

U.S. Department of Labor
Office of Administrative Law Judges
7 Parkway Center
875 Greentree Road, Room 290
Pittsburgh, PA 15220

DATED: JULY 20, 1998

CASE NO. 96-ERA-37

In the Matter of

DAVID CHARVAT

Complainant

v.

EASTERN OHIO REGIONAL

WASTEWATER AUTHORITY

Respondent

Appearances:

Michael D. Kohn, Esq.

Richard R. Renner, Esq.

Dennis Muchnicki, Esq.

For the Complainant

Gerald P. Duff, Esq.

For the Respondent

BEFORE: DANIEL L. LELAND

Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of the Water Pollution Control Act (also called the Clean Water Act) (CWA), 33 U.S.C. § 1367(a) and the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i). ¹ David Charvat (complainant) filed a complaint under the Acts on October 3, 1995, which was investigated by the Employment Standards Administration, Wage and Hour Division and found to be without merit. Complainant timely requested a hearing. A hearing was held before the undersigned in Pittsburgh, Pennsylvania on April 9-10; August 18-22; September 8-12; November 3-7, and December 15-17, 1997. At the close of the

hearing, the parties were allowed ninety days to file briefs and thirty additional days to file reply briefs. Initial briefs and reply briefs were filed by complainant and respondent.

Statement of the Case

Complainant was hired in July 1994 by the Eastern Ohio Regional Wastewater Authority (EORWA or respondent) as a superintendent of a public wastewater treatment plant in Belmont County, Ohio. EORWA had been issued a permit from the Ohio Environmental Protection Agency (OEPA) under the National Pollutant Discharge Elimination System (NPDES). Complainant was discharged on September 21, 1995 by a unanimous vote of the Board of Trustees of EORWA following a hearing.² He subsequently filed the complaint which was the subject of this proceeding.

Issue

Was complainant dismissed from his employment with EORWA because of his protected activity in violation of the CWA and the SDWA?

Summary of the Evidence

Complainant's Witnesses

Paul Russell has been an employee of EORWA for thirteen years, is currently a shift operator, and is a holder of Class I, II, and III wastewater licenses. (TR 43) In 1992-1993, Russell noted that EORWA was dumping solid waste on the banks of the Ohio River rather than in landfills. He reported this to the then superintendent Richard Vannelle and to Paul Pollock, the plant's chief operator, and Bobby Warner, the assistant superintendent, but they took no action to correct the situation. (TR 50-56) During 1992 and 1993, the witness tracked these environmental violations along with plant employees Dick Pacifico, Bill McCabe, and David Thomas. (TR 76-79) Russell sent an anonymous letter to Charles Wilson, the President of the Board of Trustees of EORWA, regarding the illegal dumping but Wilson did not respond and the violations did not cease. (TR 107-108) Russell was harassed at work as a result of his complaints to the Board of Trustees, experienced great stress, and developed an ulcer for which he was hospitalized. (TR 108-111)

Russell then reported the violations, including illegal dumping of sewage in the Ohio River, to the United States Environmental Protection Agency C 7. (TR 114-115, 117-132) The EPA referred these matters to the Ohio EPA (OEPA) which began an investigation in October 1993. (TR 135-136) An incident occurred in which Pollock started a profane tirade against Russell when Russell wanted to make log entries in ink, and threatened Russell for bringing in the OEPA. (TR 141-144) Russell reported this confrontation to Wilson and told him that he was the whistleblower who had been writing the anonymous letters. Wilson promised to take action against Vannelle, Pollock, and Warner but nothing was done. (TR 145-147) Russell was subjected to repeated acts of harassment, called a Judas, and received threatening phone calls. (TR 148)

The witness testified that under Vannelle, discipline was lax, there was a lot of tension, poor maintenance, and little formal training. (TR 153-156) Under Charvat, morale improved and Charvat encouraged plant workers to report violations to the OEPA. (TR 175-176) Charvat organized the men into areas of responsibilities and teams with mini-budgets and plans of action. (TR 181-186) C 14 and C 15 are forms Charvat distributed to report bypasses to OEPA. Charvat made improvements to plant efficiency. (TR 192-196) C 16 is a letter Charvat sent to OEPA to help with sampling discharges. Charvat also purchased a vacuum truck and helped the men get needed training. (TR 200-202) Other improvements made by Charvat were described by Russell. (TR 202-207, 219-224) Pollock and Warner resisted Charvat's changes and sowed discontent among the plant's employees. (TR 235-237) Pollock objected to Charvat's reorganization of plant employees. (TR 244-245) Pollock and Tom Morgan began a union drive (TR 246) and the Board made Charvat reverse his reorganization plan. (TR 248) In July 1995, the OEPA sent in an assist team to the plant which Russell spoke to and offered to show evidence of violations. (TR 250-252)

On cross examination, Russell admitted that the Board was aware of environmental violations as far back as late 1993. (TR 298) He agreed that there had been no formal request to form a union prior to September 1995 although union literature had been distributed before Charvat was superintendent. (TR 345-346)

Charles Wilson, the former President of the Board of Trustees, was called as an adverse witness. When Wilson was elected to the state legislature in November 1996, he resigned from the Board. (TR 400) He had been on the Board of EORWA for nine or

ten years and at the time of his resignation he was president of the Board. (TR 403) Wilson stated that he may have said at the July 5, 1995 Board meeting in response to Complainant's June 30, 1995 whistleblower letter that, "I don't want to deal with this horseshit. I'm going to take a fall because of this, and I'm pissed. I can't have my future on the line over the sewer authority". (TR 465-466) Wilson also said at this meeting that Charvat was opening up Pandora's box and that this was going to get everybody in trouble. (TR 528)

Despite Charvat's suggestions to the Board as far back as July 1994 that the digestors needed to be replaced, the Board did not approve repair of the digestors until July 14, 1995. (TR 530-544) The Board also did not act on Charvat's suggestion to improve the aeration system until after the OEPA report in July 1995. (TR 545-552) The Board also resisted other suggestions for improvements made by Charvat. (TR 555-561) Wilson stated that he did not follow Charvat's suggestions for changes because he lacked experience and that he failed to prioritize. (TR 570-572)

Anon Rony Joel is a senior vice president with Camp, Dresser and McKee, an engineering firm with ninety offices nationwide. Joel is responsible for Ohio among other locations. He has a BS in civil engineering and an MS in environmental engineering as well as an MBA, and is a registered professional engineer. The witness was qualified as environmental engineer.

In late 1994, Charvat asked Camp, Dresser, & McKee to submit a proposal for a project at EORWA which is at C 306. Joel's impressions when he met with the Board were that Wilson did not understand plant operations, Thomas was concerned about cost, Lavapies did not participate in any discussions, and Tekely did not understand financing sources and asked Joel if he would hire his son. (TR 642-644) The Board did not show any sense of urgency and did not want to use its financial resources to improve the plant's condition or to raise rates to pay for the needed improvements. (TR 645-646) Camp, Dresser was informed by the Board that their firm was ranked first and that they should submit a price proposal, but Vaughn, Coast, and Vaughn, a local engineering firm, was hired to do the project. (TR 648-649) Subsequently, complainant asked Camp, Dresser to make another proposal on system wide rehabilitation. (TR 650) Joel made studies in response and he visited the plant and felt that conditions were deplorable. He believed that the plant would have great difficulty meeting requirements of its permit. (TR 653-654)

Joel reviewed the list of priorities for plant improvement prepared by Charvat on May 20, 1995 and agreed with his priorities and thought his assessment was right on target. (TR 655; C 163) Joel asserted that Wilson is not competent to criticize Charvat's prioritization. Id. Joel thought that Charvat was an unusually competent superintendent for plant of that size. (TR 656) Joel received feedback from plant employees that the plant was not being properly maintained. He sensed high level of frustration. (TR 657-658) Joel was surprised that the Board discussed plant matters in open session including criticisms of Charvat's performance. (TR 659-660)

James F. Tekely, a member of the Board of trustees was called as an adverse witness. He has been a member of the Board since April 1994. He admitted that the May 22, 1995 admonition to Charvat to improve his performance did not suggest that he would be fired if he failed and did not contain the words discipline, warning or reprimand. (TR 700-701) He maintained that he first backed Charvat but a series of incidents over a period of time led the Board to dismiss him in September 1995. (TR 703-705) Tekely mentioned complaints of employees at February 1995 meeting, a complaint of Roger Weaver in March 1995 that Charvat told him to haul lime instead of sludge, and Charvat's insubordination toward the Board. (TR 729-736) However, Weaver later said his complaints were "diddly squat". Id.

Tekely testified that Charvat had done nothing that warranted formal discipline up to May 1995. (TR 739) Tekely also mentioned Charvat calling board members "fucking spineless" at a Board meeting, his insistence on talking to the Ohio Attorney General regarding environmental violations, and his becoming angry at Tekely when he told him that he should not have bought tires in Wheeling as bases for his termination. (TR 739-740) Tekely stated that morale was getting worse after May 22, 1995 and that the employees had threatened to unionize. (TR 745) But in his deposition, Tekely had testified that he did not know if Charvat made morale worse after May 22. (TR 748) Tekely also said in his deposition that he was unaware if Charvat encouraged factionalism, showed favoritism, confused the staff, prevented effective communications, or reduced the efficiency of the staff after May 22. (TR 749) Tekely maintained that complainant did not reduce the violations. (TR 749) He also did not follow employee suggestions and this is one of the reasons he was fired but he would not have been fired for this reason alone. (TR 750)

At the August 17, 1995 Board meeting, only one employee, Bill McCabe, showed up to complain about complainant, but Tekely says he was not representative of the plant employees. (TR 750-751) Tekely also mentioned Chuck Probst's complaints about being put on and taken off the safety committee, but this occurred before May 22, 1995 and Tekely had not mentioned this in his deposition but referred only to complaints by McCabe, Warner, and Weaver. (TR 754)

Sharon Arakawa is a registered nurse who was present at a December 1995 meeting of the Board. She identified a transcript of comments made by members of the Board and Pollock and Warner at this meeting that they were unaware of any illegal dumping of untreated sewage into the Ohio River. (See C 309; TR 818) Wilson then said something like "we're busted" or "we've been caught". (TR 819)

Michael Thomas, one of the members of the Board, was called as an adverse witness. He acknowledged that complainant's list of priorities for August 11, 1994 made overhauling and modernizing digestors the number one priority, but he stated that complainant never did anything about the digestors despite the Board authorizing him to seek bids for their overhaul in December 1994. Thomas maintained that Charvat changed his mind about rehabilitating the digestors. (TR 861-862; see C 33, p. 10) He also testified that Charvat always came in with a batch of papers at the Board meeting and did not give the Board members the opportunity to digest them. (TR 865) Complainant was asked to give monthly progress reports at the May 22, 1995 Board meeting, but did not except for the July 14, 1995 agenda which Thomas did not consider a progress report. (TR 928-929)

Thomas instructed complainant at the August 1995 Board meeting not to communicate with the OEPA because Thomas was negotiating a consent decree and did not want Charvat to jeopardize EORWA's position. (TR 937-938; See C 311, a portion of the transcript of a tape from the Board meeting of August 17, 1995 in which Thomas admonished Charvat not to send material to OEPA) Thomas asserted that Charvat could not get the violations to stop because he could not get along with the staff. (TR 1060) Thomas reiterated complainant's failure to prioritize and maintains that OEPA gave the Board the proper prioritization. (See C 33, C 37) Thomas contended that the Board did not trust Charvat to make the needed improvements because he changed work assignments frequently and never completed what he said he was going to do. (TR 1075-1076) Thomas cited Charvat's failure to create a lunchroom/training room. (TR

1075-1076) He also characterized C 193, Charvat's report of June 10, 1995 in response to the Board's call in May for improvement in his performance, as self laudatory and an "apologia pro vita mea" rather than a true progress report. (TR 1081-1082)

DeLayne Charvat is complainant's sister and was Michael Thomas's wife from 1989 to 1996; they separated in August 1995. Ms. Charvat's testimony relates to what Thomas allegedly told her, frequently while intoxicated. He felt that there were employee morale problems at the plant and that the men had once tried to form a union. He predicted that once Charvat became superintendent, the men would again try to form a union because Charvat would make them work. (TR 1146) Once after a Board meeting, Thomas said that complainant wanted \$13-14 million to fix up the plant but that the Board did not want to spend funds on maintenance, engineering studies, or training. (TR 1153-1154) The witness related that when Charvat called the Board "fucking spineless", Thomas thought that it was funny and Wilson initially got angry and then later also thought that it was funny. (TR 1162-1163) But Thomas did not like Charvat's whistleblower letter and was furious about it. He allegedly wanted the violations hushed up so EORWA would not have to raise rates and Wilson could be elected to the state legislature. (TR 1163-1164) The witness testified that Charvat has experienced insomnia, anxiety, irritability, and loss of concentration since his dismissal. (TR 1168-1170)

Mary Charvat, complainant's wife, related a meeting with Michael Thomas in July 1995 in which he inquired if complainant would accept a settlement, and indicated that he was worried about being blamed by OEPA at an upcoming meeting for plant violations. He said that he wanted to plead ignorance and was afraid that if he took complainant to the meeting, he would tell a different story. (TR 1216-1218) She testified as to complainant's insomnia, anxiety, loss of concentration, loss of appetite, and irritability since his dismissal. (TR 1218-1220) She also described the adverse effect of complainant's dismissal on their marriage, social life, and children. (TR 1220-1224)

Dale Kocarek is a civil and environmental engineer who was formerly employed by OEPA as a project engineer for the Division of Construction Grants. He helped wastewater treatment plants upgrade their facilities so they would qualify for Federal funding. (TR 1285-1286) Since 1989, the witness has been employed by a private engineering firm as project manager in their wastewater unit. He has wide experience

with wastewater treatment plants. (TR 1293-1298) He was qualified as an expert on wastewater and environmental engineering. The witness had no contact with anyone in the case and is retained as a compensated witness for the complainant. Prior to testifying, Kocarek read material regarding the operation of EORWA.

Kocarek characterized the EORWA plant in mid 1994 as in "bad shape" with fundamental design problems and hindered by poor operations due to failed systems and lack of maintenance. (TR 1301) The entire plant system needed correction and comprehensive renovation. (TR 1304) Kocarek believed that Vannelle was not too competent and that Pollock and Warner had on the job training but little knowledge of overall operations of the plant. (TR 1308-1309) Kocarek stated that complainant showed more concern for correcting the sludge handling problem than Pollock or Warner. (TR 1308-1310) Warner did not comprehend the seriousness of sewage being emitted into the public water supply. He did not use the backflow prevention device. (TR 1311-1312) Pollock did not understand the requirement for notifying OEPA regarding bypasses or the importance of secondary treatment. (TR 1312-1314) Pollock also illegally dumped grit and scum on the river bank instead of putting it in a licensed sanitary landfill. (TR 1314-1315) The witness also referred to C 69, a memo from Bob Warner regarding a practice which could lead to the mixture of oxygen and methane and an explosive hazard in the plant. (TR 1315-1317) He also referred to complainant's draining of wastewater tanks and concluded that Pollock was incorrect that this practice would create a safety hazard. (TR 1320-1322) Pollock would have been shutting down the process and violating the permit if he had done it his way. (TR 1321-1322)

Complainant was described by Kocarek as being a new breed of wastewater plant superintendent with college and engineering degrees. (TR 1322) He called Charvat's initial assessment of the changes that needed to be made on July 18, 1994 (C 33) when he first became superintendent a first rate job which showed a high level of competence. (TR 1323-1324) The August 11, 1994 agenda was also an excellent effort. (TR 1323-1324) Complainant's recommendation in C 33, p. 10, concerning overhauling and modernizing the digestors was correct. (TR 1324) The Board's authorization on April 13, 1995 to clean the digestors was not entirely consistent with complainant's recommendation because he also wanted to renovate the digestors which was the correct step to take. (TR 1327) The quality of complainant's agendas of November 15 and December 8, 1994 was very good, rated A. (TR 1327-1328) The agenda of May 20, 1995, C 163, was an A+. (TR 1330) The Vaughn, Coast, & Vaughn report at C 256

gives similar prioritization. (TR 1331) Phases I, II, and III of this report correspond to complainant's priorities 1, 2, & 3. (TR 1332) In Kocarek's estimation, complainant provided sufficient guidance for the Board. (TR 1332) OEPA's evaluation of August 21, 1995 (See C 37), is also similar to complainant's May 20, 1995 agenda. (TR 1334)

Kocarek declared that the Board giving Charvat ninety days to improve in May 1995 was completely unrealistic. (TR 1334) ³ He also averred that the data Vannelle supplied to the OEPA appears to be falsified. (TR 1337-1341) Tom Morgan also falsified data given to OEPA. (TR 1342) Charvat's reporting forms are consistent with what was required by OEPA and would ferret out more violations. (TR 1343) This would likely result in environmental enforcement against EORWA by OEPA. (TR 1344) The witness also believed that it was unusual for a facility not to bring its superintendent to a meeting with the Attorney General's office regarding a consent decree. (TR 1344-1345) Kocarek admitted on cross examination that the Board did not say on May 22, 1995 that complainant should fix everything wrong with the plant in ninety days but that they expected positive results. (TR 1380)

David Charvat, the complainant, holds a B.S. degree from the United States Naval Academy, a B.S. in mechanical engineering from the Navy Post Graduate Program, and an M.S. from the University of Pennsylvania in systems planning. He was a lieutenant commander in the Navy and received most of his training in project management with a subspecialty in engineering. (TR 1412-1414)

Michael Thomas, who was married to complainant's sister, mentioned the EORWA superintendent job to complainant in December 1993, and complainant was interviewed for the position in March 1994. When complainant knew he was to be hired, he took classes at the University of Wisconsin in wastewater treatment and human resources. (TR 1418-1420) He was not given any prior instructions or orientation by the Board before starting the job. Prior violations were not mentioned and he was not told anything special about Pollock or Warner. (TR 1430-1432) Complainant described the plant at the time he was hired in July 1994 as poorly maintained and with deplorable plant and collection system conditions. (TR 1435-1452) Employees McCabe, Zeller, and Starkey complained to Charvat about understaffing and inflexible vacation policies. (TR 1455-1457) Plant employees informed him that under Vannelle employees were told that if they ever showed up at a Board meeting they would be fired. They were allegedly scared of the Board and the prior superintendent. (TR 1459)

Complainant provided an agenda to the first Board meeting he attended on July 18, 1994. (C 33; TR 1464) He was concerned about plant inefficiency, ineffective communications, lack of training, safety problems, poor morale, poor organization, and red tape for requisitioning items. (TR 1465-1471) The Board did not seem to know much about plant operations or financing. (TR 1471-1472) Although Charvat suggested training for the Board members (see C 99), none took him up on it. (TR 1472-1475)

Charvat asked to set up meeting with Abbott Stevenson of OEPA in July 1994 on how to improve plant operations. (TR 1478; C 82) C 83 is complainant's agenda for the OEPA visit. Abbott Stevenson and Richard Lechner of OEPA visited the plant on July 27, 1994. Complainant asked them if he could draft a form for plant employees to report violations which is C 12. (See also C 12A; TR 1489) Complainant was surprised to learn that neither Pollock, the chief operator, nor Warner, the assistant superintendent, knew the permit limits for total suspended solids. (TR 1493) He later devised a form delineating the limits of EORWA's permit which he explained to his staff. (TR 1525-1526; C 102)

Complainant obtained an estimate from an engineering firm of \$8-\$14 million for upgrading the plant which he presented to the Board at the August 11, 1994 Board meeting. (C33, C 88) Wilson and Thomas expressed reluctance about spending that large a sum to fix up the plant. (TR 1499-1500) Thomas later told complainant that he and Wilson were adamantly opposed to spending that much because it would mean raising rates which would adversely affect Wilson's political career. (TR 1528-1529)

Complainant felt that Pollock was resentful of not being hired as the superintendent and resisted the changes Charvat made. (TR 1512) Pollock made comments that made Charvat question his competence. He and Warner resisted complainant's changes or refused to comply. (TR 1539-1546) Complainant testified that none of the Board members expressed problems with his prioritization presented to them at Board meetings until May 1995. (TR 1558)

In an all hands meeting on December 19, 1994, complainant provided a method to plant employees for reporting bypasses to OEPA via the superintendent. (TR 1592; see C 112) C 14 is an example of complainant reporting such a bypass to the OEPA. ⁴

In a December 20, 1994 memo, complainant informed the Board that OEPA was considering reviewing the plant. (See C 36) Wilson was very concerned about the effect this would have on his political career and did not want the media to know about this. He said he would shoot the messenger if it became public knowledge that OEPA was investigating the plant. (TR 1600-1601) Wilson asked if complainant could stop reporting violations to the OEPA but he refused. (TR 1601) In January 1995, complainant was informed by OEPA that EORWA was being placed on the significant noncompliance list and that referral to the Ohio Attorney General's Office was expected soon. (TR 1603) The bar graph at C 315 shows that complainant reported approximately twenty five violations to the OEPA in the second half of 1994 and fifty eight violations to the OEPA in the first half of 1995, which was significantly more than the violations reported by Vannelle during his tenure at superintendent.

In January 1995, complainant told the Board of personnel problems he was having with Pollock. (TR 1612) He proposed a reorganization of the employee structure which transferred some of Pollock's responsibilities due to Pollock's failure to comply with environmental requirements. (TR 1613-1616) The Board, however, reversed the reorganization plan in February 1995. (TR 1620-1621) Complainant was disappointed because he felt that the Board would not support him in making the needed changes. Id.

Pollock continued to be resistant to Charvat's changes. (TR 1617) He was formally disciplined twice in January-February 1995 for insubordination, but the Board instructed complainant to drop his reprimands of Pollock. (TR 1618-1618, 1622; see C 127, C 129A)

Charvat told Wilson in a fax dated March 31, 1995 that the plant had its fifth permit violation since mid-February and he needed the Board's approval for design services for critical areas. (TR 1628; see C 138) These violations were reported to OEPA. (C 139) Complainant was feeling frustrated at this time because the Board would not make needed improvements unless forced to do so by OEPA. (TR 1631)

At the April 13, 1995 Board meeting, Charvat called the Board members "fucking spineless" because he thought it would get their attention for funding to make plant improvements. (TR 1632) Wilson and Thomas said after the meeting that they were not offended by Charvat using this term. (TR 1633) Pollock was now openly defiant of Charvat and criticized him to other employees. (TR 1635-1636)

On April 20, 1995 Abbot Stevenson notified the Board that OEPA was aware of permit violations and warned them that failure to comply with effluent limitations or to satisfy the monitoring or reporting requirements of its permit may result in enforcement action. (C 141)

The Board called a surprise meeting for May 22, 1995. (TR 1656) Wilson said he wanted the violations to stop being reported or at least toned down. Complainant refused. Wilson also mentioned morale. He wanted Charvat to make improvements in three months in employee morale and the plant. (TR 1656-1657) Wilson expressed confusion about Charvat's prioritization for the first time. (TR 1658) Wilson again said he would shoot the messenger for reporting violations. (TR 1660-1661)

On June 23, 1995 Charvat wrote a memo to Abbot Stevenson regarding the plant's permit violations and the difficulty the plant will have in meeting permit requirements without major repairs. (TR 1661; C 182) A letter from Margaret Malone, Ohio Assistant Attorney General, was sent to the Board on June 28, 1995, stating that the Director of OEPA has referred the Board to the Attorney General for violation of water pollution laws from 1989 to the present. The letter indicated that the plant superintendent had requested representatives of OEPA to perform a comprehensive evaluation of the plant which was tentatively scheduled for July 10-14, 1995. Ms. Malone suggested that the matter could be resolved with a consent decree. (TR 1662; C 184)

On June 30, 1995 complainant sent a letter to the Wilson. (C 185) The letter reads in pertinent part:

In accordance with Ohio Revised Code 4113.52 (Ohio Whistle Blower Law), I am formally notifying you as President of the Board of Trustees (BOT) for the Eastern Ohio Regional Wastewater Authority, that I have concerns that violations may have occurred warranting disclosure to the appropriate authorities. These concerns involve possible violations of Ohio environmental laws, possible criminal offenses likely to cause, or have caused a hazard to public health, and possible felonies. My concerns can be summarized as follows:

- 1) possible falsification of, or noncompliance with state-approved plan for the land application of sludge (e.g., confusion about number of tracts of land available to EORWA for sludge application);
 - 2) possible failure to accurately report bypass events of raw sewage caused by the inoperation of lift stations at Crescent Street, 17th Street, and 49th Street;
 - 3) possible failure to accurately report combined sewer overflows or sewer ruptures (e.g., bypass of raw sewage at Martin's Ferry-near Staffolino's);
 - 4) possible failure to take appropriate measures to prevent potential contamination reaching public water supply system;
 - 5) possible record keeping violations related to monitoring required by NPDES permit;
 - 6) possible misrepresentation of handling of "grit"; and
 - 7) possible inappropriate dumping of sewage on fields or into Ohio River.
- Complainant requested authorization in the letter to conduct an internal investigation of these matters. The letter pointed out that these problems occurred or developed prior to complainant's employment and that he had worked diligently and consistently to report and correct these problems. Complainant stated in the letter that he would cooperate with OEPA during their scheduled visit to the plant.

Thomas replied to this letter on July 3, 1995. (C 186) He wrote that "(w)e welcome a full, complete and comprehensive investigation of each and every allegation as soon as possible. We pledge our full cooperation with the EPA and wish to reiterate, as we have in the past, our sincere desire to comply with any and all regulations and laws applicable to the Authority". The Board offered to meet with complainant to discuss his allegations.

In its July 5 meeting, the Board denied complainant's request for an investigation and for authority to discharge employees, such as Pollock and Warner, who were committing violations of environmental laws. Wilson again spoke of shooting the

messenger and expressed concern about the effect violations would have on his political career. (TR 1668-1669) This was surreptitiously tape recorded by complainant. ⁵ On July 8, Thomas asked Charvat to stop reporting violations and to tone it down a little and Charvat refused. Thomas said that Charvat was going to be in for a hard time. Thomas allegedly threatened complainant. (TR 1669-1670)

When OEPA visited the plant on July 10, Charvat gave them his major action report of May 20 and the list of 170 improvements he had made along with additional documentation. (TR 1671-1672) Complainant maintained that the draft report of OEPA's recommendations after their plant visit closely corresponded to his suggestions. (TR 1679) In the July 14 Board meeting the Board only moved on some of OEPA's recommendations despite complainant's protests. (TR 1683) C 193 is complainant's list of his accomplishments he gave to Wilson and Thomas on July 21, 1995. (TR 1684) The Board did not want complainant to accompany Thomas to Columbus to negotiate with the Attorney General regarding a consent decree. (TR 1684)

In the Board meeting of August 17, 1995, Charvat was told he could not contact the OEPA without going through the Board first. Thomas's comment to this effect was surreptitiously tape recorded. (See C 311) Tekely also told Charvat that he was not allowed to talk to the Attorney General. (TR 1693) Thomas admonished complainant for allowing Paul Russell to follow him around "like a puppy dog.". (See C 311A)

After a visit from an OEPA representative, Wilson told complainant that he could speak with OEPA personnel and send them monthly operating reports, but he should otherwise contact the Board first. (TR 1698-1699) The Board held a special meeting on September 6 to discuss complainant's termination. Charvat decided not to resign. (TR 1700; see C 208) C 218 is the transcript of the termination hearing held by the Board on September 21, 1995.

On cross examination complainant admitted that he was partially at fault for the low morale in 1995 and that he made mistakes, but he attributed most of the low morale to the Board reversing his reorganization plan and to Pollock and Warner putting pressure on employees. (TR 1897) He believed that the men complained about him at the February 1995 Board meeting because they were fearful of the conflict between him and Pollock and Warner and thought they might lose their jobs. They also thought they

might have been violating environmental laws and Pollock exploited their fears and sewed dissension. (TR 1907-1908)

Concerns regarding environmental violations expressed in the June 30 whistleblower letter had been occurring before Charvat became superintendent, but continued to impact on plant operations, according to complainant's testimony. (TR 1971) Complainant stated that the environmental concerns mentioned in the letter were not already known to OEPA. (TR 1973) Charvat acknowledged that all of the environmental violations mentioned in his letter were included in the OEPA 1993 investigative report except for No. 1-falsification of sludge application plan, and possibly No. 5- record keeping violations of monitoring levels. (TR 1975) But he maintained that he brought up additional matters the Board was not aware of such as poor maintenance and inadequately trained personnel that was causing environmental problems. (TR 1985) Complainant contended that his June 30, 1995 letter referred to matters which post-dated the OEPA's investigation in 1993. (TR 2087) Charvat asserted that EORWA misled OEPA as to the tracts of land it owned on the sludge farm. (See C 64) It really owned only Tracts A and B although it purported to own Tracts C, D, and E as well. (TR 2050)

Respondent's Witnesses

Eugene Peter Conway has been an operator at the plant for twenty-eight years. He testified that morale declined after complainant had been superintendent for six months because he kept changing his ideas. (TR 2131, 2150) The witness referred to a February Board meeting at which the men complained about Charvat. (TR 2136) The witness cited complaints made about Charvat at February 1995 meeting by Pollock, Warner, Morgan, and Mrs. Morgan. (TR 2248) Conway did not speak at the meeting. (TR 2138) The witness complained to Tekely about complainant changing orders. (TR 2141) He tried to inform Wilson of the problems with Charvat but he would not listen. (TR 2143) It was Conway's testimony that no employees including Pollock tried to undermine complainant. (TR 2145) Morale worsened after the February 1995 meeting because no one would listen to the men's complaints. (TR 2156) Conway did not attend the August 1995 meeting at which McCabe spoke. (TR 2161) The witness signed a union card in the Summer of 1995 because of uncertainty about job security. (TR 2162) He stated that the union petition was withdrawn because of complainant's dismissal. (TR 2166)

On cross examination, Conway admitted that he never talked to members of the Board at meetings or privately about Charvat. (TR 2171) He later testified that he did talk to Wilson but does not remember when or what specifically they talked about.

Michael W. Burns has been an operator at EORWA for nineteen years. He testified that after complainant was on the job for six months the employees' morale was bad. The witness did not know the reason for this but it pointed to Charvat. (TR 2284) Charvat had agreed with Burns that morale was bad. (TR 2285) Burns referred to the Board meeting in February 1995 at which the employees spoke. (TR 2285) He stated that the complaints at the meeting were about how bad the morale was but he does not remember the substance of the complaints. (TR 2293) The witness spoke at the meeting but does not remember what he said. Id. Burns also complained to Tekely about morale when he visited the plant. Burns did not think that complainant knew much about the operations of the plant. (TR 2308, 2305) He referred to Charvat constantly changing orders. (TR 2310) Charvat's paperwork was also confusing. (TR 2311)

In the Summer of 1995 complainant talked about contracting out the lab work which was Tom Morgan's job. (TR 2311-12) He also talked about contracting out sludge hauling. Id Complainant once said that the men were overpaid in comparison with another wastewater treatment plant. (TR 2313-14) He also once said that the men would have to choose sides. (TR 2215) Charvat used to meet with Paul Russell behind the closed doors of his office. (TR 2319) Burns testified that morale was getting worse in the Summer of 1995 due to Charvat's changes. (TR 2325) The witness did not attend the August 1995 Board meeting because he thought that the Board would back Charvat. (TR 2326)

The plant employees tried to form a union in August-September 1995 because they were allegedly concerned about complainant contracting out their jobs. (TR 2328) The petition to form a union was withdrawn after complainant was dismissed. (TR 2330) Ten employees had signed up to form a union. Id. Morale improved after Charvat was terminated. (TR 2331)

Tom Morgan has been a laboratory analyst for EORWA for thirteen years and is a Class III wastewater license holder. (TR 2474) After complainant had been on the job for six months morale at EORWA was low. (TR 2478) Charvat changed orders which

were confusing and stressful to the witness. (TR 2478-79) The low morale of the plant employees was attributed to complainant. (TR 2479) Morgan and others spoke at the February 1995 meeting complaining of Charvat. (TR 2481) There were eight to ten plant employees at the meeting. (TR 2482) The Board said that it would fully support the superintendent, so the men decided to form a union. (TR 2484) Morgan complained to Tekely after the February 1995 meeting about Charvat and the low morale. (TR 2485) Morgan never saw Pollock or any employee trying to undermine Charvat's authority. (TR 2486) Morgan assertedly experienced stomach problems due to stress from Charvat's actions. This had supposedly never happened before Charvat was superintendent and these problems improved after he was fired. (TR 2492) Morgan did have acid reflux before Charvat was hired but not as bad as after. (TR 2493) He also had extensive tests performed prior to his stomach problems in February 1995.

Morgan found the accounting procedures he had to do burdensome. (TR 2498) The men decided to form a union due to concern about job security. Morgan was concerned because complainant had talked about contracting out the lab work. (TR 2503) Charvat also said that sludge hauling might be contracted out.

Morgan referred to a Christmas party in 1994 at which complainant dressed up as Santa Claus and had everyone sit in his lap. As a prank, he dropped his pants to show his Ohio State boxer shorts. Morgan says that this was personally offensive to him. (TR 2511) After the February 1995 meeting, the men did not complain about Charvat to the Board because they did not think it would do any good. (TR 2512) Morgan maintained that morale improved after complainant was dismissed. (TR 2512)

In his deposition Morgan had said that he had been too defensive about Charvat contracting out the lab work. But he now says that he took it as a threat. (TR 2553) Morgan admitted on cross examination that he did not speak at the February 1995 Board meeting. (TR 2590)

Roger L. Weaver is an operator at the plant and has been employed by EORWA for twenty-five years. (TR 2629) Weaver testified that after Charvat was on the job for six or seven months, morale declined due to his frequent changes in job assignments. (TR 2631) Weaver told Tekely that he was upset because Charvat on one occasion had told him to haul lime instead of sludge which Weaver thought was necessary because the digesters were full. (TR 2631-32) The witness remembered going to the Board to

complain about Pollock but did not remember if he complained about Charvat. (TR 2634-35) He also recalled a Board meeting when the men complained about Charvat but did not remember if he spoke. TR 2634-35 The Board backed Charvat and morale went down because the men were confused. (TR 2637) He did not know if the conversation with Tekely about the sludge hauling was before or after this meeting. Id.

The witness did not see any employees trying to undermine Charvat. (TR 2638) He referred to two incidents when Charvat wanted to turn the heat off which would have frozen the chlorine lines, and when he turned off the purge blowers in the aeration tanks. (TR 2639) Charvat once said at a meeting that plant employees were overpaid and that some work should be contracted out. (TR 2640) Weaver felt that his job was in jeopardy. (TR 2641) Charvat once told men that they would have to choose sides and Weaver was offended by this comment. (TR 2641-42)

On one occasion, Charvat was going to allow men to work around an electrical line in an excavation pit, but the men objected because they thought it would be dangerous. (TR 2642-45) Weaver also referred to the Christmas party incident. (TR 2646) In July-August 1995 morale was still low and the men decided to join union. (TR 2647) Eight or nine men signed papers to join the union. (TR 2648) After Charvat's dismissal, the men decided to forego unionization and see what would happen. (TR 2649) Weaver felt that morale improved after complainant's dismissal. (TR 2652)

On cross examination, Weaver stated that he considered joining a union because he was concerned about threats to job security from the Board and the superintendent. (TR 2699) Dismissing Charvat actually made Weaver fear for his job and made his morale worse initially. (TR 2700) In his deposition, Weaver had said that most of his complaints about Charvat were "diddly squat". (TR 2707) He also acknowledged that it was unlikely that Charvat's turning down the thermostat would have resulted in the chlorine freezing in the pipe. (TR 2713-17) Charvat did not order the men to go into the excavation pit where there was a live wire, but only said that he would have no problem with the men doing it to insulate the wire. (TR 2740-2741)

James Murray has been a truck driver for EORWA for fourteen years. (TR 2788) He hauls sludge from the plant to the sludge farm. Murray testified that morale grew worse after Charvat had been on the job a few months. (TR 2790) However, he does not

recall any negative comments being made about complainant at the February 1995 meeting. (TR 2793)

Charvat once turned on a valve which caused sludge to spill onto the ground. (TR 2798) He said at a meeting that he would contract out the lab work and sludge hauling which Murray and Morgan took as a threat to their jobs. (TR 2799) Morale grew worse in the Summer of 1995 but the witness did not think that going to Board would do any good. (TR 2803) Murray signed a union card because of concerns about job security due to Charvat's statements. (TR 2804) The union effort was dropped after complainant was dismissed because there was more peace and quiet. (TR 2806) Morale improved after Charvat's dismissal because there was less paperwork and "nickel and dime stuff".
Id

Charvat once told Murray to haul sludge when the ground was snow covered which would prevent it from soaking into the ground. (TR 2807-08) Charvat changed his orders frequently which was confusing to the employees. (TR 2808)

Murray admitted on cross examination that there had been talk about a union for years at EORWA including when Vannelle was superintendent. (TR 2819) He stated that he did not talk to Tekely when he visited the plant. (TR 2830) Charvat listened to Murray most of the time. (TR 2843) Murray's complaints about Charvat were minor except for Charvat's supposed intention to contract out sludge hauling. (TR 2846) He could not explain why he had not mentioned this incident in his deposition. (TR 2854)

Chuck Probst is a journeyman electrician and operator at EORWA. He was an assistant operator and backup truck driver until April 1997. (TR 2925) Probst declared that morale started to drop after Charvat had been on the job for about six months because of his comments, harassment, and attempts to turn the men against each other. (TR 2927-28) Probst once spoke to Tekely about this. (TR 2928) He did not attend the February 1995 Board meeting. Id. The majority of the men opposed complainant in early 1995 because he was constantly threatening their jobs and benefits. At an all hands meeting, Charvat said he was checking around at other plants to see what they were paying their employees. (TR 2931-32) Charvat also mentioned at a meeting that some wastewater treatment plants contract out lab work and sludge hauling and the men took this as a job threat. (TR 2936) Charvat once called Probst into his office and told him he would have to choose sides. (TR 2942) Charvat listened

to the men's suggestions but did not follow their advice; he followed Russell's advice. (TR 2943)

Probst referred to the incident with high power line in excavation pit when Charvat said he would not have any problem with his employees digging around the line even though men from Ohio Electric Power told him it would be dangerous. (TR 2945-48) On another occasion, complainant told him he had to cut weeds in the rain which he considered dangerous. (TR 2951-54)

Morale declined in the Summer of 1995. (TR 2956-57) The men tried to organize a union due to "total harassment and browbeating" by Charvat. (TR 2957-58) After Charvat's dismissal, morale improved and attempts to form a union ended. (TR 2958-59) Probst also referred to the Christmas party incident and Charvat showing his Ohio State boxer shorts. (TR 2960-61)

A taped conversation between Probst and Russell in April 1994 (C 336) showed that Probst had some job dissatisfaction at that time. (TR 3013-14) In the power line incident, Charvat never ordered his men to go down in the excavation pit; he only said that he would not have a problem with them doing so. (TR 3032)

Michael Thomas, a member of the Board, testified that when the Board hired complainant in 1994, they knew he did not have any wastewater treatment experience, but they thought he would be a good manager because he had commanded men in the Navy. (TR 3050) Thomas testified that complainant wanted to have a lunchroom/training room completed but although the Board authorized the money for this purpose, it was never completed. (TR 3051) Complainant also never installed a shower at the sludge farm although authorized to do so. Id. The Board also authorized the digestors to be cleaned but Charvat changed his mind and did not put out bids. (TR 3052)

The men complained that complainant changed job assignments without explaining why, and that he was arrogant to them. (TR 3052) Thomas referred to the February 1995 Board meeting when men complained about Charvat changing job assignments, showing favoritism, and not giving any direction. (TR 3055) Morale was allegedly poor at this time. Id.

Complainant also talked about privatization, firing employees, and eliminating jobs, which the Board was assertedly against. (TR 3055-56) At the February meeting, the Board indicated that it supported Charvat. Charvat offered to resign but Thomas and Wilson talked him into staying and suggested ways that he could win over the men. (TR 3056-57) After the February 1995 meeting, the men continued to complain and considered unionization. (TR 3059)

At the May 1995 Board meeting Wilson stated that he was very concerned about the worsening personnel situation and Charvat's failure to give prioritization as to how to correct the violations in the plant. Complainant was given three months to improve the situation and to provide progress reports. (TR 3060-61) Charvat, however, never provided progress reports. Id. As Charvat did not heed the Board's advice and did not provide progress reports, the Board gave him a notice of intent to terminate. (TR 3064) Thomas maintained that the Board was already aware of the environmental violations in Charvat's whistleblower letter of June 30, 1995 and had been fully apprised of them by OEPA in 1993. (TR 3069-71; see R 58) He stated that complainant's allegations that EORWA only owned two tracts of land on the sludge farm is ridiculous because the authority owned six tracts and the correct amount of acreage. (TR 3071-72; see R 55, the deed to the sludge farm) Complainant's whistleblower letter had nothing to do with his dismissal, Thomas maintained; the Board already knew of the matters mentioned in the letter. (TR 3080)

OEPA did an investigation of EORWA in August 1995 and wrote a report. (C 37) Thomas believed that their priorities were readily understandable in contrast to Charvat's confusing list of priorities. (TR 3102-03) Thomas contended that complainant was insubordinate and contemptuous of the Board when he said that the Board was "fucking gutless and spineless" and questioned Thomas's judgment due to personal problems. (TR 3106) Charvat also took comp time off during the week and worked on weekends in contradiction to the Board's wishes. (TR 3107)

In the August 1995 meeting, only Bill McCabe spoke and said that the other men thought it would be futile to complain because the Board would back complainant. (TR 3109-10) In its September 5, 1995 meeting, the Board issued a notice of intent to terminate complainant. (TR 3114) The employees' effort to join a union effort ended after Charvat was fired. (TR 3115)

At September 21, 1995 meeting, Wilson, Warner, and McCabe testified regarding Charvat. (See C 218) Thomas stated that the main reasons for the dismissal were Charvat's inability to communicate with the staff and vendors and persons dealing with the Board, and his failure to prioritize. (TR 3121) A September 6, 1995, letter to Charvat listed the reasons for his dismissal. (TR 3122-23) ⁶ Thomas insisted that complainant's whistleblower letter had no effect on his termination. (TR 3124)

Thomas asserted that the Board did not resist Charvat's attempts to improve the plant. (TR 3127) Charvat supposedly continued to call Camp, Dresser after the Board told him not to because their rates were too high. (TR 3136-37) Thomas denied his ex-wife's statement that he thought Charvat's remark that Board was "fucking spineless and gutless" was funny. (TR 3146) He also denied that he wanted to keep the plant's violations hushed up; he claimed that he wanted people to know about the violations. Id. Thomas denied telling Charvat to slow up improvements to the plant or saying that there was not enough money to make improvements. (TR 3152) He claimed that he never told Charvat that he had to choose between reporting violations and his job. (TR 3156)

In his cross examination, Thomas stated that the Board members had told Charvat before the August 17, 1995 meeting that his agendas were too long and too complex (see C 341); but Charvat asked in the July 5, 1995 meeting for permission to fire the employees which the Board refused to give him. (TR 3193)

Thomas admitted that all of the field reports in R 58 were not in his possession at the time complainant's whistleblower letter was transmitted to the Board and that they may not have been received until after Charvat was terminated. (TR 3197-98) Thomas denied that he told Charvat to stop reporting the violations. He stated that the plant was an open book and that he welcomed an OEPA investigation. (TR 3247)

Thomas testified that EORWA owns six tracts of land on the sludge farm but in his deposition (see C 356), he admitted that the authority owned two, possibly three, tracts, but not five. When asked if the men complained about Charvat changing job assignments after the February 1995 meeting, Thomas was only able to cite McCabe's complaints at the August 17, 1995 meeting. (TR 3280-82) Thomas maintained that Charvat said that the digestors needed overhauling in August 1994 but did not ask for

authorization to clean them until April 1995 and then changed his mind the next month. (TR 3302-03)

Charles Wilson, the President of the Board from 1985-1996 and currently a member of Ohio House of Representatives, testified that as superintendent complainant was arrogant, condescending to employees, failed to use his subordinates' experience, and failed to prioritize. (TR 3469-70) He referred to the meeting when the men complained about favoritism and changing assignments. Morale at the plant was very low. (TR 3470) Wilson recalled that all but three or four of the plant employees attended the February 1995 meeting to express concerns about Charvat. In addition Tekely relayed the employees' dissatisfaction with Charvat to Wilson, and Pete Conway personally complained to Wilson. (TR 3471) Wilson, however, refused to discuss these matters with Conway. (TR 3472)

At the February meeting, the men were concerned about their jobs being privatized based on comments made by complainant. (TR 3474) The Board assured the men that it would not privatize. The Board supported Charvat. Charvat tendered his resignation after this meeting, but the Board refused it. (TR 3474-75) After the February 1995 meeting, morale continued to deteriorate based on complaints from employees, and on May 22, the Board put complainant on notice that they expected improvement in ninety days or they would terminate him. (TR 3476) However, complainant never submitted the required progress report. (TR 3478) The Board was frustrated in Charvat not making any progress and this was considered a serious failing. (TR 3479)

Wilson asserted that EORWA had been investigated by OEPA in 1993 and 1994 and that the Board was aware of the violations cited in Charvat's whistleblower letter of June 30, 1995. (TR 3480-81) OEPA frequently investigated the plant and the Board was fully aware of all the matters mentioned by Charvat. (TR 3482)

The witness declared that complainant was contemptuous to the Board, calling them "fucking gutless and spineless". (TR 3486) He would not accept orders or suggestions from the Board about how to manage employees. (TR 3486-87) He was disrespectful to the Board; complainant told Thomas that he was letting his personal life interfere with his duties as a Board member. (TR 3487)

In July 5, 1995 meeting, the Board did not want Charvat to immediately conduct an investigation of the plant because OEPA was doing an investigation on July 10-14. (TR 3489-90; see R 59) Wilson averred that complainant would have been terminated even without his whistleblower letter. (TR 3490) Wilson stated that EORWA was always anxious to end the environmental violations and to comply with OEPA. (TR 3495) After the July meeting, employee morale continued to suffer and the employees decided to form a union to protect their jobs. (TR 3502) In the August meeting, McCabe said that the men thought their jobs would be privatized and he complained about Charvat's lack of communication and favoritism. (TR 3503-04; see R 60) Wilson felt that the employees sought unionization to protect themselves from complainant. (TR 3506)

Charvat offered to resign on the phone in September 1995. (TR 3506) He asked for \$250,000.00 and told Wilson that he would be sorry he had ever heard of him. (TR 3507) A notice of termination was sent to Charvat. (C 207; R 51; TR 3511-12) At the Board meeting of September 21, 1995, Wilson and two other employees testified but Charvat did not testify although represented by counsel. (TR 3513-14)

Wilson made reference to Charvat's poor prioritization as a reason to terminate him. (TR 3516; see R 10) Wilson claimed that his comment at the July 5, 1995 Board meeting that complainant was opening a Pandora's box was not a reference to his whistleblowing activity or his June 30, 1995 letter but instead referred to the possibility of a barrage of lawsuits. (TR 3518-20) Wilson asserted that he did not tell Charvat he would have to "shoot the messenger" and did not resist repairs and rehabilitation of the plant. (TR 3524) He maintained that OEPA's report in August 1995 gave the Board a common sense approach for improving the plant which complainant had not given them. (TR 3525) Wilson denied saying that the Board would not spend money to upgrade the plant, but he wanted to spend money prudently and not just throw money at a problem. (TR 3525) Wilson stated that he never said that an OEPA investigation would kill his political career, nor tell Charvat not to report violations or ask how he could avoid reporting violations. He did not say at the May 22, 1995 Board meeting that he did not like violations being reported and that it would hurt morale. (TR 3526-27)

Complainant had originally suggested overhauling the digestors and then later requested permission to clean the digestors and the Board authorized money for this purpose but Charvat never followed through. (TR 3530-31) The Board did not resist

steps to comply with OEPA directives. (TR 3531) Wilson never said at a board meeting that "we're busted" as Sharon Arakawa reported. (TR 3532)

On cross examination, Wilson was unable to cite examples of how complainant made morale worse between May 22 and September 21, 1995, but he declared that complainant did nothing to improve morale. (TR 3573) Wilson did not consider Charvat's report at C 193 as the progress report required by the Board in May 1995. (TR 3574-75) In the July 5, 1995 Board meeting, Wilson denied to complainant that anyone had ever reported bypasses to the Board. (See C 359)

Dr. Felipe Lavapies was a member of the EORWA Board of Trustees from 1991 to 1996. Consistent with the testimony of most of respondent's witnesses, Dr. Lavapies testified that after complainant had been superintendent for six or seven months, the employees' morale was low. (TR 3763) The witness referred to the Board meeting in February 1995 when the men complained about Charvat. (TR 3764) The Board supported complainant at that time but in May 1995, based on worsening morale, Charvat was given three months to correct the situation. (TR 3768-70) Lavapies also cited the August 1995 meeting when McCabe testified about morale being low due to complainant's actions. (TR 3776) He attributed the employees' efforts to join a union in August-September 1995 to their fear of having their jobs contracted out. (TR 3779) The Board was not satisfied with complainant's response to its May 22 directive. (TR 3780) Lavapies also referred to Charvat profane remark to the Board. (TR 3787) He stated that he was shocked by complainant's comment. Id. The witness stated that he would have terminated complainant even if he had not sent the whistleblower letter of June 30, 1995. (TR 3788)

At the July 5, 1995 Board meeting, Lavapies said "Will this (complainant's whistleblower letter) help us in better operation of the plant or will this nail us to the wall?"... "We made a big mistake, things happen and I was on the Board and did not say one word about this, and what scares me about this, is this letter." (See C 370A) The witness admitted that he did not know if the communications problems between complainant and the plant employees was complainant's fault. (TR 3839) Lavapies admitted that he had no personal knowledge of complainant doing what was alleged in the September 5, 1995 letter informing him of his pending dismissal. (TR 3842-44) But he based his decision to fire Charvat on the evidence presented to him at the termination hearing. (TR 3856)

James Tekely was selected to the Board of EORWA at approximately the same time that complainant was hired as superintendent. He testified that the men complained to him about Charvat changing job assignments before work was completed, acting arrogantly, raising his voice to them, and having them ask bids on inexpensive items. (TR 3874) He heard complaints from several men. Id. Before the February 1995 meeting started, complainant informed the Board that he had been a whistleblower in the Navy and that if they terminated him he would go to radio and TV stations. (Tekely is the only witness to refer to these threats). After the meeting complainant offered to resign. (TR 3875) At the February meeting the men complained about Charvat; their morale was very low and they were afraid for their jobs because complainant had mentioned contracting out their work. (TR 3876) Although the majority of the men expressed disapproval of complainant, the Board stated that it would back him. (TR 3877) Charvat once admitted to Tekely that he had problems communicating with the men because people in the Ohio Valley were different. (TR 3878-79)

In the May 22 meeting the Board told complainant to clean up the labor problems and to talk to the men but he refused. (TR 3879) Charvat also assertedly had trouble with vendors. He purchased some tires in Wheeling, West Virginia and Tekely asked him why and Charvat became very irritated. (TR 3880-81) The Board's policy was to buy supplies from local people. Tekely considered complainant's behavior toward him to be insubordinate. (TR 3881)

The witness referred to the May 22 meeting when complainant was told by the Board to set priorities and meet with men. His response was that he would do things his way. (TR 3883-84) The Board requested progress reports from Charvat which he did not provide. Personnel matters did not improve after this meeting. (TR 3884-85) Tekely felt that the June 30 whistleblower letter was complainant's attempt to obtain leverage to lift the May 22 directive. (TR 3886-87) In July 1995, the Board asked complainant to postpone the plant investigation requested in his June 30 letter because OEPA was going to perform an investigation in July. (TR 3893) Charvat asked Board for permission to fire employees which was denied. Id. Tekely understood OEPA's prioritization in its report of August 1995 but before that he was completely lost. Charvat had submitted a large amount of confusing paperwork at Board meetings. (TR 3895-96) Tekely also referred to the August 17, 1995 meeting at which McCabe spoke. (TR 3898-99) The men later decided to form union because they were afraid

complainant would contract out their jobs. (TR 3900-01) As Charvat had not complied with May 22 directive from the Board, it was decided in September to send him a termination letter and he was subsequently dismissed. (TR 3902)

The witness cited complainant's alleged insubordination in his use of profanity to the Board members, and in insisting on calling the Attorney General's office during negotiations over the consent decree, despite Tekely telling him that Thomas was the point man in the negotiations and that he should not interfere. (TR 3902-03)

Tekely echoed the testimony of the other Board members that complainant's termination at the September 21, 1995 meeting had nothing to do with his whistleblowing activities. He would have been terminated anyway. (TR 3905) He also reiterated the testimony that complainant never followed through with cleaning the digestors, creating a lunchroom/training room, or installing a shower on the sludge farm although these projects were authorized by the Board. (TR 3909-10)

In his cross examination, Tekely acknowledged that complainant did not explicitly state in his June 30 letter that he wanted the May 22 directive changed, but Tekely viewed complainant's reference to that meeting as an implied threat to inform OEPA of plant violations. (TR 3927-28) He testified that the men never cited examples of illogical job changes made by complainant but he took them at their word. (TR 3948-49) A transcript from the August 17, 1995 meeting suggests that Charvat changed job assignments frequently because the plant was understaffed. (See C 370)

David Thomas is Michael Thomas's son and the office manager of EORWA. (TR 4018) He testified that employee morale at the plant dropped steadily from two to three months after complainant was hired until he was terminated. (TR 4019-20) The majority of the men complained to the witness about Charvat. (TR 4020-21) Thomas referred to the February 1995 meeting. (TR 4022) Complainant offered to resign but the Board backed him. (TR 4024-25) The men were surprised at the Board's decision. (TR 4025) Morale continued to decline after the May 22 meeting. Complaints about Charvat continued until his dismissal. (TR 4029) Thomas informed the Board members of these complaints but not in a formal meeting. Id. Thomas also cited McCabe's comments at the August 17 meeting that the men thought it would be a waste of time to come to complain about Charvat. (TR 4031) From Thomas's discussions with the men, a majority supported the union effort. (TR 4032)

The witness referred to complainant cursing at the Board at a meeting. (TR 4035-36) He testified that when the Board did not agree with complainant he would "cop an attitude" and raise his voice. He referred to complainant getting angry at Tekely when he questioned him about buying supplies in West Virginia. (TR 4036-37) He also cited the comment complainant made to Thomas about letting his personal life interfere with his decisions. (TR 4037)

Complainant's Rebuttal Witnesses

The discovery deposition of Larry Starkey was introduced into evidence pursuant to 29 C.F.R. § 18.23(a)(4). (C 385) Starkey had been a plant employee for nineteen years. He testified that complainant "went to bat" for plant employees. Id at 7-8. Complainant improved safety procedures and training. Id at 13-15. He did not show favoritism when he was superintendent; "he treated everybody the same". Id at 16-17. Pollock was bucking Charvat; he made derogatory remarks in front of other employees. Id at 17-18. Complainant let employees build up their comp time. Id at 20. When Charvat put men on two shifts, some of the men did not like it. Id at 25. Complainant requested input from employees. Id at 48.

Charvat rotated overtime work. Id at 49-50. He listened to the employees and did not shout or scream. Id at 50. Starkey went to the February 1995 meeting to complain about McCabe, not Charvat. Id at 60. Complainant was fair and honest as superintendent. Id at 68. If the men had a problem, they could talk to complainant about it. Id at 68-69. Charvat held employee meetings to talk about ideas. Some employees, including Pollock, complained about the meetings. Id at 69-70. Complainant was the first superintendent to give the men a form to report environmental violations to OEPA. Id at 72. Charvat tried to work with Pollock and Warner and learn the system from them. Id at 86. He did not make confusing staff changes. Id at 86. Complainant let employees know that complying with environmental laws was important. Id at 88.

Starkey did not dispute that the morale of the majority of the men was low. Id at 101-102. He felt that more than 50% of the employees wanted Charvat removed as superintendent. Id at 103.

Richard Pacifico's discovery deposition was also introduced pursuant to 29 CFR § 18.23(a)(4). (C 386) He is an assistant operator with EORWA. Pacifico's morale improved under Charvat. Id at 13. Complainant's overtime policies were more favorable to the witness than his predecessor. Id. Charvat listened to the employees' ideas. Id at 49. He was honest and treated Pacifico with respect. Id at 60. Complainant implemented a safety program. Id at 61. He held regular meetings with the employees and received input from them. Id at 62. Complainant encouraged the men to report violations to OEPA. Id at 63. The witness was not aware that complainant showed favoritism. Id at 113. He did not make any staff changes that were confusing to Pacifico. Id at 114.

Larry Lynn Zeller is an operator at EORWA. He testified that morale was poor under Vannelle, initially improved under Charvat, and then deteriorated again. (TR 4215) Complainant initiated a safety program. He was "a hell of a good superintendent". (TR 4216) He put the plant on two shifts instead of three and changed the policy on comp time for overtime work. Id. He listened to what the men had to say, held regular meetings, and encouraged employees to make suggestions. (TR 4217) Pollock did not like Charvat's changes. Id.

Morale started to decline after complainant's reorganization plan was rejected by the Board. (TR 4218-21) After this occurred, Pollock was arrogant and argumentative. (TR 4221) He made disparaging comments about Charvat. (TR 4221) Pollock was responsible for the decline in morale, not complainant. (TR 4221-22) Charvat did not threaten to contract out the lab work but mentioned that although some wastewater plants did this, he would not do it at EORWA. (TR 4222) After Charvat was fired morale went down hill. (TR 4226) Zeller admitted in his deposition that a majority of the men opposed Charvat. (TR 4241)

Complainant was called as a rebuttal witness. He stated that he never threatened to contract out sludge hauling. (TR 4322) He also never said that he would contract out lab work, only that some wastewater treatment plants contracted out their lab work. He reassured Tom Morgan that he would not contract out his lab work. (TR 4327-29) Wilson had suggested that Charvat looked into contracting out work but Warner was opposed to the idea as were Tekely and other Board members at the April 1995 meeting. Wilson dropped the idea. (TR 4336-37) Complainant stated that contracting out was never brought up prior to his attending a meeting in May 1995 in Columbus,

Ohio. (TR 4431) Complainant was criticized by Tekely for buying tires in West Virginia where they were cheaper rather than from a tire shop in Bellaire, because the shop owners were rate payers. Charvat denied that he was insubordinate to Tekely and that he was admonished by Tekely during this incident. (TR 4348-49)

Fred Snell is an employee of OEPA, has a Master's degree in environmental science, and holds a Class III wastewater license. (TR 4433-34) He was involved with EORWA as a pre-treatment coordinator, and was part of the enforcement team that recently investigated EORWA. (TR 4435) In July 1995, EORWA was visited by a technical assistance team whose function was to offer assistance rather than to investigate. (TR 4439) Prior to complainant becoming superintendent, EORWA's relationship with OEPA was not close or cordial. (TR 4441) OEPA dealt with Morgan, Vanelle, Pollock, and Warner. (TR 4443) Snell believed that the data submitted by EORWA during Vanelle's tenure as superintendent was suspicious and did not appear to be technically possible. (TR 4444) The data consistently showed compliance with environmental laws which led Snell to question it based on his knowledge of wastewater treatment operations. (TR 4446) After Charvat took over as superintendent, the monthly operating reports started to show violations. (TR 4450) Snell felt that these reports were accurate. (TR 4451) As the plant superintendent, Charvat opened up communications with OEPA and asked for their help. (TR 4457-58) Pollock tried to undercut complainant and questioned his technical competence. (TR 4460) The Board professed to be unaware of past violations during its negotiations with OEPA, which was a mitigating factor in assessing a penalty. Had the Board been aware of the past violations, this would be considered an aggravating factor. (TR 4466) Snell stated that it was more likely than not that Morgan falsified environmental data given to OEPA. (TR 4497)

Findings of Fact and Conclusions of Law

I.

The CWA provides that:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted, any proceeding under this chapter,

or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

33 U.S.C. § 1367(a).

The SDWA states that:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has

(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State,

(B) testified or is about to testify in any such proceeding, or

(C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C. § 300j-9(i).

A complainant in a whistleblower case may satisfy his initial burden of establishing a *prima facie* case of discrimination by showing that (1) the employer is subject to the Act; (2) the complainant engaged in protected activity; (3) the complainant was subjected to an adverse employment action; (4) the employer was aware of the protected activity when it took the adverse action, and (5) an inference is raised that the protected activity was the likely reason for the adverse employment action. *Passaic Valley Sewerage Com'rs v. Dept. of Labor*, 992 F. 2d 474, 480-81 (3d Cir. 1993), *Carroll v. U. S. Dept. of Labor*, 78 F. 3d 352, 356 (8th Cir. 1996), *Kahn v. U. S. Secretary of Labor*, 64 F. 3d 271, 278 (7th Cir.1995). If the complainant makes out a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate business reason for the adverse action. Where the employer articulates a legitimate nondiscriminatory reason for the adverse action, the complainant has the ultimate burden of proof that the reasons articulated by the employer were pretextual, either by showing that the unlawful reason more likely motivated the employer or by showing that the proffered explanation is not credible and that the employer discriminated against him. *Nichols v. Bechtel Construction Co.*, 87-ERA-44 (Sec'y, October 26, 1992), *Carroll, supra*, *Kahn, supra*.

As the operator of a wastewater treatment plant on the Ohio River, it is clear that the respondent is subject to the coverage of both the CWA and the SDWA. Respondent has not contested the jurisdiction of the court under these statutes, and therefore I find that both Acts are applicable to this proceeding.

Protected activity is broadly construed under the environmental whistleblower protection acts. *Guttman v. Passaic Valley Sewerage Comm.*, 85-WPC-2 (Sec'y, March 13, 1992), affirmed *Passaic Valley Sewerage Com'rs*, *supra*. Complainant engaged in protected activity on numerous occasions. From the beginning of his tenure as superintendent of the plant, complainant initiated a pattern of reporting the plant's environmental violations to OEPA and encouraged EORWA's employees to do the same. The reporting of these violations increased dramatically over those of complainant's predecessor and eventually led to OEPA's enforcement action. Complainant also invited OEPA to make a comprehensive evaluation of the plant. Such complaints to a State agency entrusted with enforcing environmental laws clearly constitute protected activity. See *Conley v. McClellan Air Force Base*, 84-WPC-1 (Sec'y, September 7, 1993), *Ivory v. Evans Cooperage, Inc.*, 88- WPC-2 (Sec'y, February 22, 1991).

Complainant's June 30, 1995 whistleblower letter is also protected activity. (Internal complaints constitute protected activity under the CWA and the SDWA, See *Carson v. Tyler Pipe Co.*, 93-WPC-11 (Sec'y, March 24, 1995), *Passaic Valley Sewerage Com'rs*, *supra* at 478-479.) Respondent argues that the environmental violations enumerated in the letter were already known to the Board and that therefore the letter is not legitimate whistleblowing, citing *U. S. Ex Rel. McKenzie v. Bellsouth Tel*, 123 F. 3d 935, 941 (6th Cir. 1997) for the proposition that a whistleblower must be the first individual to disclose the information. However, *Bellsouth* is a case arising under the *qui tam* provisions of the False Claims Act which requires the employee to be the original source of the disclosures. There is no such requirement under the environmental whistleblower statutes. See *De Ford v. Secretary of Labor*, 700 F. 2d 281, 286 (6th Cir. 1983), *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB, October 16, 1996). Moreover, complainant's whistleblower letter was partly couched in broad terms, e.g., possible failure to take appropriate measures to prevent possible contamination of the public water supply system, rather than referring to discrete incidents which had taken place in the past. Many of the reported violations had been known to OEPA when it conducted its investigation in 1993 but continued after complainant was hired as superintendent.

Other matters mentioned in the letter, e.g., possible falsification of the number of tracts owned on the sludge farm, have still not been satisfactorily resolved.

I do not, however, find that complainant's efforts to be included in the negotiations with the Ohio Attorney General constituted protected activity. Complainant purportedly intended to inform the Attorney General that the Board was aware of the past violations despite Thomas's assertion to the contrary, which would have been an aggravating factor in the assessment of a penalty against respondent. However, protected activity is the reporting of environmental or safety violations, not the disclosure of a party's awareness of such violations. *Johnson v. Old Dominion Security*, 86- CAA-3, 4-5 (Sec'y May 29, 1991). Furthermore, I can find nothing in the record to indicate that complainant intended to reveal the Board's awareness of the prior violations to the Ohio Attorney General, only that he wanted to be included in the negotiations. There is no indication that his purpose for being included was to disclose any particular information.

As complainant was terminated from his position as plant superintendent, he was subject to an adverse employment action. There is also no question that respondent was aware of complainant's protected activity as Wilson and Thomas repeatedly asked complainant to stop reporting violations and complainant's whistleblower letter was sent to the Board. Inasmuch as complainant was dismissed less than three months after he wrote the whistleblower letter and within a short time after he continued to report violations, the inference that his dismissal was in retaliation for his protected activity has been raised. *Couty v. Dole*, 886 F. 2d 147, 148 (8th Cir. 1989). Complainant has therefore made out a *prima facie* case of discrimination and the burden of production is shifted to respondent to articulate legitimate nondiscriminatory reasons for his dismissal.

II

The asserted reason for complainant's dismissal are contained in the Notice of Termination dated September 6, 1995. (C 207; R 51) Reasons 1 through 6 basically pertain to complainant's relations with the plant employees and their morale problems. Reasons 7, 9, 11, and 13 primarily deal with complainant's relations with the Board. The major focus of the testimony of respondent's witnesses was the poor morale of the employees resulting from complainant's actions, and his insubordinate behavior toward the Board. Other alleged deficiencies were complainant's failure to prioritize clearly,

favoritism toward certain employees, failure to observe regular working hours, and an incident at the Christmas party in 1994. These proffered reasons for complainant's dismissal are certainly legitimate and nondiscriminatory and satisfy respondent's burden of production. The burden of proof therefore shifts to complainant to show that these reasons are pretextual and that he was terminated in retaliation for his protected activity. *Kahn, supra*, at 278.

The employee witnesses testified that complainant harmed their morale by frequently changing job assignments and threatening to contract out their jobs. I find much of their testimony in this regard unpersuasive. Their testimony had a cookie cutter quality as if they had been carefully coached to repeat the same complaints about Charvat. Although Morgan and Murray, as well as other witnesses, stated that their discontent with complainant was due to his comment that he would eliminate their jobs by contracting out their job functions, there is nothing in the record to indicate that complainant ever made such a threat. Complainant merely stated that some wastewater treatment plants contracted out some of their services, not that he had any intention of doing so. Charvat's reference to this practice may not have been tactful, but in light of the fact that no move was made in the direction of farming out job functions, the employees' declining morale is difficult to accept. Also there was not one concrete example cited of any frequent job changes made by complainant, and Tekely strongly suggested in the August 17, 1995 Board meeting that reassignments were necessary because of insufficient personnel. Therefore, I do not see why this would have been a factor in the employees' morale.

In February 1995, the employees attended a Board meeting at which they allegedly voiced their discontent with complainant. This meeting was frequently cited by the Board members as the primary basis for concluding that complainant was adversely affecting the men's morale. However, the evidence indicates that the only speakers who complained about Charvat were Pollock, a disgruntled employee who had expected to be named superintendent instead of complainant, Warner, who had tried to thwart complainant's changes, and Rebecca Morgan, the wife of Tom Morgan, and not an employee of EORWA. Furthermore, the Board members made it clear that they backed complainant after this meeting and refused to heed any complaints about him. There is little evidence in the record of any complaints being made to the Board members about Charvat in the months following this meeting. Respondent's witnesses were able to cite few examples of any continuing employee discontent until the August 1995 meeting

when McCabe was the only employee who spoke. Although some of the Board members asserted that McCabe stated that he was representative of other employees, there is no evidence that he was speaking on their behalf, and McCabe actually praised complainant in his affidavit and stated that he was not responsible for low morale. (See C 374) McCabe was not called as a witness by respondent. Some of the employees did try to join a union in September 1995 supposedly out of fear for their job security, but the evidence is not clear that complainant, as opposed to the Board, was the reason for this union effort. McCabe also averred that Pollock was behind the attempt to join a union which is consistent with his efforts to undermine complainant. Inasmuch as the Board backed complainant after the February meeting and there was little indication of continued employee discontent thereafter, the conclusion is inescapable that the Board was motivated to dismiss Charvat in September 1995 because of his continued reporting of environmental violations and his whistleblower letter of June 30. ² The resort to the employees' morale as a reason to fire complainant is clearly pretextual.

The next most frequently cited reason for dismissing complainant, after low morale, is complainant's alleged insubordination and contemptuous behavior toward the Board, specifically the incident in April 1995 when complainant referred to the Board members as "fucking spineless". Thomas, Wilson, Lavapies, and Tekely all referred to this incident as a basis for terminating complainant. However, DeLayne Charvat credibly testified that neither Thomas nor Wilson was offended by this remark and that Thomas thought that it was funny. There is no record of complainant being admonished for his comment or of any criticism of complainant by the Board regarding his comment until the termination hearing in September 1995. The Board members were not above using unprofessional language themselves as the taped excerpts of the Board meetings are sprinkled with the use of profanity.

Moreover, I do not believe that complainant's comment, however tactless, constituted insubordination. Complainant used the coarse language as a method of exhorting the Board members to take the action needed to modernize the facility so that it could be in compliance with environmental regulations. His actions are a far cry from the behavior of the complainant in *American Nuclear Resources v. U. S. Dept. of Labor*, 134 F. 3d 1292 (6th Cir. 1998), cited by respondent, who was fired for "interpersonal problems" including being rude and abrasive. The present case is also distinguishable from the actions of the complainant in *Kahn, supra*, who was "sarcastic, argumentative, and condescending", had a "loud and abusive demeanor", and engaged in unconsensual and

"inappropriate touching" of a female coworker, and made suggestive comments and unwanted sexual advances to her. The only other example of insubordinate behavior cited by respondent was complainant suggesting that Thomas's personal problems were affecting his judgment, and complainant's alleged raising his voice to Tekely over the purchase of tires in West Virginia. Both of these incidents are *de minimis* in nature and were clearly dredged up by respondent as support for its unwarranted termination of complainant.

Another major reason alleged for terminating complainant was his failure to state priorities clearly. The Board, however, made no mention of any difficulty it was having in understanding complainant's priorities until May 1995, although complainant had been presenting his priorities to the Board in the same format beginning in August 1994. (See C 33) While complainant's prioritization may not have been a model of clarity, it was not substantially different from the prioritization in OEPA's report of August 1995, which the Board members professed to find clear and understandable.

Complainant's failure to utilize the experience of Pollock and Warner, his favoritism toward Russell, and his alleged failure to observe normal working hours are also red herrings. Pollock and Warner did everything in their power to prevent complainant from making the required changes in the plant and tried to sabotage complainant at every step. Charvat realized that relying on their views was an exercise in futility. Complainant did not favor Russell but likely consulted him frequently because he had reported prior environmental violations. ⁸ Complainant was a conscientious employee who was at the plant whenever it was necessary to perform the functions of his job. ⁹

The best indication that complainant's dismissal was motivated by his protected activity is contained in the tape recorded comments of the Board members in the July 1995 meeting. The Board members were obviously aghast at complainant's whistleblower letter and were fearful of the effect the disclosure of the environmental violations would have on their reputations and careers. They chose to terminate him, rather than to make the changes necessary to place the plant in compliance with environmental laws. Their statements and subsequent dismissal of complainant are corroboration of complainant's testimony that Wilson and Thomas told him to stop reporting violations and that they would "shoot the messenger" if he did not stop. Further verification of their improper motivation is the choice of Pollock and Warner to succeed complainant as co-superintendents. ¹⁰ Pollock had transmitted false, and

perhaps falsified, data to OEPA when Vannelle was superintendent, he had intimidated Russell for his whistleblowing activity, and he had sabotaged complainant's efforts to improve the plant's operations. The Board would not have chosen such an individual to be the new superintendent unless they were trying to prevent further reporting of violations. Therefore, I conclude that the Board terminated complainant not for the reasons listed in his notice of termination or the reasons articulated by respondents' witnesses at the hearing in this case, but because of his protected activity.

III.

Complainant is entitled to immediate reinstatement to his former position of superintendent at EORWA as a matter of law. 29 CFR § 24.6(b)(2). He is also entitled to back pay from the date of his discharge until his reinstatement. Complainant has the burden of establishing the amount of back pay he is owed, but any doubts in determining this amount should be resolved against the discriminating party. *McCafferty v. Centerior Energy*, 96-ERA-6 (ARB, Sept. 24, 1997). Although complainant has the duty to attempt to mitigate damages by seeking suitable employment, respondent has the burden of establishing that the back pay award should be reduced because complainant has not exercised reasonable diligence in seeking other employment, *See West v. Systems Applications International*, 94-CAA-15 (Sec'y, April 19, 1995), a burden the respondent has made no attempt to meet.

Complainant's salary at the time of his discharge was \$54,600.00 a year and he would have received 3% wage increases for the calendar years 1996, 1997, and 1998. Under the formula outlined in complainant's brief at p. 38, which I find to be accurate, complainant would be entitled to \$158,105.22 in back pay if he were reinstated on June 23, 1998. As this decision is being issued approximately four weeks later, complainant is entitled to an additional amount of \$4,589.44 (four weeks at ,147.36 a week) for a total of \$162,694.66 in back pay. Added to this amount is the statutory contributions respondent would have made to the Ohio Public Employee Retirement System for complainant at the prescribed rate. (See complainant's brief at p. 39) Complainant is also entitled to his out of pocket costs for health insurance which he estimated as \$325.00 a month, plus dental and vision expenses of ,000.00 to \$2,000.00. I calculate this amount to be \$12,325.00. I decline to order compensation for the loss of the company car as I can find no precedent which would include this perquisite as part of back pay.

The back pay award should be augmented by pre-judgment interest commencing from the date of complainant's discharge until his reinstatement in accordance with 29 CFR § 20.58(a) at the rate specified in Section 6621 of the Internal Revenue Code, and interest is calculated quarterly. *Office of Fed. Contract Compliance Programs v. WMATA*, 84-OFC-8 (Ass't Sec'y Aug. 23, 1989), *motion for recon. den.* (Ass't Sec'y Nov. 17, 1989), *Blackburn v. Metric Constructors*, 86-ERA-4 (Sec'y Oct. 30, 1991). Because interest is not assessed on interest, pre-judgment interest awarded on a damage award is not compounded. 29 CFR § 20.58(c). Therefore, the amount of interest earned must be set aside in a separate sum which is never included in a further calculation of interest. See *WMATA*, 84-OFC-8 at 5-6.

Complainant also seeks \$100,000.00 in compensatory damages for emotional distress and loss of reputation. Complainant's wife and sister testified as to his insomnia, anxiety, and loss of concentration resulting from his dismissal and its adverse affect on his private life. Wilson testified that complainant's family was formerly held in high regard, but that since his discharge the reputation of complainant and his family has suffered. (TR 3467-68) However, complainant did not experience the type of humiliation suffered by the whistleblower in *Marcus v. U. S. EPA*, 92-TSC-5, Recommended Decision & Order of Administrative Law Judge, adopted by the Secretary (Feb. 4, 1994), cited by complainant, and there has been no concrete evidence as to the loss of his professional reputation. I also note that complainant has not consulted a psychiatrist nor taken medication for his emotional distress. Under the circumstances, I feel that an award of \$5,000.00 is appropriate compensation for emotional distress and loss of reputation.

Complainant also seeks a broad and extensive abatement order which would require the court to overturn respondent's personnel policies in regard to all of its employees. Such an abatement order is unprecedented and unwarranted. I will order respondent only to expunge any negative references relating to complainant's discharge from his personnel records and to post this decision and order for sixty days in a prominent place in respondent's facility, and to take reasonable steps to prevent the decision and order from being altered, defaced or covered. See *Doyle v. Hydro Nuclear Services*, 89-ERA-22 (ARB, Sept. 6, 1996), *Smith v. Littenburg*, 92-ERA-52 (Sec'y, Sept. 6, 1995), *Zinn v. University of Missouri*, 93-ERA-34 and 36 (Sec'y, Jan. 18, 1996).

Finally, complainant asks for exemplary damages based on respondent's "suppression" of complainant's ability to inform the Attorney General of the Board's prior knowledge of environmental violations. ¹¹ In *Johnson, Hernandez, and Bradley v. Old Dominion Security*, 86-CAA-4, 86-CAA-5, 86-CAA-6, (Sec'y, May 29, 1991), the Secretary set forth a two-step analysis for determining whether exemplary damages are appropriate. The first step is to determine the wrongdoer's state of mind, did the wrongdoer demonstrate a reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those rights? Once this state of mind has been established, the second step is to determine whether an award is necessary for deterrence.

Complainant's request for exemplary damages is based entirely on respondent's reaction to his conduct which I have determined does not constitute protected activity. However, there is no question that respondent engaged in a pattern of trying to silence complainant's reporting of environmental violations to OEPA and ultimately discharged him because of his whistleblowing activity. Respondent therefore showed a callous indifference to complainant's rights and acted with deliberate disregard of those rights. Because of respondent's actions, I believe that an additional award of \$10,000.00 in exemplary damages is necessary to deter future misconduct.

Recommended Order

Eastern Ohio Regional Wastewater Authority is ORDERED to:

- (1) Reinstate complainant to the position of superintendent of respondent's plant in Belmont County, Ohio and to the same compensation, terms, conditions, and privileges of employment he previously had,
- (2) Pay complainant \$175,019.66 in back pay with interest and make payments to the Ohio Public Employee Retirement System for the back wages owed,
- (3) Pay complainant \$5,000.00 for emotional distress and loss of reputation,
- (4) Pay complainant \$10,000.00 in exemplary damages,

(5) Expunge any negative references relating to complainant's discharge from his personnel records,

(6) Post this Decision and Order in a prominent place at its facility for sixty days and ensure that it is not altered, defaced or covered, and

(7) Reimburse complainant for the reasonable cost of attorney fees and litigation expenses in connection with this proceeding.

Within thirty (30) days of the date of this decision and order, complainant's counsel shall submit a fully supported fee application detailing their hourly fee, the number of hours expended on this proceeding, and any associated litigation expenses. Respondent will have fifteen (15) days to respond with any objections.

DANIEL L. LELAND

Administrative Law Judge

DLL/lab

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 20 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.8 and 24.9, as amended, by 63 Fed. Reg. 6614 (1998).

[ENDNOTES]

¹ The case was mistakenly denominated ERA, a case arising under the Energy Reorganization Act.

² The Board of Trustees was composed of Charles Wilson, the President of the Board, Michael Thomas, James Tekely, and Dr. Felipe Lavapies. Wilson abstained from voting on complainant's dismissal because he had testified at the termination hearing.

³ In its May 22, 1995 meeting the Board evaluated complainant's performance. Charles Wilson stated that the Board was concerned with the staff discontent attributable to the superintendent, which he felt was resulting in poor performance and labor problems. The Board also expressed frustration with lack of communication, plant operations and the planning for correction, and repair or replacement of parts , systems and machinery which would correct problems and bring the plant in compliance with EPA and OSHA regulations. The Board directed complainant to provide progress reports and to show positive results in three months in the areas indicated.

⁴ A bypass occurs, for example, when due to heavy rain the conversion manholes overflowed and sewage would bypass through a discharge pipe into the river. (TR 1593-1594)

⁵ Wilson said "Dave, this has Pandora's box written all over it", (C 370A); "I can't believe that this kind of horseshit is going on, I mean I really can't believe it. I'm gonna take a fall because of this, and it's, it's--I'm pissed, I mean...", (C 357); "I don't want to deal with this horseshit, you understand what I mean? I don't want to do that. I can't have my future on the line over the sewer authority. I can't do that. I won't do it that way." (C 367)

⁶ The September 6, 1995 letter states that the Board was considering complainant's termination because of (1) Creation and maintenance of bad relations with the majority of the staff causing the staff to investigate the possibility of unionizing; (2) Non-use of the services, capabilities and experience of the two most senior employees; (3) Inability to gain the respect and trust of the employees this achieving and obtaining good performance from the staff; (4) Encouraging factionalism of the staff by displays of favoritism; (5) Confusing the staff with frequent illogical changes in work assignments; (6) Inability to meld the different factions together so as to create a favorable work atmosphere which is conducive to increased efficiency by the staff; (7) Inability to communicate with the Board of Trustees thus causing the Board concern as to the ability to communicate with vendors, the public, and others; (8) Inability to establish priorities so that replacement or repair of equipment is accomplished in an orderly fashion; (9) Inability or refusal to follow mandates of the Board; (10) Inability to focus on a job assignment until its successful conclusion; (11) Willful rejection of Board policies and rules, (12) Failure to observe normal working days and hours; (13)

Contemptuous treatment of Board members in front of the staff, and (14) Inability or refusal to attempt to understand other members of the staff or the Board. See C 207, R 51. The parties stipulated that reason number 15 was not a basis for complainant's termination.

⁷ Although the Board asked complainant to show progress in improving plant operations and employee morale in May 1995, there was absolutely no suggestion that Charvat would be dismissed if he failed to effectuate the requested improvements. It does not appear that his termination was even considered until after he transmitted his June 30, 1995 whistleblower letter.

⁸ Thomas's comment that Russell followed complainant around "like a puppy dog" can be fairly read to mean that Thomas was concerned about the influence that Russell, a known whistleblower, would have on Charvat's reporting of environmental violations.

⁹ The pretextual nature of respondent's proffered reasons for dismissing complainant is best exemplified by the reference to the Christmas party incident. Complainant having employees sit in his lap while he was dressed as Santa Claus and his revealing of his Ohio State boxer shorts is so insignificant and petty that it defies belief that such innocent behavior at a holiday party could figure in his dismissal. In addition, the party took place in December 1994 and the Board terminated complainant nine months later, thus suggesting that their professed dismay at complainant's conduct was fabricated.

¹⁰ Pollock is now the sole superintendent of the plant.

¹¹ Exemplary damages may be imposed in cases arising under the SDWA. See 42

U.S.C. § 300j-9(i)(2)(B)(ii).