterial to the outcome of the case.

Because this case has already had a full trial on the merits, in the interests of judicial economy and clarity, I will begin my analysis by presuming, for the moment, that the Complainant here has established that: 1) he engaged in protected activity; 2) that the Respondent was aware of; and 3) that the Complainant suffered an adverse employment action.

While I decline to make any specific findings on these issues at this point, these presumptions are not unreasonable. After all, the Solid Waste Disposal Act, in particular, protects a very broad range of activity, including internal complaints about threats to the environment and public health, and even, arguably, about occupational hazards. *Lee v. Parker-Hannifin Corp.*, Case No. 2009-SWD-3, slip op. at 7 (ARB Feb. 29, 2012); *Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985); *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 1997-SDW-5, slip op. at 4 (ARB Dec. 30, 2004). Further, regardless of whether any of the issues the Complainant reported were valid, I do not doubt he had a good faith belief that he was reporting on actual health and environmental risks.⁶⁹ (HT, p. 2181.) *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, Case No. 1993-ERA-6 (ARB July 14, 2000). Also, the Complainant was quite persistent about notifying EG&G about these perceived violations through condition reports and complaints to his supervisors, supporting a strong presumption that at least his manager, Mr. Nielsen, was aware of the Complainant’s activity. (E.g., CX 15, p. 1; RX 21, pp. 176-78; RX 165, pp. 2445-46, 2459, 2715, 2718; RX 128, p. 1201; RX 130, pp. 1241, 1247; CX 24, p. 1.) Since Mr. Nielsen had substantial input on the case for the Complainant’s termination, presenting the basis for it to EG&G’s executive board, his knowledge of the Complainant’s complaints is likely sufficient to meet that element of the case as well. (HT, p. 78.) *Fraday v. Tennessee Valley Auth.*, Case Nos. 92-ERA-19 and 34 (Sec’y Oct. 23, 1995); *Thompson v. Tennessee Valley Auth.*, Case No. 89-ERA-14 (Sec’y July 19, 1993). Lastly, no one disputes that the Respondent’s termination of the Complainant’s

⁶⁹ Whether that belief was reasonable would be a closer question that I decline to analyze here.

employment on January 21, 2010, qualifies as a tangible and adverse employment action. (HT, p. 10.)

For these reasons, though I DO NOT at this time make any findings about whether the Complainant established these *prima facie* elements, I am comfortable presuming that he did for the purposes of this decision, to focus my analysis on the ultimate question of whether retaliation was proved.

b. *Motivation for Termination*

Having examined the record in this case at great length, I find that there is minimal evidence that the Complainant's protected activity even partially motivated the Respondent to terminate his employment. On the contrary, I find that there is overwhelming evidence that the Complainant was fired for a host of legitimate, non-retaliatory reasons related to his poor job performance.

The Complainant is a hard-working, well-meaning, highly sincere individual who took his work at EG&G extremely seriously. Based on the testimony, even when the Complainant's supervisors grew frustrated with him, they never doubted that the Complainant was investing supreme effort in doing what he thought was best for his employer. (*E.g.*, RX 29, p. 240 (Mr. Nielsen told the Complainant that he needed to "make changes" in how he worked, but also said he knew the Complainant was "trying [his] guts out").) Thus, my finding that the Complainant was fired for legitimate performance reasons is not a finding that he is a bad person or a bad employee, only that he was not able to shape his many good qualities to the particular demands of working at TOCDF. In a less hierarchical organization or in a field where precise communication and compliance with a multitude of procedures were less vital, the Complainant could potentially be an excellent employee. That was just not the situation in this setting, in this case.

1. The Complainant's Evidence of Retaliation

The Complainant's evidence for the existence of retaliation in this case is very weak and does not hold up under scrutiny. Primarily, the Complainant presents three routes to an inference of discriminatory motive: 1) directly, by linking the timing of his disciplinary warnings to when particular whistleblowing activities happened; and indirectly, by citing 2) his being told not to talk to DCD and 3) EG&G not resolving the issues exactly as the Complainant wanted, as evidence that EG&G wanted to "cover up" his environmental concerns and, therefore, might have terminated his employment for similar reasons. None of these arguments are persuasive, but I will examine each in turn.

Proximity in Time: In the Complainant's closing briefs, he alleged that Mr. Nielsen gave the Complainant his first PIP because he raised concerns about the sewage treatment ponds and then tried to take those concerns to Terry Thomas, Mr. Nielsen's boss. (Complainant's Brief, pp. 5-6; Complainant's Reply, p. 9.) In addition, the Complainant claimed there was a similar

temporal nexus between his submitting his application for educational funding,⁷⁰ which included identification of the environmental rules the Complainant believed EG&G was violating, and his second PIP. (Complainant's Brief, p. 6; Complainant's Reply, pp. 10-11.) He also offered his push to schedule the hydrant flow test as a potential trigger for the second PIP. (Complainant's Reply, pp. 4, 8.)

When I look at the timeline of events in this case, I do not make the connections the Complainant desires. The Complainant's first PIP was discussed with him on July 6, 2009, and he contacted Mr. Thomas on June 29, 2009. (RX 23, p. 180; RX 14, p. 127; HT, p. 780; CX 16, p. 1.) However, it is clear from notes made at the time, that Mr. Nielsen and Mr. Johnson started assembling the first PIP a month before the Complainant reached out to Mr. Thomas. (RX 159, p. 2311 (on May 27, 2009, Mr. Nielsen asked Mr. Johnson about starting the disciplinary process).) Though the Complainant also tried to attribute the first PIP more broadly to his raising concerns about the sewage treatment ponds, the Complainant raised those issues several months earlier, when he pitched his plans for modifying that system at a meeting in late March 2009. (Complainant's Reply, p. 9; CX 13, p. 1; HT, pp. 718, 720, 740 (the Complainant presented his plans for modifying the ponds on March 23, 2009).) That EG&G wanted to muzzle the Complainant's whistleblowing but then waited two months before even beginning to do so, is unconvincing.

Not only are there temporal gaps between the events the Complainant wants linked, there were significant intervening events that provided much more persuasive motivation for the Complainant's written warnings. *Evans v. Washington Pub. Power Supply Sys.*, Case No. 95-ERA-52 (ARB July 30, 1996), citing *Williams v. Southern Coaches, Inc.*, Case No. 94-STA-44 (Sec'y Sept. 11, 1995) (legitimate reason for termination occurring after protected activity may negate any temporal inference of causation). Between the Complainant's proposal to modify the ponds and Mr. Nielsen's directive to Mr. Johnson to start the disciplinary process, Mr. Nielsen discovered that the Complainant had made far less progress on the critical water treatment upgrades than he had been led to believe, that several weeks of the delay were attributable to the Complainant's own mistakes, and that the Complainant had not removed the 50-pound bag of peanuts when asked to do so, but had instead hidden it. (See RX 159, pp. 2310-11; RX 14, p. 127.) Mr. Nielsen made these highly negative discoveries about the Complainant's performance just hours before deciding to initiate discipline, not months before, making the causative link much stronger. (See RX 159, pp. 2310-11; RX 14, p. 127.)

Likewise, in between the appeal to Mr. Thomas and the actual delivery of the first PIP, the Complainant's unauthorized brine concentration test by the sewage treatment ponds was discovered, and a lid the Complainant left unsecured flew off a tank and wrecked three vehicles. (See RX 14, p. 127; RX 159, p. 2312 (Mr. Nielsen actually told the Complainant there would be a PIP because of the swamp cooler test as soon as it was discovered); RX 102, pp. 722, 725.) These intervening events are much more plausible reasons for disciplining an employee.

⁷⁰ In his reply brief, the Complainant added that right before his second PIP, he had also been agitating to include his concerns about the eyewash stations and safety showers in a presentation Mr. Nielsen gave to an EG&G committee and in the written flow test plan. (Complainant's Reply, p. 11.)

As for the second PIP, the connection in time is at least tighter. The Complainant filed his application for classes in mid-to-late November, the committee presentation was December 2, he contested proposed edits to the test plan throughout this period, and the second PIP was December 7, 2009. (See RX 40, pp. 289, 293-94; RX 106, p. 1031; RX 31, p. 246; RX 33, p. 249-52.) On the other hand, it seems illogical that Mr. Nielsen would retaliate against the Complainant for filing the class request and yet still approve that request, as he did once the forms were filled out neatly. (HT, p. 893; CX 53, pp. 1-2; RX 40, p. 288.)

Also, the supervisors and senior engineers at EG&G editing the Complainant's test plan appeared to agree that the assertions about the eyewash stations were off-topic and distracting. (E.g., RX 39, pp. 279 ("you are trying too hard to throw everything in here to sell you[r] ... point of view – these are the things that confuse people").) For them to disagree with the Complainant about this does not require them to have a nefarious or discriminatory motive. *Odom v. Anchor Lithkemko*, Case No. 96-WPC-1, slip op. at 10 (ARB Oct. 10, 1997) ("mere difference of professional opinion, without more, does not prove retaliatory motives"). Rather, as they explained it, they were removing reference of the eyewash pressure problems – one discrete symptom of the plant's lack of pressure – to focus the test more effectively on the larger issue with the water supply. (See HT, pp. 570, 1029, 1834, 1861, 1939.) Under this reasoning, streamlining the test plan and presentation helped them to fix the major problem the Complainant had identified, not to cover up that problem.

Finally, the Complainant also claims he was given the second PIP because he was pushing to do the flow testing before spring. (Complainant's Reply, pp. 4, 8.) Yet, the evidence indicates that it was the Complainant's inability to write a coherent test plan, exacerbated by his refusal to take input from senior engineers on how to improve that test plan, which led to the testing being delayed. (HT, pp. 1175, 1760-61, 1999-2000.) In turn, that delay, and the Complainant's resistance to feedback that caused the delay was what aggravated his supervisors enough to trigger further discipline. (*Id.* at 1999-2000; RX 33, p. 250.) Again, that reflects how seriously EG&G wanted to correct the problem, not an attempt by EG&G to avoid the issue.

Therefore, I decline to make any inference of retaliation from the timing of the Complainant's PIPs. Instead, I find that the disciplinary measures were timed to respond to the Complainant's failures to meet reasonable performance expectations.

Instruction Not to Contact DCD: Less directly, the Complainant attempted to draw inferences of retaliation from his being told not to contact people outside EG&G about problems he saw. In his closing brief, the Complainant alleged that he was told not to talk to employees at DCD, other demilitarization facilities, the Field Office, or any regulatory agency. (Complainant's Brief, pp. 4, 10.)⁷¹ To the Complainant, this was an indication of his supervisors' desire to "cover up" the concerns he was raising about EG&G's systems. (See *id.*) Following this logic, if there had been attempts to silence the Complainant, it would seem more likely that his termination was part of a campaign to stop him from blowing the whistle on EG&G or to retaliate against him for having done so.

⁷¹ But see HT, pp. 2164-67 (the Complainant testified that he discussed environmental concerns with a state regulator during class and invited him to visit the plant to assess compliance, but no one at EG&G had any objections to this).

While the Complainant was told several times to limit discussion about the water pressure problem to people within EG&G, examined in context, these appear to have been attempts to get the Complainant to follow a reasonable deliberative decision-making process. If EG&G had been trying to keep DCD from finding out about the issues the Complainant was reporting, presumably he would have been silenced as soon as possible. However, the Complainant began working with DCD to investigate the plant's water pressure beginning in mid-July of 2009, and continued to talk to them, with his supervisors' knowledge, for two months. (*See* RX 130, pp. 1247-49; RX 163, pp. 2371-72; CX 51, p. 1.) There were even several formal meetings between EG&G and DCD about the problem. (RX 140, p. 1511; CX 51, p. 1.) It was only after September 22, 2009, that the Complainant was told to start working on the problem "in house." (HT, p. 808.)

As Mr. Nielsen explained soon afterwards, the problem was that DCD, EG&G's client, was hearing different things from different people, making it more difficult to get them to work on solving the problem. (RX 29, p. 242.) Thus, "Until we have all the facts, [Mr. Nielsen] wish[ed] to limit the speculation to within the working group." (*Id.*) Again, EG&G wanted to address the concerns the Complainant had made, it just wanted to do so in an effective rather than scatter-shot way. (*Id.* at 240-41 (Mr. Nielsen wanted the Field Office to work with EG&G, so they needed to "make sure we have our ducks in a row" and could prove what was broken before jumping to conclusions or demanding actions that might turn out to be unnecessary).)

Also weighing against the inference of retaliation, the Complainant was never "gagged" on any issue; his supervisors simply attempted to constrain the timing and frequency of his contact. For instance, though the Complainant was instructed in late September 2009, to get approval before talking to DCD, he was still included in a joint DCD-EG&G meeting on October 15, 2009, about designing the test plan. (HT, p. 808; RX 130, p. 1255.) When asked, Mr. Johnston readily gave permission for the Complainant to contact DCD representatives with specific questions as well, and the Complainant was not prevented from responding to DCD when they contacted him. (HT, p. 806.) All his supervisors wanted was to be in the loop on these communications and to be sure that DCD was getting a "consistent and concise story" so EG&G would not be embarrassed. (*Id.* at 803, 1180; RX 31, p. 246.)

Additionally, sometimes it was not EG&G that wanted the Complainant to stop talking to DCD. In more than a few cases, it was someone at DCD who requested that the Complainant stop "pestering" them, as the Complainant himself described his method of requesting help. (Complainant's Reply, p. 2 ("I pestered people ... I didn't just raise the issues, I forced the issues and I was relentless"); HT, pp. 1180-81 (told the Complainant he "wasn't helping get the situation resolved by repeatedly talking to [DCD] ... that they were complaining that he was calling them all the time ... it was bothering them"), 1258, 1262-63 (the Complainant would call with his concerns "often times daily," it really irritated people at DCD); RX 69, p. 532 (a DCD maintenance man told the Complainant to "never call his office again").) In those instances, the Complainant's supervisors were only trying to keep him from alienating key organizational allies. (HT, pp. 801 ("Don't bother them anymore"), 1180-81; RX 29, p. 240.) This again, seems appropriate under the circumstances.

Therefore, none of these actions raises an inference that EG&G made a practice of silencing whistleblowing activity.

Technical Disagreement about Issues and Resolution: Finally, the Complainant also seems to have implied that EG&G not responding to the issues he raised in the way the Complainant felt they should have been dealt with is evidence of a desire to retaliate against him. (*See* Complainant's Brief, pp. 7-11; Complainant's Reply, pp. 1-2, 8-12.) As the Respondent noted in its reply brief, this is the most vague and conclusory of the alleged nexuses. (Respondent's Reply, pp. 2-3.)

The Complainant railed against EG&G for not reporting his concerns far and wide, even when further investigation did not bear out his complaints, and for not proving to the Complainant's satisfaction that his issues were fully addressed, even when multiple regulatory agencies were satisfied. (*See* Complainant's Reply, p. 1 (asking why, if the Respondent found there was no violation, it did not notify state agencies and all employees of the problems the Respondent had determined did not exist); Complainant's Brief, pp. 9-11 (claiming no evidence his concerns were addressed adequately); *but see* Respondent's Brief, pp. 13-14 (multiple investigations by regulators failed to find any of the violations the Complainant alleged EG&G was committing).) The Complainant's demands are clearly unreasonable: EG&G had no obligation to report to its employees the results of every investigation of a complaint, especially if it found the complaint to have no merit, and it certainly had no obligation to report to state agencies the results of its investigations into complaints that were found to be meritless.

While the Complainant's belief that there were problems seems very sincere, even the most conscientious whistleblower can be wrong and the violations they report may not have actually occurred. It would strain my technical understanding of the engineering involved in this case to make any factual finding to that effect, but there is at least some credible evidence that the Complainant's concerns proving unfounded may have been part of why the Respondent did not take all the actions the Complainant wanted. (*See* Respondent's Brief, pp. 13-14 (brief summary of all the agency investigations and findings that EG&G had not violated the law or that the law did not require what the Complainant claimed).) If, upon investigation, the Respondent found that the system was not actually out of compliance after all, of course no corrective actions to "return" the system to compliance would be necessary.

Also, as the Complainant himself admitted in some instances, there were situations where "reasonable minds could differ" about the correct response. (*E.g.*, HT, p. 900 (about whether a certain rule had to be interpreted as meaning that the Polecat blower was not allowed).) Again, differences in professional opinions, on their own, are not proof of retaliatory motives. *Odom*, Case No. 96-WPC-1, slip op. at 10.

Further, in a few places where the Complainant most cites disagreement with his analysis as evidence of retaliatory motive, it was someone from DCD who disagreed with him, not someone from EG&G. (*See* HT, pp. 944-45, 963 (the Complainant identified only four employees of DCD as those whose disagreement with him led to his firing); Complainant's Brief, p. 7 (allegations based on DCD employees not agreeing with the Complainant's analysis).) Because the Complainant worked for EG&G, not DCD, even if a DCD employee disagreeing with the Complainant did indicate that employee's desire to retaliate against the Complainant, DCD had no direct power over the Complainant's employment. This makes it even less likely that these disputes could have been a retaliatory factor in why the Complainant was terminated.

Finally, there is the hard truth that the Complainant's own lack of credibility makes his interpretation of events as supporting an inference of retaliation, unpersuasive. *See Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2 (ARB Feb. 28, 2003) (if a complainant's "perception of events is the principal component in her belief that she has been discriminated against," and there is evidence the complainant is not a credible witness, that "cast[s] doubt upon [the complainant's] interpretation of the evidence and give credence to [] managers' testimony that they made decisions pertaining to her based upon considerations that the law recognizes as legitimate and non discriminatory").

Again, I am not saying that the Complainant was untruthful, much less a "liar." The Complainant appeared to be resolutely sincere and to completely believe his own testimony. Rather, the problem throughout this case has been the Complainant's "tunnel vision" and inability to acknowledge facts that did not fit his personal perception of the "truth." This pervasive tendency to ignore all evidence that contradicted the conclusion the Complainant had decided on was noted by several employers.⁷² The Complainant is simply not able to be a reliable judge of his own actions and the appropriateness of the responses of others to those actions because in his mind he is always right, regardless of evidence to the contrary. (E.g., RX 2, p. 29 (the Complainant blamed the wording on the form for his failure to report his income, since it asked only if he had worked and the Complainant worked "everyday" by "volunteering, and helping [his] neighbor"⁷³); *see also*, HT, pp. 1622 ("it was always someone else's fault or always someone else's problem" even when no other engineer had that difficulty), 1625-26.) Thus, the Complainant's insistence that the Respondent was out "to kill the messenger" rings hollow without clear evidence to support that inference. I have found no such evidence in this case, so I find the Complainant's perception of the Respondent's motivations, standing on its own, unpersuasive.

Therefore, I see no plausible evidence that anyone in this case arriving at different technical conclusions than the Complainant did constituted evidence of motivation to retaliate.

For all the above reasons, the Complainant has failed to provide more than a scintilla of evidence that there was a retaliatory nexus in this case between his alleged protected activity and his termination.

2. The Respondent's Evidence of Legitimate Reasons to Terminate

In addition to the Complainant's weak evidence of retaliation, we have the Respondent's overwhelming evidence that there were a multitude of serious problems with the Complainant's performance and that these problems were the sole motivation for his termination.

⁷² E.g., RX 151, pp. 2235, 2237 (supervisor at Alliant counseled the Complainant to look at all the relevant information, "not just data that matche[d] [his] expectations," and to keep an "open mind" while investigating, rather than having a "hidden agenda"); HT, pp. 681-82 (the Complainant was very difficult to communicate because he was not "willing to consider someone else's opinion"), 1818 (Mr. Nielsen: "if [the Complainant] did not like the response, [he was] not accepting of the answer"), 1907 (Ms. Weyland had "many technical discussions" with the Complainant about his concerns, but he "just [was not] accepting the answers that were being given").

⁷³ While this might by some stretch of the imagination explain the Complainant reporting "working" when he had not earned anything by his labor, logically claiming that you thought a question was broader does not explain, let alone excuse, not reporting activity that definitely fell within even the narrowest interpretation of the question. (*See* RX 2, pp. 19, 29.)

Performance Problems: The record has an abundance of reasons why the Complainant was unsuited to his duties at EG&G.

One of the defining features of work at TOCDF, and appropriately so for a facility that incinerates chemical weapons, is that almost every action needs to comply with a comprehensive set of closely-defined procedures. (HT, pp. 126-28, 152-53, 194, 583.) Most decisions require at least one level of documentation and authorization, and there are multiple committees and departments charged with ensuring compliance with all of these precautions. (*Id.*) Understandably, it usually takes new employees some time to get used to working with these restrictions. (*See id.* at 128.) There was testimony from several sources, though, that the Complainant, despite time and extensive coaching, never adapted to this way of doing things. (*E.g., id.* at 156-63 (Mr. Hunter wrote the Complainant a spreadsheet to guide him through the procedures, counseled the Complainant repeatedly, but even after a year never “really saw any evidence that [the Complainant] would take the initiative to go and find a procedure and read it and follow it” as engineers were expected to do), 2384-85 (maintenance supervisor could not think of any time the Complainant followed the correct process from start to finish).) The timeline in this case is rife with instances where he failed to file the right paperwork, get the right approvals, or proceed in the right way.⁷⁴

Further, the Complainant often did not even try to follow the rules; that he believed they were an unnecessary burden he preferred to avoid dealing with.⁷⁵ (HT, p. 689 (“appeared that we had kind of a rogue employee who was just trying to operate on his own without following our processes”).) Many supervisors and coworkers expressed frustration with the amount of effort the Complainant spent fighting the procedures rather than following them. (*e.g.*, RX 90, p. 623 (“You [the Complainant] have now wasted much more time trying to get around the required testing and approval process, than it would have taken to do it right the first time”); HT, pp. 692, 1386, 2012 (“trying to work around the system”).) While on a human level, the Complainant’s impatience is understandable, in a high-stakes environment like TOCDF, subject to extensive regulatory oversight, not following procedures is completely unacceptable and presents a real danger to safety. The Complainant’s shortcomings in this area alone provided more than adequate grounds for his termination.

In addition to not complying with the written rules, the Complainant also has a well-documented history at EG&G of ignoring direct orders from his supervisors. (*E.g.*, RX 14, p. 127 (told to remove the 50-pound bag of peanuts from the office, the Complainant instead hid it); RX 160, p. 2328 (the Complainant was told to work with a senior engineer to incorporate comments into his test plan and not to send the test plan outside of EG&G until it was complete, the Complainant refused the edits and gave the plan to DCD); RX 23, p. 181 (the Complainant

⁷⁴ Looking only at problems that arose after the Complainant had been at EG&G for over a year, examples include: delivery of chemicals to the Complainant’s home rather than the appropriate department (RX 93, p. 628; RX 124, pp. 1130-31); swamp cooler test unauthorized, no work control documents, safety procedures not followed (RX 159, p. 2312; RX 14, p. 127; HT, pp. 1316, 1333, 1388, 1962); after nearly two years at TOCDF, the Complainant was still not filling out testing forms as required (RX 124, pp. 1139, 1144-46 (November 16, 2009)); not following rules for sampling and safety working around ice (RX 97, pp. 635-36).

⁷⁵ The Complainant frequently justified his decisions to deviate from procedure on the grounds of it being faster or easier or because he did not see breaking the rules as more than a “minor” problem. (*E.g.*, HT, pp. 1088, 1217-18, 1223-24, 2179.)

ignored instruction to stop doing lab tests in his cubicle, tried hiding the equipment).) The most blatant example of this was, of course, his repeated defiance of orders to stop making brine.⁷⁶ Though the Complainant was usually quick to produce reasons why he believed he could do what any other person hearing the same instructions would know they absolutely could not do, those beliefs, while perhaps sincere, were not at all reasonable.⁷⁷ Environmental laws like the ones invoked in this case empower employees to report wrongs they observe in their workplace; these laws *do not* give employees carte blanche to act to correct those perceived problems themselves despite contrary directives from management. I understand that the Complainant felt an acute sense of duty to the environment and the taxpayers, etc., which is commendable, but that does not excuse his failures to fulfill his duties as an employee by restraining himself from doing things he was told repeatedly not to do. Obviously, the Complainant's insubordination also could have independently provided legitimate grounds for the Complainant's dismissal.⁷⁸

The Complainant additionally experienced great difficulty in working productively with others at EG&G.⁷⁹ Though in some cases his coworkers could perhaps have been more patient, understanding, or kind, I found no convincing evidence that their behavior ever crossed the line into being unacceptable in a professional setting.⁸⁰ (*See* HT, pp. 521-23 (Mr. Johnston: never

⁷⁶ The Complainant was told by his managers on March 23, 2009, that concentrating brine was "the last thing we want to do." (HT, p. 742.) On April 16, 2009, Mr. Nielsen authorized the Complainant to make all the changes he wanted, except make brine. (*Id.* at 865, 873; RX 159, p. 2308.) This message was repeated at another meeting on May 7, 2009, and by emails from the Environmental Department and his manager on June 29, 2009. (RX 14, p. 127; CX 16, pp. 2-3.) Despite all this, the Complainant ran an unauthorized test of brine production with swamp coolers by the sewage treatment ponds, which was discovered on June 30, 2009. (RX 14, p. 127.) The first PIP on July 6, 2009, made management's condemnation of such testing explicit and told the Complainant that he was not allowed to start any new projects. (RX 23, pp. 181-82.) In spite of this, the Complainant wrote on August 12, 2009, that he was still pursuing the brine project and taking it in a "different direction." (RX 131, p. 1289.) In response, on August 17, 2009, Mr. Nielsen instructed the Complainant that the brine project "ha[d] been killed," and would not be pursued in its current form or any other. (*Id.* at 1290.) Still, the Complainant protested, insisting that brine concentration was a good idea and would be continued through mixing brine. (*Id.*) Mr. Nielsen immediately discussed this with the Complainant and told him that it was "unacceptable to disregard direct instructions." (HT, p. 1989.) Ignoring these very clear orders, the Complainant worked with Maintenance to mix brine again on November 5, 2009. (RX 140, pp. 1537-38.) Again, his management told him not to do this. (*Id.*) But, in "blatant defiance" of his instructions, a little over a month later, the Complainant made plans to volunteer with DCD to help them continue the brine concentration project. (RX 34, p. 253.)

⁷⁷ *E.g.*, HT, pp. 1084 (despite emails telling the Complainant to not do a test, he believed he "absolutely" might have set it up anyway, "because it was harmless"), 1085-86 (despite a PIP followed by emails from his supervisors directing him to remove the water test kit from his cubicle, the Complainant kept it because he had "permission from a safety representative"), 2067-68 (despite lack of authorization and being told not to have outside people involved, the Complainant thought it was ok to do so because he was trying to get equipment for free).

⁷⁸ In fact, the senior managers who reviewed the termination decision were reportedly surprised that the Complainant had not been fired sooner because of his repeated insubordination. (HT, pp. 48, 51, 53, 79.)

⁷⁹ *E.g.*, RX 33, p. 250 ("several complaints from individuals who would prefer not to work with [the Complainant] because of [his] difficulty in communicating and getting along with others. [He] appear[ed] to be incapable of working as a team with other organizations at TOCDF."); HT, pp. 485 (some people had a "very hard time" with the way the Complainant did things and his lack of cooperation), 1859-60 (the Complainant would get very frustrated with anyone who disagreed with him, it would really impact how he interacted with others), 1927-28 ("lots of complaints" about working with the Complainant, "a very, very poor working relationship with" the Maintenance Department).

⁸⁰ Even if every one of the harshest quotes the Complainant attributed to Mr. Nielsen, for example, were true, that might make Mr. Nielsen a jerk, but that would not make it any less a part of the Complainant's job to work productively with Mr. Nielsen anyway. Many situations in the workplace may be unwise or unfair, yet not illegal.

witnessed Mr. Nielsen get angry, yell, swear, or publicly criticize at the Complainant), 944-45, 963 (only examples of claimed “harassment” the Complainant provided were of people not agreeing with his technical opinions), 978-79 (no profanity and inconsistent equivocal testimony about even raising voices) 1930 (Mr. Nielsen: never witnessed anything unprofessional), 2010-13 (one instance of public criticism of the Complainant’s work and Mr. Nielsen defended him).) Even if other employees had behaved badly, it is not the court’s place to second-guess management decisions to resolve workplace conflicts by firing one or the other of the employees involved, as long as that decision was not motivated by illegal discrimination, such as retaliating against a whistleblower. As discussed above, I found next to no evidence that retaliation motivated EG&G to terminate the Complainant. Rather, the record reveals that the Complainant had frequent conflicts with almost every group he worked with and that even when counseled about this, he resisted taking any responsibility for the state of affairs or making any changes in his behavior. (*Id.* at 1625-26 (Mr. Nielsen: “it seemed like everybody that [the Complainant] worked with, there was contention,” but the Complainant always blamed others – “Everybody else is against me. I don’t understand why.” – rather than considering if he needed to change anything about his own behavior).) If an employee cannot work productively with his coworkers and attempts to resolve the problem fail, no reasonable option exists for the employer except to stop employing the quarrelsome worker.

Finally, there was also plenty of evidence here that the Complainant exhibited a host of other performance problems, most of which are further examples of his unwillingness or inability to follow directions. These problems included: consistently writing poor quality work orders that Maintenance had great difficulty understanding and carrying out (HT, pp. 1376-81 (frequently one-line work orders without details, parts, or drawings)); not keeping his workspace free of clutter and using the space for inappropriate functions (*Id.* at 233, 1636 (trip hazards, “helter-skelter paper everywhere”); RX 23, p. 181 (“conducted laboratory type experiments” without authorization inside the office)); leaving work without permission and not filling out his timecard correctly (RX 14, p. 128; RX 25, p. 231; RX 135, pp. 1331-32); and not arriving at work free of beard stubble (RX 14, p. 128; RX 33, p. 249). Some of these were minor problems (cubicle clutter); others were not minor at all (a large percentage of the Complainant’s work orders having to be cancelled because of insufficient detail even after contacting the Complainant to make corrections). (HT, pp. 1377-81 (new engineers often have one or two work orders cancelled for lack of detail, for the Complainant it was 20% the whole time he was at EG&G).) Again, looking at the big picture, nearly all of these incidents reflect the Complainant’s primary source of difficulty: his inability to see, let alone cooperate with, perspectives other than his own. While the Complainant might have been motivated by the best intentions in the world, his intractability to guidance doomed his attempt to work in a heavily regulated environment like EG&G and made his eventual termination for one or more serious performance problems almost inevitable.

Thus, I find that there is abundant evidence that the Complainant had a variety of serious performance problems during his time at EG&G. These included consistent failure to follow required procedures, repeated insubordination to supervisors’ instructions, an inability to work productively with others, and a generally extreme stubborn worldview that resisted outside

See Pignato v. Am. Trans Air, Inc., 14 F.3d 342, 349 (7th Cir. 1994) (“it is not enough for the plaintiff to show that a reason given for a job action is not just, or fair, or sensible;” the motivation needs to be illegal).

direction. Once more, this is not a finding that the Complainant is a bad person: he obviously has great strength of character and if he were, for instance, in business for himself or in a less restricted field, he might be very successful. But here, EG&G had certain reasonable expectations for the behavior and performance of its employees, expectations that the Complainant did not fulfill, providing many legitimate reasons for his termination from EG&G.

Not Retaliatory: The Respondent also presented a wealth of evidence that EG&G was not in any way inclined to retaliate against the Complainant for reporting safety and environmental concerns.

First, there is all the evidence that, far from retaliating against workers who make environmental or safety complaints, EG&G generally has a strong record of encouraging reporting and responding proactively to potential issues. EG&G has in fact been recognized by OSHA's Star Employer Program for providing "exemplary work protection." (RX 19, p. 135.) To earn that designation, EG&G was subjected to a week-long audit in the spring of 2009, where 8 OSHA inspectors interviewed over 150 workers at TOCDF. (HT, p. 590.) Key findings from the investigation were: management's commitment to health and safety is "a particularly strong element at this worksite;" "there seems to be no resource limit ... when the subject of hazard identification and correction comes up;" EG&G has a robust condition reporting system where every month employees freely bring up hundreds of potential issues; and employees "consistently describe an environment in which they truly feel their safety takes priority over any other concern ... a true "Stop Work" culture ... [with] no fear of reprisal or retribution for ... participating in any safety-related activity." (RX 19, pp. 145, 152.) The Complainant himself shared these feelings: he testified that EG&G made safety a high priority and safety personnel took their jobs seriously. (HT, p. 904.) He also "firmly agree[d]" that environmental compliance at TOCDF was excellent.⁸¹ (*Id.* at 904-05.)

Further, in the Complainant's specific case, EG&G repeatedly gave the Complainant positive recognition for reporting potential issues. During his two years at TOCDF, the Complainant received two awards for reporting environmental and safety concerns. (RX 15, p. 130; RX 136, pp. 1333-34.) His project for reusing the water treatment brine also got favorable coverage in two employee newsletters and led to congratulatory emails from senior management. (*See* RX 7; RX 8; RX 18, p. 134.) Likewise, when the Complainant alerted EG&G to the potential shortfalls in water pressure to the fire protection systems, he was praised by his supervisors and coworkers. (HT, pp. 1145, 1192-93.) Two senior managers even met with him privately to let him know that they appreciated his investigation and that he could come to them for support if he ran into any difficulties tracking down the source of the pressure problem. (*Id.* at 808, 826-27.)

While EG&G did not do everything the Complainant demanded of it, its evaluation of the issues he raised appears to have been robust and searching. Though DCD might have dismissed the Complainant's claims quickly, I saw no sign that EG&G cut any corners in investigating potential problems. Mr. Nielsen testified that every concern the Complainant brought up was

⁸¹ In his testimony, the Complainant said he was only criticizing DCD's commitment to the environment, alleging that no one on that part of the base "looked at it" and that he "strongly question[ed]" DCD's compliance. (HT, pp. 904-05.)

responded to and “communicated to all the proper individuals all the way across the site.” (HT, pp. 1817-18.) Ms. Weyland, in the Environmental Department, also said that she had “many technical discussions” with the Complainant about how his complaints had been evaluated and why EG&G’s conclusions were sound. (*Id.* at 1907.) Both offered the opinion that the Complainant’s dissatisfaction was not with how his complaints had been handled, but that these investigations reached conclusions that were not what he wanted the answer to be. (*See id.* at 1818, 1907.) However, even when EG&G did not find the issues the Complainant had raised were legitimate problems, the organization erred on the side of disclosure and encouraging further reporting. For example, when the Complainant took his concerns to OSHA after he was terminated, despite determining that TOCDF was already in full compliance, EG&G published those complaints in the employee newsletter. (RX 85, p. 614.) In that article, the General Manager also took an opportunity to remind all workers at TOCDF of their right to file such complaints and of the existence of the internal condition reporting system. (*Id.*) This is not how a company that retaliates against whistleblowers acts.

Also, far from rushing to get rid of a “troublesome” whistleblowing employee, the Complainant’s supervisors provided him with extensive support, critical feedback, and coaching on how to improve.⁸² Even when the Complainant began doing outrageous things,⁸³ his failings were tolerated for a long time, he got lots of extra chances to turn his performance around, and EG&G made several deviations from standard procedure *in his favor*.⁸⁴ *See Acord v. Alyeska Pipeline Serv. Co.*, Case No. 95-TSC-4, slip op. at 10-11 (ARB June 30, 1997) (tolerating intervening performance failures can negate an inference that later termination was motivated by retaliation).

Finally, I find it telling that the reasons EG&G terminated the Complainant were virtually identical to those his previous employer, Alliant, cited for his termination in 2008, after over 20

⁸² *E.g.*, RX 39, p. 274 (Mr. Johnston stayed late to make lots of editing suggestions for the test plan); RX 29, p. 240 (Mr. Nielsen offered advice and wanted to discuss one-on-one how the Complainant could be successful at TOCDF); RX 30, p. 244 (let other employees neglect their normal duties in order to assist the Complainant with his tasks); RX 159, p. 2319 (Mr. Nielsen counseled the Complainant and suggested reading about leadership skills); HT, pp. 1429 (Maintenance provided a dedicated point of contact), 1815 (Mr. Nielsen: “I spent quite a bit of time with [the Complainant] in terms of coaching and trying to help [him] along, [rather] than just counting [him] as a trouble maker and trying to wash my hands of [him].”), 1816 (“invested a lot of time in [the Complainant] hoping to see [him] be successful”).

⁸³ Such as running unauthorized, undocumented tests using safety equipment taken from other departments (RX 14, p. 127; RX 159, p. 2312; HT, pp. 487, 1961-62, 1973-76), hiding objects the Complainant’s supervisor told him to remove (RX 14, p. 127), or repeatedly and blatantly defying orders to stop concentrating brine (*Id.* at 128; RX 25, p. 229; RX 140, pp. 1537-38; RX 34, p. 253).

⁸⁴ *E.g.*, RX 14, p. 127 (the Complainant was given a reprieve from his first PIP so he could focus on the pressure issue without distraction); RX 153, p. 224; HT, p. 530; RX 33, pp. 249-52 (by the beginning of September 2009, the Complainant had the lowest performance review score in the Department and was essentially ignoring nearly every direction from his first PIP, yet a second PIP was not instituted until December 7, 2009); HT, pp. 90-91, 110 (the Complainant was given a second PIP when he had not fulfilled his first because his managers “were trying to give [him] every opportunity to succeed,” this was “pretty lenient” compared with other managers); RX 159, p. 2311; RX 43, p. 298 (eight months passed between the disciplinary process starting and when the Complainant was finally terminated); HT, pp. 48, 51, 53, 79, 110 (the executive board would have approved of termination after just the first PIP, were surprised how many chances the Complainant had been given); HT, pp. 79, 88; RX 117, pp. 1095-96 (even after the Complainant was terminated, EG&G deviated from normal procedures and allowed him to write an appeal letter to the General Manager who responded two weeks later with a detailed explanation of the termination decision).

years with that company.⁸⁵ (See RX 43, p. 298; RX 151, pp. 2234-35, 2237-38, 2240-42a.) This is compelling evidence that EG&G was not trumping up problems with the Complainant, but rather was responding to legitimate and long-standing problems with the Complainant's work style. Alliant had tried to accommodate the Complainant for years in every conceivable way before reluctantly reaching the conclusion that there was no way for it to make effective use of the Complainant's many talents without his weaknesses being too problematic. (See RX 151.) From everything I have seen in this case, over time, EG&G unfortunately arrived at the same opinion and reasonably decided to terminate the Complainant as a result.

For all of these reasons, I am convinced that EG&G's reasons for firing the Complainant were legitimate and not in any way tainted by a desire to retaliate against the Complainant for raising environmental and safety concerns.

Therefore, I find that the Respondent had multiple legitimate reasons to terminate the Complainant's employment and that there is persuasive evidence that EG&G had no retaliatory motive for doing so. Since the Complainant presented no compelling evidence of retaliation to outweigh the Respondent's proof, I find that the Complainant has not proved the existence of a discriminatory nexus between his alleged protected acts and his firing. Thus, I find that the whistleblower provisions cited in this case were not violated.

CONCLUSION

In conclusion, the Complainant has failed to prove by a preponderance of the evidence that the Respondent EG&G violated the employee protection provisions of the Clean Air Act or the Solid Waste Disposal Act by retaliating against him for engaging in protected activity. I made no findings about the *prima facie* elements of the complaint, since the case could be decided on the basis of the Complainant failing to establish by a preponderance of the evidence that there was any retaliatory nexus between his alleged protected activity and the Respondent's decision to terminate him.

ORDER

Based on the above findings, it is ORDERED that the relief sought by the Complainant Louis A. Keating, Jr. be DENIED and that his complaint be DISMISSED.

JENNIFER GEE
Administrative Law Judge

⁸⁵ Specifically, these reasons included things like: being distracted by side projects (RX 151, p. 2238; HT, p. 1996); poor quality written and verbal communication (RX 151, pp. 2235, 2242-42a; RX 43, p. 298); taking too long to complete projects (RX 151, pp. 2234, 2242; RX 43, p. 298); lack of improvement with coaching (RX 151, p. 2242a; RX 43, p. 298; HT, p. 1996); and not following instructions from supervisors (RX 151, p. 2241; RX 43, p. 298).

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. *See* 29 C.F.R. § 1980.110(a). The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).