**U.S. Department of Labor**

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**Issue Date: 21 November 2005**

Case No.: 2005-SDW-00001

In the Matter of:

FRANK ED BROCK,
Complainant,

v.

CITY OF PICKENS, SOUTH CAROLINA
Respondent.

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

Appearances:

For the Complainant:
Robert Sneed, Esq.

For Respondent:
Charles Thompson, Esq.

**RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT**

This proceeding arises from a claim arising under the Safe Drinking Water Act ("the Act"), as amended, 42 U.S.C. § 300j-9. Complainant, Frank Ed Brock, alleges he was discharged by Respondent, City of Pickens, South Carolina, in retaliation for filing a complaint with the South Carolina Department of Labor, Licensing, and Regulation ("SCDLLR"). Subsequent to his discharge on July 9, 2004, Complainant filed a timely complaint with the Occupational Safety and Health Administration (OSHA) on July 29, 2004. OSHA conducted an investigation and on November 29, 2004, issued a Notice of Determination denying the complaint. By letter dated December 2, 2004, Complainant requested a *de novo* hearing.

A formal hearing in this matter was held on June 28 and 29, 2005, in Greenville, South Carolina. At the hearing, Claimant offered into evidence exhibits 1 through 17; Respondent offered exhibits 1 through 6.[1] All exhibits were received into evidence. The record was held

[1] The following abbreviations will be used as citations to the record:
CX – Claimant's Exhibits
RX – Respondent's Exhibits

open for the post-hearing deposition of Brian Gravely, which was later marked as Respondent's Exhibit 7. The parties agreed to stipulations, which were received into evidence. Both parties filed post-hearing briefs; Complainant also filed a motion to reconsider three evidentiary rulings. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

## ISSUE

Was Complainant discharged in retaliation for his protected activity in violation of 42 U.S.C. § 300(j)-9(i)(1)?

## STIPULATIONS

1. Complainant and Respondent are parties subject to the Safe Water Drinking Act, 42 U.S.C. § 300, *et seq*.

2. Complainant engaged in protected activity, to wit, participating in the SCDLRR investigation.

3. Respondent was aware that Complainant engaged in protected activity.

4. On July 8, 2004, Respondent made the decision to terminate Complainant, and communicated its decision to Complainant on July 9, 2004.

5. Complainant filed a timely complaint with OSHA on or about July 29, 2004.

## OVERVIEW

Complainant began working as a part-time water plant operator for the City of Pickens in January 2000. In February 2001, Complainant began working as a full-time water plant operator, which he continued until July 2004. In November 2003, the South Carolina Department of Labor, Licensing, and Regulation (SCDLRR) began an investigation into the qualifications of a new full-time water plant operator, B.J. Westbrook. Complainant alleges that the investigation began after he called the SCDLRR and relayed his concerns about Mr. Westbrook's qualifications. Complainant contends that he discussed his concerns about Mr. Westbrook's qualifications with other water plant employees. The investigation which ensued also focused on Brian Gravely, the water plant superintendent who had signed off on Mr. Westbrook's qualification to be a water plant operator.

During the course of the investigation, the SCDLRR investigator, Mr. DeLeon Andrews, spoke with employees of the water plant, including the Complainant. Several employees,

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Tr. - Transcript

including Complainant, received subpoenas to appear at the hearing. The investigation was common knowledge among employees of the water plant and among higher officials at the City of Pickens. The investigation continued through January 2005, eventually culminating in a hearing which found that neither Mr. Westbrook nor Mr. Gravely had committed any violations of the relevant statutes.

On July 9, 2004, Complainant was terminated from his employment. Complainant contends that his termination was retaliation for his involvement in the SCDLRR investigation. He also states that his supervisors – Mr. Gravely and Mr. Harry – made threats or comments on separate occasions which are evidence of Respondent's discrimination against Complainant for his protected activity. Respondent admits that Complainant's cooperation with Mr. Andrews during the investigation was protected activity under the Act and acknowledges that it was aware of Complainant's protected activity. However, Respondent contends that Complainant was terminated as a result of his failure to show up for work on July 7, 2004, in addition to his declining job performance in the months prior to July 2004. Respondent argues that Complainant's termination and oral and written warnings prior to his termination were in no way retaliation for his protected activity.

## SUMMARY OF THE EVIDENCE

### Employees of City of Pickens

Several employees from the City of Pickens testified at the hearing. Complainant began working at the City in 2001. Complainant's direct supervisor was Marrion Harry, who became the water plant supervisor in December 2003. Mr. Harry was Complainant's immediate supervisor for the period of January 1, 2004 through July 9, 2004. (Tr. 120-21). During this time, Mr. Harry maintained a personal journal in which he noted his observations as a supervisor, including observations about Complainant's work performance. (Tr. 121). At the time of the formal hearing in June 2005, Mr. Harry no longer possessed the journal. (Tr. 121). Mr. Harry believed he lost the journal sometime between June 2004 and December 2004. (Tr. 122). Prior to becoming a supervisor in January 2004, Mr. Harry worked as a water plant operator. (Tr. 121). Mitchell Ellenburg was Complainant's immediate supervisor before December 2003. Mr. Ellenburg resigned from his employment in late October 2003.

Mr. Harry reported to Brian Gravely, who is the wastewater and water plant superintendent. (RX 5 at 7). Mr. Gravely has worked in this position since January 2001. (RX 5 at 7). Mr. Gravely reports to Christopher Eldridge, who is the senior full time employee for the City, and has been employed as the Administrator for the City of Pickens since March 2002. (Tr. 36-37). B.J. Westbrook was a water plant operator who was hired as a full-time operator in November 2003. Ken Thorpe was a water plant operator who worked with Complainant during his tenure at the water plant. Thus, during 2004, the relevant chain of command above Complainant was Mr. Harry, then Mr. Gravely, and then Mr. Eldridge. (Tr. 47).

## The SCDLRR Investigation

Background of the SCDLLR Investigation

The SCDLRR investigation focused on whether Mr. Westbrook had worked sufficient hours to be a licensed plant operator. (Tr. 92). The city's position was that there was no legal requirement regarding the number of hours or shifts worked. (Tr. 92-93). Specifically, the City argued that the relevant statute required only one year of experience. (Tr. 96). The investigation also focused on Mr. Gravely, because he was a supervisor of Mr. Westbrook and accordingly had signed off that Mr. Westbrook had the necessary experience for the certification level. (Tr. 93).

Chronology of the SCDLRR Investigation

Mr. Andrews is an investigator for the SCDLLR. He stated that the investigation started when Mr. Westbrook's application to be certified as a Class C operator was received by Donna Caldwell, an SCDLRR administrator, on November 14, 2003. (CX 15 at 6-7). When asked by Complainant's counsel how the investigation began, Mr. Andrews explained that the question regarding Mr. Westbrook's qualifications arose because Mr. Westbrook's application showed that he was both an employee of Table Rock State Park and of the City of Pickens. (CX 15 at 6). Mr. Andrews' role was to operate as a fact finder and determine how much time Mr. Westbrook had worked. (CX 15 at 7). On November 17, 2003, Mr. Andrews went to the City of Pickens and met with Mr. Eldridge, the city administrator. (CX 15 at 7). Mr. Andrews stated that he did not have any contact with any other individuals regarding Mr. Westbrook's qualifications prior to his meeting on November 17, 2003. (CX 15 at 51, 53).

Complainant stated that he called the South Carolina Department of Labor, Licensing and Regulation (SCDLRR) in late November 2003 and was patched through to Mr. Andrews. (Tr. 179). Complainant shared concerns with Mr. Andrews that he had not seen Mr. Westbrook in the water plant before November 3, 2003, and did not think he was qualified. (Tr. 184). Complainant was next contacted by the SCDLRR in early December while he was on a shift at the plant. (Tr. 179). During this conversation, which Complainant recalled lasting approximately 20 minutes, Complainant answered Mr. Andrews' questions regarding how and when Complainant worked with Mr. Westbrook and whether or not he felt that Mr. Westbrook was qualified. (Tr. 187). Thereafter, Complainant sent the SCDLRR a written statement. (Tr. 180-81).

Mr. Eldridge and Mr. Gravely both recounted meeting Mr. Andrews for the first time on November 17, 2003. (Tr. 49, RX 5 at 63). Mr. Andrews wanted payroll records of water plant employees. (Tr. 50). Mr. Andrews then went and talked to all employees who were working at the water plant that day. (Tr. 101). Upon meeting Mr. Andrews on November 17, 2003, Mr. Eldridge assumed that the investigation was initiated by a disgruntled employee. Mr. Eldridge

assumed that the disgruntled employee was Mitchell Ellenberg, who had just resigned from the water plant. (Tr. 49). Mr. Ellenberg was a supervisor at the water plant who became upset after he was disciplined. (Tr. 99). Mr. Ellenberg also lived in the City House, next to the water plant. Following his resignation, Mr. Ellenberg refused to leave the house, and was eventually served with an eviction notice. (Tr. 99). Thus, Mr. Eldridge assumed that Mr. Ellenberg had contacted the SCDLRR since Mr. Ellenberg had the motive to be upset. (Tr. 99).

Mr. Gravely recalled that on November 17, 2003, Mr. Eldridge called and asked that he meet Mr. Andrews at the water plant. (RX 5 at 84). When Mr. Gravely arrived at the water plant, Mr. Harry was still there. (RX 5 at 89). Mr. Andrews then asked Mr. Gravely who Mr. Westbrook was; Mr. Andrews explained that SCDLRR had received a complaint that Mr. Westbrook did not have enough training hours. (RX 5 at 89).

Mr. Andrews then spoke with Mr. Gravely by telephone on November 18, 2003. On November 19, 2003, Mr. Andrews began contacting other individuals, including Complainant and Mr. Thorp. (CX 15 at 8). Mr. Andrews asked Complainant and Mr. Thorp to submit written statements in which they addressed their contact with Mr. Westbrook over the two years prior. (CX 15 at 9). In his statement, Complainant wrote

> Since my employment with the City of Pickens, I have not trained or have known of anyone being trained at the Pickens Water Plant until November 5, 2003. When I arrived for my shift at 1300 on the date November 5, 2003 was the first meeting of Mr. B. J. Westbrook.
>
> My current supervisor is Brian O. Gravely – Utilities Superintendent instructed me to train Mr. Westbrook of operation of the water plant and labor techniques. I have not performed any type of training with Mr. B.J. Westbrook before this time and date.

(CX 11 – Brock).

Approximately seven or eight days later, Mr. Andrews returned to collect the data that he was not able to obtain during his first visit. (RX 5 at 96). During this visit, on November 25, 2003, Mr. Andrews interviewed Mr. Gravely and Mr. Westbrook separately. (RX 5 at 97; CX 15 at 9). Mr. Andrews described Mr. Gravely as an especially fit individual and stated that Mr. Gravely stood behind him for approximately two and one-half hours while Mr. Andrews reviewed records at the wastewater plant. (CX 15 at 44-45).

Complainant stated that early on in the investigation, he spoke with most of his co-workers – including Mr. Harry, Mr. Thorpe, Mr. Holcombe, and Mr. Gravely - and stated his opinion that Mr. Westbrook was not qualified to do the job. (Tr. 188). Specifically, Complainant told Mr. Gravely in late November 2003 that he did not understand why he had to teach Mr. Westbrook how to do the job. (Tr. 188). Complainant secretly recorded this conversation, but was no longer in possession of the tape at the time of the hearing. (Tr. 227). Complainant stated that towards the end of this two-hour conversation, as he and Mr. Gravely were walking out to their vehicles, Complainant shared with Mr. Gravely that he had heard

rumors about Mr. Gravely's infidelity to his wife. (Tr. 228). At some point during this two-hour conversation, Complainant stated that Mr. Gravely became agitated and said "when this is all over somebody is going to get their ass kicked". (Tr. 188-89). Complainant assumed Mr. Gravely was referring to the SCDLRR investigation. (Tr. 189; 229). After Mr. Gravely made this statement and left the building, Complainant called Mr. Thorpe to relay Mr. Gravely's statements. (Tr. 193-94).

Complainant noted that he did not know how information regarding the SCDLRR investigation got back to Mr. Gravely at this time considering that Complainant first called Mr. Andrews at the SCDLRR in late November and this conversation with Mr. Gravely took place on the last day of November. (Tr. 190). Complainant contends that Mr. Gravely knew the investigation had started at that point because employees at the Water Plant were already talking about it in late November/early December 2003. (Tr. 192). Complainant did not have any discussions with Mr. Gravely regarding the SCDLRR investigation. (Tr. 188). Complainant felt very intimidated by Mr. Gravely, whom he said made him "feel awful small." (Tr. 193).

Mr. Gravely denied that his comment had anything to do with the SCDLRR investigation. As he recalled, in late November 2003, Complainant approached him and spoke of his desire for a raise. (RX 7 at 6). After discussing this issue, and as Mr. Gravely was leaving the water plant, Complainant stopped him and informed him of a rumor which alleged that Mr. Gravely had previously committed marital infidelity. (RX 7 at 5). Mr. Gravely asked Complainant twice who had made this allegation but Complainant would not say. (RX 7 at 5). Finally, Mr. Gravely told Complainant that anyone messing with him or his family would "get their ass kicked". (RX 7 at 5). Mr. Gravely did not recall the SCDLRR investigation as coming up at any point in this conversation. (RX 7at 6).

Mr. Gravely then had a telephone discussion with Donna Caldwell of the SCDLRR in January 2004. The next contact Mr. Andrews had with anyone from the City of Pickens was on January 28, 2004, when a meeting was held in his office. (CX 15 at 10). Between November 2004 and this January 2004 meeting, Mr. Eldridge also did not recall having contact with anyone from SCDLRR. This meeting was held in Columbia, South Carolina, and was attended by Mr. Eldridge, Mr. Gravely, the old and new mayor of Pickens, the Pickens city attorney, and SCDLRR officials. (Tr. 45; RX 5 at 102).

Mr. Andrews stated that on several occasions, Mr. Gravely questioned him as to what triggered this investigation. (CX 15 at 43). Mr. Gravely insinuated that Mr. Ellenburg had somehow triggered the investigation, but Mr. Andrews assured Mr. Gravely that Mr. Ellenburg had nothing to do with the investigation. (CX 15 at 43). Mr. Andrews stated that the reason he sought written statements from Complainant and Mr. Thorpe first were because they were the main and full-time employees at this facility. (CX 15 at 53). Mr. Andrews also said that before November 19, 2003, he had not received information from anybody that indicated that either Complainant or Mr. Thorpe would support the allegation that Mr. Westbrook did not have the required experience. (CX 15 at 53).

After the January 2004 meeting and between the time Complainant was terminated in July 2004, Mr. Eldridge does not recall having in-person or telephonic contact with anyone from

SCDLRR. (Tr. 51). However, during the period from November 2003 through February 2005, Mr. Eldridge spoke with Mr. Gravely approximately 30 or 40 times. (Tr. 47-48). Based on his conversations with Mr. Gravely, Mr. Eldridge believed that Mr. Gravely was concerned and frustrated by the investigation. (Tr. 48). Mr. Gravely did not recall Complainant ever complaining about Mr. Westbrook's qualifications. (RX 5 at 103). He also did not recall Complainant ever specifically mentioning the SCDLRR investigation to him. (RX 5 at 105). Mr. Thorpe and Mr. Gravely discussed the SCDLLR investigation on several occasions; Mr. Gravely asked Mr. Thorpe what he had heard about the investigation. (Tr. 283). Mr. Thorpe also discussed the investigation with Mr. Harry on about six occasions throughout 2004. (Tr. 284).

In late Spring 2004, SCDLRR sent subpoenas for records and subpoenas for witnesses to appear at the hearing. (Tr. 51). Mr. Eldridge believed that all of the subpoenas were sent to the City's mailing address; once a subpoena arrived at the City P.O. Box, it would be placed in the water plant mailbox in City Hall. (Tr. 52). Complainant received his first subpoena on May 27, 2004. Complainant stated that it was a taped shut envelope which arrived at the plant. It was handed to him by Mr. Harry, and Complainant opened it immediately because "it was mail". (Tr. 181). The envelope indicated a return address from the SCDLRR. (Tr. 182). Complainant stated that when Mr. Harry handed him the envelope, Mr. Harry said "Ah, now we know who the conspirator is". (Tr. 182). Complainant did not believe Mr. Harry to be joking, as Complainant did not feel that Mr. Harry joked with him much. (Tr. 182). Complainant felt nervous after Mr. Harry's comment.

Mr. Harry recalled a letter arriving at the plant which was addressed to Complainant and originated from City Hall. (Tr. 311). Mr. Harry did not know at the time that the letter was from the SCDLRR. (Tr. 311). Mr. Harry said Complainant did not open the envelope in his presence. (Tr. 311). Mr. Harry stated that he never thought Complainant had anything to do with the SCLLR investigation; Mr. Harry even asked Complainant in January 2004 if he had anything to do with the investigation and Complainant emphatically denied it. (Tr. 311). Mr. Harry did not know that Complainant had any involvement with the ongoing investigation; he did not think any of his operators had anything to do with the investigation. (Tr. 137).

Complainant later learned that other employees received subpoenas too. Complainant asked the SCDLRR to send correspondence to another address because he felt uncomfortable receiving the subpoenas at work. (Tr. 185). Complainant explained that other employees from the City were personally interviewed but that he never was. (Tr. 186).

During the investigation, the City allowed Mr. Westbrook to continue working, but he was always working with someone so that there could not be any accusations related to the impending investigation regarding Mr. Westbrook's qualifications. (Tr. 93-94). During the SCDLRR investigation, counsel for Mr. Gravely and Mr. Westbrook had told Mr. Eldridge that they did not think it was fair for the two employees to pay significant legal fees. (Tr. 91). Mr. Eldridge then told Mssers. Gravely and Westbrook that the City would possibly reimburse them for their legal fees. (Tr. 91). Mr. Eldridge also wrote letters to his state representatives because he felt that the investigation was politically motivated, based on the fact that a state representative who had lost an election was involved in the investigation from the very beginning. (Tr. 92). Additionally, Mr. Eldridge was frustrated at the length of the investigation,

which had taken over a year, even though the maximum prescribed fine under the relevant statute was only $500.00.

A day long hearing was ultimately held before the SCDLRR Certification Board in February 2005. (Tr. 47, 97). Mr. Gravely and Mr. Westbrook were both represented by counsel. The Board recessed, and then determined that there was no basis for the claim. (Tr. 97). The City of Pickens was not a party in the SCDLRR proceeding, and the City did not hire the attorney who represented Mr. Gravely and Mr. Westbrook. (Tr. 97). SCDLLR ultimately determined that the allegations were unfounded; both Mr. Gravely and Mr. Westbrook were allowed to go back to work. (Tr. 93). Following the dismissal of the case, the City paid the legal bills of the two employees, which were in excess of $15,000. (Tr. 44-45).

## Complainant's Performance Issues

The City of Pickens has an employee handbook for its employees, which has been in effect since March 2002. (Tr. 37-38). The Employee handbook does not have mandatory steps of discipline. (Tr. 57). Specifically, it states that "The City of Pickens reserves the right to take any form of disciplinary action against any employee at any time." (Tr. 57; CX 1). However, the handbook suggests progressive forms of discipline: oral reminder, written warning, suspension/leave without pay, and discharge. (Tr. 57). The handbook requests that employees notify "their supervisors as far in advance as possible when they must be absent from work." (CX 1). Additionally, the handbook states that "discipline for absenteeism or tardiness is up to the supervisor's discretion, and may include any form of discipline…including termination." (CX 1). Mr. Eldridge stated that the City expects employees who are going to be absent from work to notify their supervisor. (Tr. 105).

Mr. Gravely recalled that he attended a few discussions with Mr. Ellenburg regarding Complainant's performance issues. Mr. Gravely recalled one instance when he was a witness to a discussion between Mr. Ellenburg and Complainant after Complainant and his co-worker, Ken Thorpe, exchanged rough words. (RX 5 at 42). Mr. Gravely also learned from Mr. Ellenburg that Complainant did sloppy work at times. (RX 5 at 44). Complainant's job performance evaluations from January 2002 and January 2003 were generally positive. In January 2004, Complainant's evaluation was less positive. He was marked off for proper attire, break room cleanliness, leaving doors unlocked and giving out his pager number to unknown persons. (CX 2). Complainant was also given only a "satisfactory" rating on the question of dependability during this evaluation, which was accompanied by a note that Complainant needed to get a telephone in order to be reachable outside of work. (CX 2). His overall performance was rated "satisfactory", which was accompanied by a note that complainant was a "good operator when he wants to be." (CX 2).

After Mr. Westbrook was hired, Mr. Gravely was called over to the water plant twice during the winter of 2004 to discuss concerns of Complainant. (RX 6 at 4, 7). At this time, Complainant expressed his desire to be making more money and to be put on first shift. Mr. Gravely told Complainant that if it would make him a better employee, then he would look into

these issues. Mr. Gravely discussed this idea with Mr. Eldridge, and Complainant was given a raise to $13 an hour and was given one first-shift per week. (RX 6 at 5).

Mr. Eldridge did not personally observe Complainant at work for any length of time between Spring 2002 and November 2003. (Tr. 53). From November 2003 through July 2004, Mr. Eldridge heard more about Complainant's job performance because Mr. Harry became supervisor at that time. (Tr. 54). Within four to six weeks after Mr. Harry took over as supervisor, Mr. Eldridge began hearing about Complainant's specific job performance issues. (Tr. 55). Mr. Eldridge recalls that he heard issues pertaining to Complainant's performance of tasks, playing computer games, and/or his attire. (Tr. 55). Mr. Eldridge was usually told these things when he was out visiting the water plant and he would ask Mr. Harry how things were going. (Tr. 55-56). Mr. Eldridge instructed Mr. Harry to discuss any problems he had with Complainant, and if the problems were serious enough, to document them and write up Complainant. (Tr. 56). The first write-up of Complainant that Mr. Eldridge was aware of took place in Spring 2004. (Tr. 56).

When Mr. Harry came to talk to Mr. Eldridge about issues regarding Complainant, Mr. Eldridge kept Mr. Gravely, who was Mr. Harry's supervisor, "out of the loop", as a result of the SCDLRR hearings. Mr. Eldridge did not know if Mr. Gravely was specifically aware that he was being kept out of things involving discipline of plant employees, but he was under the impression that Mr. Gravely knew that Mr. Harry was handling personnel issues. (Tr. 64).

Shifts at the water plant usually begin at 6:00 a.m.; the plant usually shut down between 10:00 and 11:00 p.m. (Tr. 94). There is usually only one person there at start-up, and that person is usually joined later in the morning by another employee; similarly, one person usually works the nightshift. (Tr. 94).

Mr. Eldridge described Mr. Gravely as a laid back and timid individual who is not at all aggressive. (Tr. 103). Mr. Eldridge kept Mr. Gravely out of the employee discipline process not because of any particular problem with Complainant or other employees, but rather for the sake of appearances, since Mr. Gravely was a subject of the SCDLRR investigation. (Tr. 105).

Mr. Harry stated that he allowed Complainant to continue bringing his dogs to work. (Tr. 126). Mr. Harry allowed this request, taking into consideration that Complainant was working second shift and weekends by himself. However, Mr. Harry required that the dogs stayed outside. (Tr. 126). Complainant abused this privilege, however, when he allowed the dogs inside the water plant. (Tr. 126-27). Mr. Harry then revoked Complainant's privilege to bring his dogs to work.

Mr. Harry also explained that the water plant had two computers, and that he allowed Complainant to play computer games on the older computer. His reason for allowing Complainant to play computer games was due to the long periods of time during the shifts in which there was nothing to do. (Tr. 127). Mr. Harry instructed Complainant not to use the new computer to play computer games. (Tr. 127). Mr. Harry believed that Complainant disobeyed this instruction, and played a game on the new computer, during which he turned off the computer while an EPA document was still in process. Complainant acknowledged that he

caused the EPA document to be lost on the computer, although he claims that it was lost after he fell off a chair and knocked out the power from the main terminal to the computer. (Tr. 220-21). Once the computer shut down, the information in the document was erased. (Tr. 128). After this incident, Mr. Harry gave Complainant a written warning dated June 11, 2004. (Tr. 129). Mr. Harry recalled that Complainant signed the warning, but Complainant stated he did not agree with it. (Tr. 130).

In late June 2004, Mr. Harry asked Complainant to finish a Monthly Operations Report ("MOR"). A MOR is first generated on the computer; next it is sent to the superintendent for review, and then is sent to DHEC (Tr. 130; RX5 at 36). Mr. Harry asked Complainant to finish the report by entering the necessary information into the computer. Complainant said he would do that. Mr. Harry next checked the computer about five or six days later and there wasn't any new information. Mr. Harry then printed a handwritten memo and gave it to Complainant, who acknowledged the note, but then tore it up and threw it in the trashcan; Complainant stated he would take care of it. (Tr. 131-32) Complainant described this note as a small, yellow "stickey". Mr. Harry described Complainant as "aggravated" after receiving this memo.

When Mr. Harry next checked the computer a day later, the information had still not been entered. Mr. Harry recalled that he then wrote Complainant up for his failure to complete the report. (Tr. 131). It was about five to six days between the time Mr. Harry first instructed Complainant to complete the report and the time Complainant tore up the note. (Tr. 132). The MOR was part of Complainant's normal duties, and Mr. Harry stated that Complainant usually kept it up well. (Tr. 132). Complainant did not offer Mr. Harry an explanation for his failure to complete the report. (Tr. 132).

Mr. Harry discussed with Mr. Gravely the possibility of suspending Complainant if his work continued to decline. (Tr. 133). Mr. Harry also discussed this with Mr. Eldridge. (Tr. 61, 133). Accordingly, Mr. Harry, Mr. Gravely and Mr. Eldridge held a meeting at City Hall to discuss what actions to take in response to Complainant's performance issues. (RX 6 at 21). The mayor of Pickens also came into the meeting, although Mr. Gravely explained that the mayor wasn't specifically called in for the meeting. (RX6 at 22). Mr. Gravely did not make any remarks during the meeting, but did speak up at the end of the meeting, when Mr. Eldridge determined that a three-day suspension was appropriate. (RX 6 at 23). Mr. Gravely told Mr. Eldridge that it would make things difficult at the water plant if the suspension was issued because of the tight schedule. (RX 6 at 23). However, Mr. Eldridge thought that city policy required the suspension, and thus Mr. Gravely knew it was out of his hands. (RX 6 at 23). Complainant was to be notified the next day of this suspension when he showed up for his shift on July 7, 2004. (Tr. 61).

<u>July 7, 2004 – July 9, 2004</u>

Complainant was scheduled to work from 6:00 a.m. to 4:00 p.m. on July 7, 2004. (Tr. 201). On this day, two other employees were also scheduled to work, which Mr. Eldridge described as typical. (Tr. 68). Mr. Eldridge was told by Mr. Harry that Complainant was scheduled to open the plant that morning. (Tr. 66). Mr. Harry told Mr. Eldridge that he would meet Complainant when he opened up the plant and then would have Complainant come by Mr.

Eldridge's office around 8:30 or 9:00 am that morning, where Complainant would be told about his three-day suspension. (Tr. 66).

However, Complainant did not show up for work on July 7, 2004. Complainant stated that when he attempted to leave for work that day, his truck would not start. (Tr. 200). Because Complainant did not have a phone at his home, he went next door to his neighbor's house to use a phone and call into work. (Tr. 201). However, when Complainant called in at approximately 6:15 a.m., the line was busy. (Tr. 201). Complainant went back home and attempted to fix his truck. Complainant thought not showing up to work on July 7, 2004, was not a "big deal" because he had previously worked two weeks of overtime. (Tr. 201). Complainant did not walk into town or to a nearby store because the road was not safe for walking. (Tr. 201-202). Although Complainant had a cell phone, the valley where he lives does not pick up cell signals well. (Tr. 202).

At approximately 1:00 p.m., Complainant had his truck running and was able to drive into town. (Tr. 203). Once Complainant reached town, the truck kept stalling out. (Tr. 203). Complainant did not want to get stuck in town. (Tr. 203). While Complainant was in town, he saw Jacob Henry Anthony and Tommy Jack Gilstrap, who are employees of the City of Pickens Water Department. (Tr. 203, 251, 260). Complainant contends that he waved at Mr. Anthony and Mr. Gilstrap, but that they did not see him and then they continued on. Complainant then drove back home because he didn't want to stall out. (Tr. 203). Complainant failed to bring the cell phone with him on his trip into town, because he thought the truck was running fine and he was hyper to get to work. (Tr. 204).

Mr. Gilstrap confirmed that he saw Complainant on July 7, 2004, while he and Mr. Anthony were pumping gas at Moore Brothers. (Tr. 260). Mr. Gilstrap told Mr. Anthony that he saw Complainant. At that time, Complainant was headed down Highway 8 towards Easely. Mr. Gilstrap also saw a dog in the back of Complainant's pick-up. Mr. Gilstrap has witnessed the Complainant in his pick-up before, which Mr. Gilstrap identified as a bluish-looking truck. (Tr. 262). Mr. Gilstrap stated that he never saw Complainant without his dogs in the truck. (Tr. 263).

Complainant then returned home. When his neighbor returned home, Complainant again used the neighbor's phone to call the water plant. Complainant spoke to Mr. Thorpe at approximately 5:15 p.m. On July 8, 2005, Mr. Gravely received a call at the water plant from Mr. Thorpe, who stated that Complainant had called him at the water plant the previous evening. (RX 5 at 64). Mr. Gravely recalled that Mr. Thorpe stated that Complainant had called the plant at 4:30 p.m. on July 7.[2] (RX 5 at 64).

On the morning of July 8, 2004, Mr. Anthony was at City Hall, where he and Mr. Eldridge discussed Complainant's absence. (Tr. 251). Mr. Anthony stated that he goes to City Hall every day to check his mailbox. Mr. Eldridge asked Mr. Anthony what had happened to Complainant on July 7, 2004; Mr. Eldridge relayed that Complainant didn't call in and didn't

[2] Mr. Gravely knew that Mr. Thorpe must have mistaken the time because Mr. Gravely had not left work by 4:30 on July 7, 2004. (RX 5 at 64). Mr. Gravely assumed that if Complainant had called in at 4:30 on July 7, then Mr. Thorpe would have called him soon thereafter. (RX 5 at 65).

show up for work. (Tr. 251). Mr. Anthony then stated that he and Mr. Gilstrap had seen Complainant at 2:00 p.m. on July 7, 2004, when they were pumping gas at Moore Brothers. (Tr. 251-52). Mr. Anthony stated that at the grievance hearing following Complainant's termination, Complainant acknowledged that he saw Mr. Anthony and Mr. Gilstrap at the gas station on July 7, 2004. (Tr. 255). Complainant also admitted at the grievance hearing that his dog was in the back of the truck. (Tr. 255).

During the mid-afternoon of July 8, 2004, Complainant called Mr. Harry to explain his absence on July 7, 2004. Complainant used a pay phone in the town of Easley to make this call. (Tr. 204). Mr. Harry informed Complainant that he was to meet Mr. Eldridge at 9:00 a.m. on July 9, 2004, at City Hall. (Tr. 204). At this time, Complainant realized he was going to be terminated because, in his opinion, "no one talks to [Mr. Eldridge] unless they're getting fired." (Tr. 205). Despite his absence, the plant operated safely and there were no system or equipment malfunctions. (Tr. 124).

Mr. Gravely learned that Complainant was going to be terminated on the afternoon of Thursday, July 8, 2004, during a phone conversation with Mr. Eldridge. (RX 6 at 21). Mr. Eldridge instructed Mr. Gravely and Mr. Harry to meet Complainant at City Hall on the morning of Friday, July 9, 2004. (RX 6 at 21). In Mr. Gravely's opinion, the decision to terminate Complainant was made by the mayor and Mr. Eldridge. (RX 5 at 66).

Mr. Eldridge was told that Complainant called in to Ken Thorpe, his co-worker, around 5:00 p.m. on Wednesday, July 7, 2004. (Tr. 67). Mr. Eldridge testified that Complainant was terminated because on the day Complainant was going to be notified that he was going to be suspended for refusing to complete a report, he failed to show up for work and also did not call in. (Tr. 60-61). According to Mr. Eldridge, two employees saw Complainant driving his truck about two blocks from City Hall; because Complainant claimed to have vehicle trouble and then failed to notify his supervisors of his absence, Mr. Eldridge decided to terminate Complainant. (Tr. 61). Mr. Eldridge stated that employees who are going to be absent from work must notify a supervisor, not a co-worker. (Tr. 105).

On Friday morning, July 9, 2004, Mr. Eldridge communicated to Complainant that he was terminated. (Tr. 68). At this time, Mr. Eldridge was also aware that Complainant had called in on Thursday, July 8, 2004, even though he was not scheduled to work. (Tr. 68-69). In the three years in which Mr. Eldridge has been administrator, Complainant was the only employee who had been terminated from the water treatment plant. (Tr. 77). Mr. Eldridge did not confer with the City Council prior to terminating Complainant. (Tr. 79). Mr. Eldridge explained that other city employees had been terminated for a first offense. (Tr. 90).

## COMPLAINANT'S MOTION TO RECONSIDER THREE EVIDENTIARY RULINGS

Complainant first requests the Court to reconsider its exclusion of the testimony of DeLeon Andrews with respect to Mr. Gravely's behavior and state of mind during the investigation. Next, Complainant requests the Court to reconsider its hearsay ruling in excluding the testimony of Ken Thorpe, who, according to the proffer, would have testified to hearing

Complainant tell him of threats made by Brian Gravely. Finally, Complainant objects to the admissibility of the deposition testimony of Brian Gravely (RX 7) which was taken after the hearing.

Complainant's motion is denied. First, there appears to be confusion with Complainant's request with respect to the issue regarding Mr. Andrews. The court allowed the deposition of Mr. Andrews to come in for the limited purpose of showing the amount of communications between Mr. Andrews and the city officials for the purpose of showing the state of mind of the city officials and the supervisors at the water plant. (Tr. 31). The court also allowed the deposition to come in for the purpose of showing Mr. Gravely's state of mind towards the investigation. (Tr. 31-32). Respondent had no objection to the deposition coming in for those limited purposes. (Tr. 31-32). Thus, Complainant's request in his Motion for Reconsideration was already granted during the formal hearing. The relevant portions of Mr. Andrews' testimony were considered and summarized in the section above. Complainant has no valid request for reconsideration on this issue.

Second, the court stands by its initial ruling that Complainant's phone call to Mr. Thorpe must be excluded because it qualified as hearsay and was not subject to any exceptions to the hearsay rule. Finally, the court stands by its ruling to allow counsel to take a third and limited deposition of Mr. Gravely. Mr. Gravely was deposed prior to the hearing because he was not able to attend the hearing in person due to a prior commitment. During the hearing, Complainant testified to a conversation with Mr. Gravely during which Complainant perceived that Mr. Gravely was threatening him. The court felt it was necessary, in order to establish a level playing field, to allow counsel to depose Mr. Gravely post-hearing on this particular issue. (Tr. 278-284). Accordingly, Complainant's Motion for Reconsideration on these evidentiary rulings is denied in its entirety.

## DISCUSSION

The employee protection provisions of the environmental acts prohibit an employer from taking adverse employment action against an employee because the employee has engaged in protected activity. *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146 at 14, 1988-SWD-00002 (ARB Feb. 28, 2003). To prevail on a complaint of unlawful discrimination under the SWDA, a complainant first must establish a *prima facie* case, thus raising an inference of unlawful discrimination. *Id. at 15*. A complainant meets this burden by showing that (1) the employer is subject to the applicable retaliation statues, (2) that the complainant engaged in activity protected under the statutes of which the employer was aware, (3) that she suffered adverse employment action, and (4) that a nexus existed between the protected activity and the adverse action. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 00-CAA-09, 01-CAA-11, slip op. at 9-10 (ARB June 30, 2004).

The parties have stipulated that (1) Respondent is subject to the statute; (2) that Complainant engaged in protected activity and that Respondent was aware of Complainant's protected activity, and (3) that Complainant was terminated from his employment. Finally, there is a nexus between the protected activity – which occurred throughout 2004 - and the adverse

employment action, as Complainant was terminated on July 9, 2004. Thus, Complainant has established his *prima facie* case.

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. *See Carroll v. Bechtel Power Corp*., 91-ERA-46 (Sec'y February 15, 1995). In this case, Respondent has produced evidence showing that in the immediate time period prior to his termination, Complainant exhibited performance issues for which he was suspended. On the day Complainant was to be informed of his suspension, he failed to show up for work and failed to notify his supervisors of his absence in a timely manner. Respondent also noted that its employee handbook does not require any mandatory steps of discipline. Respondent also showed that that all employees of the water plant – not just Complainant - were involved in the SCDLRR investigation. Therefore, I find that Respondent has met its burden of production.

The complainant may counter the respondent's evidence by proving that the legitimate reason proffered by the respondent is a pretext. *See Yule v. Burns Int'l Security Serv.*, 93-ERA-12 at 7-8 (Sec'y May 24, 1994). The complainant then must prove by a preponderance of the evidence that the employer intentionally discriminated against him. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993); *Darty v. Zack Co.*, 82-ERA-2 at 5-9 (Sec'y Apr. 25, 1983) (*citing Texas Dep't of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981)). The complainant may demonstrate pretext by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. *Frady v. Tennessee Valley Authority*, 1992-ERA-19 and 34 (Sec'y Oct. 23, 1995). However, it is "not enough for the complainant to show that a reason given for a job action is not just, or fair, or sensible . . . [rather] he must show that the explanation is a 'phony reason.'" *Gale v. Ocean Imaging*, ARB No. 98-143, ALJ No. 1997-ERA-38 (ARB July 31, 2002).

Complainant argues that the reasons offered by Respondent for Complainant's termination are pre-textual and that the genuine reason for his termination was retaliation for his protected activity. Complainant also asserts that Respondent's characterization of the circumstances surrounding absence on July 7, 2004 are "patently false". Based on the evidence of record, I find that Complainant has not proved, by a preponderance of the evidence, that Respondent discriminated against him in violation of the Act. There is no evidence that discrimination was a motivating factor in Respondent's actions, nor do I find that the proferred explanation for Complainant's termination is not worthy of credence. *See Gale v. Ocean Imaging, supra.*

First, the record does not establish that discrimination was the motivating factor in Respondent's discipline and eventual termination of Complainant's employment. There is no evidence that Respondent or any of its employees harbored any bias or retaliatory motive against Complainant for his role in the SCDLRR investigation. In fact, the record reveals that all employees of the water plant ultimately participated in the investigation. Complainant suggests, nevertheless, that Respondent was overly concerned with how the investigation began and was consumed by the investigation. Although I find truth to Complainant's allegations, I do not find that these facts in any way establish that Respondent retaliated against Complainant for his protected activity.

With respect to the initiation of the investigation, Complainant testified that he called SCDLRR Investigator Andrews in late November to share his concerns regarding Mr. Westbrook's qualifications. However, Mr. Andrews' testimony does not support this account of events. Mr. Andrews testified that the investigation ensued after his co-worker Donna Caldwell received Mr. Westbrook's application for a Class C license and became concerned over some of the information on the application. Mr. Andrews testified that he never spoke with Complainant until after the investigation began, at which time he sought the cooperation of Complainant and Mr. Thorpe. Thus, I find Mr. Andrews' account of events to be the most plausible, especially because Mr. Andrews has no incentive to lie about how the investigation commenced.

Notwithstanding the above findings, there is no evidence that Respondent ever believed that Complainant instigated the investigation. In fact, several employees testified that they initially believed the investigation may have been initiated by former employee Mitch Ellenburg, who had been terminated shortly before the investigation began. However, the assumption by these employees – particularly Mr. Eldridge and Mr. Gravely- that the investigation was initiated by Mr. Ellenberg does not establish that Respondent sought to retaliate against the instigator, if one even existed. Rather, it appears that the timing of events – the resignation and subsequent eviction of Mr. Ellenberg in late October/early November and the commencement of the SCDLRR investigation in mid-November created a nexus which made Mr. Ellenberg's involvement seem plausible. Additionally, Mr. Andrews assured Mr. Eldridge and the other water plant employees that Mr. Ellenberg had nothing to do with the investigation.

Furthermore, although I find that Respondent and its employees were generally concerned with the investigation, I do not find that this concern led Respondent to discriminate against Complainant. Having considered the testimony of the various witnesses and the context of this investigation, it does not seem out of character for a small city and its water department to be rattled by a lengthy investigation, even if the potential fine is not onerous. The fact that particular employees or supervisors may have felt concerned about the investigation does not necessarily equate into Respondent discriminating against Complainant.

Complainant also cited Mr. Gravely's alleged threat to him regarding the investigation as evidence of his discriminatory termination. I also do not find Complainant's recollection of this threat credible. Complainant admitted that he made a remark to Mr. Gravely about alleged infidelity – a fact corroborated by Mr. Gravely. The context in which Complainant made this remark strongly suggests that Complainant was trying to instigate something with Mr. Gravely. Nevertheless, Complainant assumed that Mr. Gravely's threat was in reference to Complainant's participation in the SCDLRR investigation, even though Complainant admitted that he never specifically discussed the investigation with Mr. Gravely. Thus, I find Complainant's characterization of this conversation not credible, and based on the evidence of record, I do not find that Mr. Gravely threatened Complainant in any way for Complainant's participation in the SCDLRR investigation.

Second, Complainant attempted to prove discrimination by showing that the timing of Respondent's discipline was "suspicious". Complainant also attempts to show that other employees received several warnings for infractions before they were terminated, or were

terminated without warning for infractions far more serious than Complainant's infraction. However, the court finds that Complainant's declining job performance, ultimately marked by his failure to show up for work on July 7, 2004, is supported by the evidence of record. Complainant did have generally above-average job performance ratings prior to January 2004. However, the supervisor giving these ratings – Mr. Ellenburg – also resigned after being confronted with his own performance issues in October 2003. Complainant then worked for a new supervisor, Mr. Harry, who the record has shown to be a stricter supervisor than Mr. Ellenburg. The evidence of record, however, neither proves nor suggests that the more stringent performance standards applied to Complainant were methods of retaliation for Complainant's participation in the SCDLRR investigation.

Furthermore, the evidence showed that Mr. Harry made allowances to Complainant which were not mandated by the job. For example, Mr. Harry continued to allow Complainant to bring his dogs with him to work, provided they were kept outside. It was only after Complainant disobeyed this instruction and brought his dog inside that he was instructed to leave his dogs at home. Mr. Harry also allowed Complainant to play games on the old computer; Mr. Harry acknowledged that the water plant operator position has significant down time and can be monotonous. Thus, despite the fact that Mr. Harry may have evaluated Complainant more thoroughly than his predecessor, his allowances to Complainant weigh against Complainant's theory of bias and motive. With respect to Complainant's various on-the-job infractions, Complainant admitted that he played games on the computer; he admitted that the new computer powered down while he was on it, which caused the information in the EPA report to be lost; and he admitted that he failed to complete the MOR report at the time he was told to complete it.

Finally, it is undisputed that Complainant failed to show up for his shift on July 7, 2004. It is also undisputed that Complainant failed to reach any supervisors or work colleagues by telephone during the hours he was scheduled to work. Complainant testified that he thought not showing up to work on July 7, 2004, was not a "big deal" because he had previously worked two weeks of overtime. Complainant attributed his failure to reach the water plant to his not having a phone and to the water plant phone line being busy. However, Complainant did have a cell phone and was eventually able to drive into town, and came within just a few blocks of City Hall.[3] He failed to bring the cell phone with him on his trip into town, although he oddly brought his dog with him in the back of his truck, even though Complainant was aware that he was not allowed to bring his dog to work. Complainant's reason for not calling from a payphone in town – or for stopping at City Hall when he was spotted only two blocks away – is simply not credible. Additionally, Respondent was aware that Complainant had been spotted driving in town despite Complainant's excuse that his truck was not running that day. Complainant strives to show that his failure to show up for work or notify his supervisors in a timely manner of his absence is not severe misconduct; this court, however, disagrees. It is irrelevant that the water plant operated safely that day. The fact remains that Complainant simply did not show up for work and failed to contact his supervisors before his 10 hour shift was over. The employee

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[3] It is not clear from the record how far the City of Pickens City Hall was located from the water plant. Complainant states that he drove into town to "explain himself" for his absence. Thus, the court assumes that Complainant was attempting to reach City Hall to explain himself to Mr. Gravely or Mr. Eldridge. If Complainant was attempting, instead, to reach the water plant, it is still not clear to the court why Complainant wouldn't have stopped at City Hall anyway to get in contact with his supervisors at the water plant.

handbook specifically states that an employee can receive any level of discipline – including termination – for an unexcused absence. Furthermore, while it was within the purview of Respondent to determine what constituted a serious infraction, the court finds that Complainant's actions were sufficient cause for his termination, notwithstanding his other performance issues. Accordingly, the court finds that the discipline exacted on other employees of the City shows that Respondent takes various levels of disciplinary action depending on how it views a particular infraction. Once again the record fails to show that Complainant's termination was a result of anything other than his own misconduct. There is nothing in the record which supports the allegation that Complainant's termination was the result of his protected activity.

## CONCLUSION

Complainant has established his *prima facie* case of discrimination under the Act. Respondent has successfully rebutted the *prima facie* case by showing through evidence that it terminated Complainant for a legitimate, non-discriminatory reason. Finally, Complainant has failed to show, by a preponderance of the evidence, that Respondent's proferred reason for his termination was untrue. Accordingly, Complainant has failed to carry his burden and his complaint must be dismissed.

## ORDER

It is hereby RECOMMENDED that Complainant's complaint of retaliation under the Act be DISMISSED.

SO ORDERED.

A

Daniel A. Sarno, Jr.
Administrative Law Judge

DAS/jre

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary,

Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).