U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 25 November 2008

CASE NO.: 2007-SDW-1

In the Matter of:

GEORGE W. POWELL, III
Complainant

v.

CITY OF ARDMORE, OKLAHOMA
Respondent

Appearances:

Richard R. Renner, Esq.
For the Complainant

Margaret McMorrow-Love, Esq.
Matthew J. Love, Esq.
For the Respondent

Before: THOMAS M. BURKE
Administrative Law Judge

DECISION AND ORDER

This is a proceeding brought under the employee protection provisions of the Safe Drinking Water Act, ("SDWA"), 42 U.S.C. 300j-9; the Clean Air Act, ("CAA"), 42 U.S.C. 7622; the Solid Waste Disposal Act, ("SWDA"), 42 U.S.C. 6971; the Water Pollution Control Act, 33 U.S.C. 1367; and the Toxic Substances Control Act, 15 U.S.C. 2622, as well as the implementing regulations found at 29 CFR Part 24. The employee protection provisions of these Acts safeguard employees who engage in certain protected activities from employer retaliation.

Complainant, George W. Powell, III, initiated a complaint on August 18, 2006, with the Occupational Safety and Health Administration (OSHA), alleging that Respondent, City of Ardmore, Oklahoma, discharged him from the position of heavy equipment operator in Respondent's waste water treatment plant because he raised concerns over the discharge and disposal of sewage which he believed constituted violations of environmental requirements. The complaint was investigated by OSHA and found to be without merit by letter from the Regional Supervisor dated January 11, 2007.

Complainant filed *Objections and Request for Hearing* on June 27, 2007. Respondent filed *Objections to the Request for Hearing* on July 9, 2007, asserting that the hearing request was untimely as it was not filed within five business days of receipt of OSHA's determination as required by 29 CFR § 24.4(d)(2). However, Complainant's attorney, who was retained by Complainant during the OSHA investigation, claimed that he did not receive notice of the OSHA determination letter until June 25, 2007 by facsimile transmission from Respondent's counsel. An Order was issued by the undersigned Administrative Law Judge on September 6, 2007, holding that Complainant's request for a hearing was timely filed. The Order reasoned that 29 CFR § 24.4(d)(2), requires actual receipt, and since Complainant received a copy of the OSHA determination letter on June 25, 2007, and the hearing request was received on June 27, 2007, it was filed within five days of actual receipt.

A *Motion to Compel Discovery* was filed by Complainant on March 19, 2008. Respondent filed a response on March 31, 2008. An Order was issued on April 11, 2008 requiring the production of discovery. *See Order Regarding Motion to Compel Discovery* issued on April 11, 2008.

A hearing was held in Ardmore, Oklahoma on April 28-31, 2008. Post-hearing briefs were filed by Complainant on July 9, 2008 and Respondent on July 14, 2008. Response briefs were filed by Complainant on July 25, 2008 and Respondent on July 31, 2008.

FINDINGS OF FACT

Complainant is George Powell. He is married to Sheelagh Powell. They live in Lone Grove, Oklahoma. Tr. 35. Respondent is the City of Ardmore, an Oklahoma municipal corporation located in Carter County, Oklahoma. It has a Commission-Manager form of government. Dan Parrott is the City Manager. He is the chief executive officer. He has held that position since September of 2002. Tr. 676-678. He is responsible for appointing employees and, when deemed necessary, transferring, promoting, demoting or terminating employees. The City Commission and the Mayor are prohibited from becoming involved in personnel matters except as it relates to the City Manager's employment or giving consent to the hiring of department heads. RX 1, § 22; Tr. 677-678.

The City of Ardmore has twelve departments with fifty-two divisions and two hundred eighty-five employees. The City Manager supervises the department heads who, in turn, supervise the division heads. The division heads supervise subordinate employees. Tr. 679. Shawn Geurin is the Public Utilities Director of the City of Ardmore. His assistant is Blake Rudd. Tr. 151. Carol Anderson is the Superintendent of the Wastewater Treatment Plant. Tr. 12. She reports to Geurin and Rudd. Tr. 151. Le Ann Collins is the Human Resources Director for the City of Ardmore. She has held the position since March of 2006. Tr. 593, 595.

Complainant was originally hired by the City of Ardmore in the Street Department. Tr. 269. His employment with the Street Department was involuntarily terminated in July, 2003 because he failed a random drug test for marijuana. Tr. 269. Complainant admits that he was using marijuana at the time. Tr. 269. After Complainant's termination, Parrott hired him to do

work at his residence because he felt sorry for him. Tr. 682. Complainant and his wife described Parrott as a friend. Tr. 38, 383, 384.

Complainant was re-employed by the City of Ardmore in November of 2004 pursuant to a Return to Work Agreement. RX 5. The Agreement provided that Powell would not use any illegal drugs on or off duty and would not appear at work under the influence of alcohol. Specifically, the Agreement read:

> Due to the history of George Wallace Powell III's substance abuse problems, if George Wallace Powell chooses to self report a relapse of any type, George Wallace Powell III understands that he will be terminated.

RX. 5.

When Complainant was rehired in November 2004, he was assigned as an Equipment Operator in the Street Department. He was transferred to the Wastewater Treatment Plant in July of 2005 and promoted to the position of Heavy Equipment Operator, effective July 11, 2005. RX. 6.

Complainant was issued a written warning for improper use of a City vehicle by Anderson on April 20, 2006. The violation involved speeding through a yellow light as he was observed "traveling to (sic) fast for the intersection and other vehicles had to stop to stay out of his way." RX 7. Complainant signed the warning. *Id.*

On June 22, 2006, Complainant reported to work before the normal start of his shift to cook breakfast for fellow workers. Tr. 320, 321. While cooking breakfast Complainant belched and tasted the "nasty taste of tequila." A co-worker, Willard Walls, smelled alcohol on Complainant's breath when Complainant put his face next to Walls' face while giving him a "big old hug" and pinning his arms to his side. Tr. 252, 253, 321. Rick Morse, a co-worker, also smelled alcohol on Complainant's breath that morning. Tr. 507; CX 71[1], p. 14-15. Complainant reported his condition to Anderson that morning. Tr. 322. Complainant reported to her office to say that he had been out drinking the night before, and that he did not think enough time had elapsed from the time he had gotten to bed--around 2:30 a.m.--until the time he got to work, and he did not think he was in any condition to work. CX. 66 [2], p. 66, 67. Anderson instructed him that if he could not work, he needed to go home. *Id.* Anderson reported the incident to her supervisors, Rudd and Guerin. CX. 68 [3], p. 27-31. Complainant was given a written reprimand on July 6, 2006, from Anderson for reporting to work under the influence of alcohol on June 22. 2006. Rudd was present as a witness. *Id.* p. 69,70. Complainant refused to sign the reprimand, and wrote, "I disagree" on the reprimand. RX. 9.

Complainant was given a written reprimand on July 6, 2006 for reporting to work late on July 5, 2006, and for failing to notify Anderson until thirty minutes past his starting time. Tr.

[1] CX. 71 is the deposition of Rick Morse.

[2] CX. 66 is the deposition of Carol Anderson.

[3] CX. 68 is the deposition of Shawn Geurin.

325. The reprimand noted that this was his third violation. RX. 8. Complainant denies that he showed up late for work on July 5, 2006. Tr. 325. However, Complainant's time sheet for that day shows that he reported for work at 8:00, one hour after his starting time of 7:00. The time sheet notes in a comment to the starting time: "storm knocked out elec." RX. 25.

On July 10, 2006, four days after receiving the second and third written remands, Complainant showed up, unannounced, at the office of Collins. Tr. 595. Complainant told Collins that he had gotten write-ups that were bogus and thought Anderson was out to get him. He discussed the incident where he was sent home after his self-report of alcohol consumption. Collin's notes from the meeting reveal that Complainant told her that he believed Anderson was out to get him because he told her about something green coming from a pipe at the Airpark into the Ouachita River. Complainant also brought up other matters characterized by Collins as "operational/environmental issues." Tr. 596. Those matters, according to Collins' notes include putting sludge on the ground without permission, burying motors that had mercury in them, and a mercury spill, which he was required to clean up without any protective gear. Tr. 604, 605; RX 12.

Collins described Complainant as being very agitated. "At one point in time, he slammed his fist down on the table, and, to be quite honest with you, I was to the point that I was almost somewhat frightened of [Complainant]" Tr. 607. Complainant told Collins he wanted to strike back at the situation caused by Anderson. Tr. 463. Complainant told Collins that these "write-ups and falsifications" were not the first time something like this had happened to him and cost him his job. He told about being fired from his employment as a safety steward at Atlas Roofing in Ardmore, Oklahoma because, after taking pictures to bring to management's attention, he was accused of threatening to kill a supervisor, his wife and children. Tr. 340, 379.[4] Complainant agrees that he told Collins that he was terminated for warning the supervisor at Atlas Roofing, "I'm going to go home and smoke a joint so I don't come back to kill you." Tr. 379. Complainant related a second story to Collins concerning an incident where he came home one night and "beat the hell" out of a man he caught with his wife, "[a]nd when he looked at my wife I kicked him a side kick in his chest…" Tr. 341, 606.

Following her July 10, 2006 meeting with Complainant, Collins contacted Parrot, her supervisor, and related three concerns: the environmental concerns expressed by Complainant; Complainant's expressed belief that he was being written-up because he was voicing environmental concerns; and her worry over Complainant's mental state as she advised Parrot that she was "almost downright scared of [Complainant]." Tr. 611, 612. She explained to Parrot that Complainant was slamming his fists and telling stories of his violence in his past, even though she had not asked about them. Tr. 612. Parrot told her to investigate. Tr. 612.

[4] Complainant's union at Atlas Roofing filed a grievance over his termination but the Arbitrator ruled in favor of Atlas Roofing. Tr. 606. The parties have raised the issue of whether the arbitrator's decision finding that Complainant made statements threatening the life of his supervisor is binding on the issue of whether Complainant threatened violence at Atlas Roofing. However, the ruling of the arbitrator is of little consequence. What is relevant is what Complainant told Collins about his threatened violence, and its effect on Collins' decision.

The next morning, July 11, 2006, Complainant arrived at the waste water treatment plant before the 7:00 shift started to take pictures. CX. 68, p. 38. When Collins was informed of the picture taking, she contacted Parrot to tell him that she believed Complainant would be back to see her because he had been out taking pictures. She advised Parrot that if his mental state was the same as the day before, it would be best for the City and Complainant if he was placed on administrative leave. She expressed concern that Complainant was going to lose control. Tr. 612, 613. Parrot concurred in the recommendation. Tr. 614, 686. Parrot was convinced that Collins' concerns might be valid, that Complainant was agitated and might "do some violence." Tr. 687.

As Collins' suspected, Complainant visited her office that day, July 11, 2006. Tr. 613. At the meeting she advised Complainant that he was being placed on administrative leave with full pay and benefits. Tr. 614. Collins told Complainant that the purpose of the leave was to give him time to calm down and the City time to investigate his allegations.[5] Tr. 615. Complainant raised to Collins a concern over a crack in the digester. He thought the effluent was washing the sidewalk out. Tr. 610. Complainant telephoned Collins three days later, July 14, 2006, to report a truck driving down the road without a tarp. Tr. 626.

During the period July 10, 2006 through July 17, 2006, Collins investigated the operational/environmental concerns raised by Complainant. She reviewed his allegations of a discharge at the pipe at the Air Park. She drove to the Air Park to look at the pipe to see if there was a green discharge. Tr. 615-617, 638. She checked to see if Respondent had a permit to store sludge on the ground on north hill. Tr. 639. RX. 19. She investigated the possibility of a crack in the digester causing sludge liquid to wash out the sidewalk. She talked to Anderson who said they had discovered a crack when they emptied the digester and that it was going to be repaired. Tr. 640. She investigated the mercury leak by interviewing Morse and Anderson. She verified that there had been a leak of mercury from the motor gear box, that spill kits had been ordered and personal protective equipment had been supplied. Tr. 618, 619, 639. Collins sent her safety manager to investigate the allegation made by Complainant in his July 14, 2006 telephone call that trucks were being driven without tarps. Tr. 640, 641. The safety manager reported back that there was one truck that was not tarped.

Collins' investigation included interviews with Anderson, Morse, and Complainant's co-workers, Jason Willmond and Paul Short. Collins interviewed Morse sometime during the period July 12 to July 17, 2006. She interviewed Morse because he was a co-worker of Complainant and involved in the mercury cleanup. Tr. 617. She discussed with Morse the mercury cleanup. Collins interviewed Willmond because he was a co-worker of Complainant and was recommended by Complainant as an individual who would verify his complaints. Tr. 621. Collins testified that she was told by Willmond that he had never observed anything that

[5] Blake drafted a letter intended to place Complainant on administrative leave on July 14, 2006, three days after Parrott had already placed Complainant on administrative leave. The draft was prepared at Geurin's request for Geurin's signature. Geurin testified that the letter was never issued because Complainant had already been placed on administrative leave at Collin's recommendation. He also testified that since it was a draft it would not have been issued without changes, and it would not have been issued before discussions with Collins as an HR representative.

he would construe to be illegal or of an environmental concern. He offered that he was aware that Complainant was "calling around trying to get [Anderson] in trouble because he was mad about the write-ups." Tr. 622. Short told Collins that he had never seen anything he would consider to be illegal or improper, and he knew Complainant was calling around trying to get Anderson in trouble. Tr. 623. Short offered his opinion that, if anything, Anderson was overzealous in calling Oklahoma's environmental protection agency. Tr. 624.

Collins testified that Morse told her that he was concerned with Anderson's safety because the Complainant had made the comment that he knew how to deal with his problems and was going to push Anderson into the digester. Tr. 619; CX 67, p. 42. Morse also testified that the Complainant told him that he could solve his problems by throwing Anderson in the digester. He testified that he took the comment seriously because of what Morse had told him about his past – that he beat someone up at a prior place of employment. Tr. 498. Morse prepared a statement at the request of the Respondent. The statement reads:

> Sometime around the middle of July [Complainant] had become very paranoid of losing his job. At one point that was all he could talk about. [Complainant] started to make some real bad comments about what he would do if Carol fired him. I did not pay much attention to these comments until the next day. Me and [Complainant] was at the digesters when he told me he had it all figured out. I ask him what he had figured out! He said he would push [Anderson] in the digester when the air was on and that would solve the problem. Rick Morse 8-4

RX 17.

After her investigation, Collins recommended to Parrott that Complainant be terminated from his job at the treatment plant. Tr. 626-627. She told Parrot that she felt Complainant "was going to do harm to Carol Anderson," based on her discussion with Morse and Complainant's comments to her that he had a violent past and had threatened to kill a supervisor at a prior job. Tr. 629. She testified that she also factored in Complainant's mental state as very anxious, including his statement "I'm going crazy out here." Tr. 630.

Parrot testified that he concurred in the recommendation made by Collins based on the information she provided. Specifically, Parrot testified that he considered Collins' investigation of Complainant's environmental concerns, Complainant's threat of harm to Anderson, and the fact that he had gone out on a limb to rehire Complainant and Complainant had broken his agreement by appearing at work in an unfit state. Tr. 691, 692. Collins drafted the letter of termination at the direction of Parrot. Tr. 628, 629; Rx. 13.

Collins met with Complainant on July 25, 2006, to deliver the letter of termination. Also present were Complainant's wife, and Rudd. Tr. 630. Collins testified that she advised Complainant about her investigation. She shared her information that there was no basis to consider the reprimands as bogus, and that she had looked into the environmental complaints, but that the biggest concern for the city was the threats Complainant had made against Anderson. Tr. 631; 464.

Complainant appealed the termination. An appeal hearing was held on August 1, 2006, before Parrott. It was attended by Collins, Complainant and his wife. Tr. 692, 693. Parrott affirmed his decision to discharge Complainant. Tr. 698.

CONCLUSIONS OF LAW

To prevail under the six whistleblower statutes Complainant must prove by a preponderance of the evidence that he engaged in protected activity, that Respondent was aware of the protected activity, that he suffered adverse employment action, and that the protected activity was a motivating factor in the adverse action, i.e., that a nexus existed between the protected activity and the adverse action. 29 C.F.R. § 24.109; *King v. BP Products North America, Inc.*, ARB No. 05-149, ALJ No. 2005-CAA-5 (ARB July 22, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024, ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007).

Protected Activity

Complainant contends that he engaged in protective activity by raising compliance issues with management including improper clean-up of a mercury spill, burying a motor containing mercury, failure to tarp sewage sludge during transport, intentionally bypassing sewage, spraying untreated sewage on land, improper sludge disposal, sewage leak from a digester crack, and dumping grit by a creek.[6]

Mercury spill

During the Fall of 2005, construction was ongoing to modernize the sewage treatment plant. Tr. 486. As part of the construction, Rick Morse, the senior operating heavy equipment operator and Complainant's immediate supervisor, was assigned by Anderson the responsibility of removing gear boxes from two old trickling filters. Tr. 487. The gear boxes weighed about 1,000 to 1,500 pounds. *Id.* As they were removing the second gear box by a chain tied a backhoe, they observed some mercury spilling from it. Morse reported the spill to Anderson. Anderson responded that she would be right down. Complainant heard Anderson tell Morse that she would call the Oklahoma Department of Environmental Quality (ODEQ). The ODEQ arrived at the site the next day and approved Respondent's clean up procedure. Tr. 396. Complainant estimated that the spill involved about thirty pounds of mercury. Complainant testified that sometime later he asked Anderson if there was any danger in his handling of the mercury. Tr. 289-296.

The recollection of Complainant about the mercury spill incident differs from that of Morse and Anderson. Complainant testified that until Anderson arrived, "we were messing around with it," and subsequently put it in a jar. Complainant testified further that Anderson arrived with a turkey baster, Mason jar and possibly a cup, and the three of them got on their hands and knees and picked up as much mercury as they could. Morse testified that when he called Anderson, she instructed that they set the gear box on plastic and stay away from it, and

[6] *See* Complainant's Objections and Request for Hearing from Complaint of Retaliation against Whistleblower under 29 CFR Part 24, p. 2, ¶ 4.

that he relayed the message to Complainant that they were to place the gear boxes on a heavy plastic film called Visqueen. Tr. 490. Anderson arrived at the site in about ten minutes, watched them wrap the plastic over the gear boxes, and said she would order some recovery kits. Tr. 489-491; Cx. 66, p. 54. Morse testified that he did not play or mess around with the mercury but he did observe Complainant rolling the mercury around on the ground. Tr. 491. Morse and Anderson testified that the mercury was not cleaned up until the recovery kits were obtained a couple of days later. Tr. 491, 492; Cx. 66, p. 54. Morse testified that he later discovered that Complainant had taken some of the mercury home when Complainant told him that he was bringing some mercury back because he could not get rid of it. Tr. 494. Morse instructed Complainant to return the mercury and he would put it in a recovery kit. Tr. 494. Complainant returned the mercury in a bottle and Morse dumped it into a recovery kit. Tr. 495. Morse testified that he did not tell Anderson about Complainant taking the mercury because he considered Complainant a friend who had previously been in trouble. Tr. 498. Anderson testified that Morse brought to her a bottle of mercury some time after the cleanup. When she asked him where it came from, he replied that she did not want to know. Cx. 66, p. 54.

There is substantial disagreement over Complainant's actions during the mercury spill incident. However, there is agreement that a spill occurred and that Complainant "played" with the mercury without wearing any protective equipment. Complainant denies taking mercury home, but Morse's testimony of taking mercury in a bottle from Complainant a couple of days after the cleanup, and Anderson's independent testimony that Morse unexpectedly showed up with a bottle of mercury days after the cleanup, are consistent with a finding that Complainant took and subsequently returned mercury. Complainant and Morse both testified that they did not have any training in mercury cleanup. In either event, at issue here is not whether the handling of the mercury was proper, but whether Complainant engaged in protective activity. Did Complainant raise an issue with management regarding an improper clean-up of the mercury spill? The sole testimony supporting such a finding would be Complainant's testimony that he asked Anderson if there was any danger from the mercury. "So then I went to [Anderson] and asked, I said, well, is it – do I have to worry about this stuff, is there a danger involved in this? And she assured me that we went through the proper procedures. And I said, okay, no problem. So I did bring it – I did ask her about it." Tr. 295, l. 11-16.

Complainant's question to Anderson does constitute protective activity. He is arguably expressing a concern about the proper handling of mercury. The purpose of the whistleblower provisions is to protect the public health by protection of complaints or concerns of environmental harm. *See Makam v. Public Service Electric & Gas Co.*, ARB No. 99-045, ALJ No. 1998-ERA-22 (ARB Jan. 30, 2001).

Even if Complainant's questioning of Anderson does not constitute protected activity, his statements to Collins about the mercury spill during the July 10, 2006, meeting is protected.

Truck without tarp

Complainant testified that when he was first asked by Anderson to drive the truck transporting dried up sewage sludge from the treatment plant to the land fill, he answered that he couldn't because the truck was not tarped. Yet, Anderson said to go ahead and drive the truck as

the tarp is not in the budget, and she would attempt to obtain one the next fiscal year. Tr. 284, 285. Complainant testified that the truck was never tarped during his employment at the plant. He referred to a City of Ardmore Purchase Request for a truck tarp showing the City purchased a tarp for a Mack Truck on August 10, 2006, a couple of weeks after he was fired. Tr. 286; Cx. 42.

Parrott testified that he first heard about the truck being driven without the tarp during the hearing on Complainant's appeal of his firing. Tr. 713. He agreed that such was a violation of Department of Transportation rules and posed a risk of "material being distributed to the environment." Tr. 714, l. 5, 6. Anderson testified that she does not recall Complainant raising an issue over driving a truck transporting dry sewage without a tarp. Cx. 66, p. 45, 46.

Collins testified that she received a telephone call from Complainant on July 14, 2006, to report a truck driving down the road without a tarp. Tr. 626. Collins testified that she asked Complainant why he had not told her previously about the tarp, and Complainant relied that, "I've kept a few things in my pocket and you don't even… know what I know." Tr. 626. Collins testified that she sent her safety manager to investigate Complainant's allegation that trucks were being driven without tarps. Tr. 640, 641. The safety manager reported back that there was one truck that was not tarped, that it had been taken recently to a vendor for installation of a tarp but the tarp was the wrong size. Tr. 641.

Complainant's complaint about the truck transporting dry sewage sludge without a tarp constitutes protected activity. The purpose of the tarp is to prevent the waste material from spilling onto the ground. The unpermitted disposal of the sewage sludge would constitute a violation of the Solid Waste Disposal Act.

Burying Motor

Complainant's Objections and Request for Hearing allege that he engaged in protective activity by raising an issue with management about the burying of a motor containing mercury. The only testimony Complainant offered about bringing the issue of a buried motor to management's attention was his testimony that he brought up the matter during his appeal hearing. He testified that he told Parrot at the appeal hearing that he had a concern about "the motor or old gear box being buried in the old clarifier." Tr. 357. He testified further that he was provided the information by Charlie Bean, a bull dozer operator for Wynn Construction, the construction company working on the treatment plant upgrade. Burial of equipment would have taken place during the upgrade, and Thomas Mansur, a senior engineer with Benham Companies, who was the chief engineer on the upgrade project, testified that no motors were buried during the upgrade, as motors would have been removed earlier. Tr. 537, 564. Anderson testified that the upgrade construction included caving in the contact basin and clarifier but the clarifier was not equipped with a gearbox or motor. Cx. 66, pp. 47, 95.

Collins' notes of her meeting with Complainant on July 10, 2006 state that Complainant told her that Respondents were burying motors that had mercury in them. Cx. 24, p. 2. Thus, Collins notes show that Complainant engaged in protected activity. Even though his information was incorrect, in that there were no motors with mercury buried at the wastewater treatment site,

his expression of concern is protected if it constitutes a reasonably perceived threat to environmental safety. *Erickson v. U.S.E.P.A.*, ARB Nos. 03-002, 03-003, ALJ No. 1999-CAA-2 (ARB May 31, 2006).

Bypassing Sewage and spraying untreated sewage on land

Respondent operates a small activated sludge plant for sewage treatment at the Air Park. Treatment involves a pool or lagoon to provide secondary treatment, that is, to remove solids through settling, and a sprinkler system to spray the effluent over the surrounding ground. On site is a contact basin to chlorinate or disinfect waste water, but the contact basin has not been in operation since before Anderson's employment at the plant. Mansur described the system as very basic for a "very intermittent flow." He characterized the flow as so small that they could have used a septic system. Tr. 575.

Complainant testified that he was concerned about the treatment method of spraying the waste water over land, and his belief that it was illegal to operate the sprinkler system without the effluent being chlorinated. Tr. 304. However, the record does not show that Complainant ever discussed this concern with Respondent's management, and the record does not show that Complainant's concern was reasonable. Rather, Mansur testified that the treatment method is permitted and chlorination, although desirable, is not required. Tr. 574.

Complainant asked Anderson about a sewage bypass valve at the Air Park treatment plant. Tr. 310. His concern stemmed from a conversation he had with Willard Walls, a fellow employee, while they were mowing the lawn at the Air Park. Complainant testified that Walls showed him an open valve that could discharge sewage into the Ouachita River in the event of an overflow in the contact basin. Tr. 300, 301. He testified that Walls pointed to "green stuff" at the exit of the discharge valve. Tr. 302.

Anderson testified that Complainant told her about the open sewage bypass valve Walls had shown him. Cx. 66, pp. 59, 60. Collins' notes of the July 10, 2006 meeting show that Complainant told her that Anderson was out to get him because he told her of something green coming from a pipe at the Air Park into the Ouachita River. Cx. 24, p. 2.

The record shows that Complainant expressed concern to Respondent's management, Anderson and Collins, about an open overflow valve. At issue, is whether the concern was reasonable. Walls disagreed with Complainant's testimony of their conversation at Air Park. Wall testified that he showed Complainant how the plant previously operated when it discharged effluent into the river. He showed an overflow valve that was in use when the old plant was in operation, but the discharge had not been in operation since the 1990s when it was replaced by the spray on field system. Tr. 242, 243, 248. He testified that the pipe that they observed did not have green biological material on it. Tr. 244. Also, Mansur testified that he does not believe that there is ever a discharge at this pipe as he doubts that there would ever be a significant overflow at the lagoons. "The onetime that I saw it overflow, it overflowed and just collected there by the lagoons." Tr. 575, l. 10-12. Thus, the testimony of Walls, the basis of Complainant's expressed concern, as well as that of Mansur, Respondent's consultant, reveals no concern for a sewage discharge at this pipe.

Thus, Complainant's expressed concerns over waste discharge at Air Park is not protected as the concerns are not considered reasonably perceived threats to the environment. *Erickson v. U.S.E.P.A., supra.*

Improper Sludge Disposal

Complainant asked Anderson why Respondents were hauling truckloads of sludge to the north hill and spreading it onto the ground. Tr. 319. Anderson testified that Respondent had been given a permit by the ODEQ to temporarily store sludge at the location for a six month period. The purpose of the temporary storage was to allow for the cleaning out of the digester. Cx. 66, p. 64-66. The sludge was removed from north hill and taken to a landfill before the six month period expired. *Id.*

Complainant expressed concern about the placement of sludge on the ground at the north hill to Collins during their July 10, 2006 meeting. Tr. 639. Collins investigated and was shown a letter from the ODEQ permitting the temporary placement of the sludge at the north hill.

Complainant's raising the issue of depositing sludge at the north hill is not considered protected activity because a concern that the activity constituted a violation of the environmental statutes is not reasonable in light of the Respondent's receipt of permission for the activity.

Sewage leaking from a broken digester

Complainant, Morse and Paul Short, another worker at the plant, brought to Anderson's attention a crack in the digester that they discovered when they were cleaning it. Cx. 66, p. 71. Complainant brought it up again at the July 11, 2006 meeting with Collins. Collins recalled that he told her that the crack in the digester, which he referred to as a "sludge pit," was washing out the sidewalk. Tr. 640. Collins remembers contacting Anderson who explained that a separation or crack was discovered in the digester when it was emptied and that it would be repaired as part of the plant upgrade project. *Id.*

Mansur discussed the digesters during his testimony. He testified that the two digesters or basins were separated by a wall with a sidewalk on top so that an operator could walk between the two basins for observation. Tr. 540. He had been aware of breaks in the sidewalk in several places. The sidewalk was replaced as part of the upgrade construction. Tr. 541. He also noticed settling of the center between the basins but that a survey showed that the basins as a whole had not moved. His remedy was to repair the sidewalk, but nothing more extensive because the structure was otherwise stable. Tr. 543. He received a telephone call from Anderson informing him that a crack was observed in the floor of digester B during its cleaning. Tr. 544. When he looked into it, he found that his investigator was already aware of the crack. Mansur described the crack as eight to ten feet length where the basin floor had cracked and moved away from the basin wall. Tr. 545. His survey had found that the basin was not otherwise under unusual stress, so he ordered the crack to be repaired by a grout. Tr. 546. He considered that any leakage would have been minute, and he opined that it would be highly unusual a for structure like the basin to not have some leakage over the years, and in fact the basin is not required to be watertight as "[t]here's no way to make it waterproof." Tr. 549, 550, l. 15.

Complainant's raising the concern of the crack in the digester is protected activity even if the digester was to be repaired as part of the treatment plant upgrade.

Dumping of grit by a creek.

Complainant testified to a concern about the disposal of grit. Grit is solid inorganic material that settles out of the wastewater. Tr. 185. Complainant testified that the grit was temporarily stored on the ground until sufficient amount accumulated to transport it to the landfill. Tr. 369. His concern was that the grit was stored within twenty feet of a creek and it would never accumulate, instead washing into the creek. *Id.* However, Complainant did not offer any evidence that he brought his concern to anyone's attention.

Adverse Employment Action

Complainant suffered an adverse employment action when Respondent terminated his employment on July 25, 2006.

Contributing Factor

Complainant must prove by a preponderance of the evidence that his protective activity was a contributing factor motivating Respondent's discharge of him. *King v. BP Products North America, Inc., supra; Seetharaman v. Stone & Webster, Inc., supra.*

Complainant was discharged on July 25, 2006 when Collins presented him with a Notice of Termination of Employment signed by Dan Parrott, City Manager. Collins drafted the notice at the direction of Parrott. Parrott testified that he discharged Complainant on the recommendation of Collins. Tr. 630, 631. The Notice of Termination reads:

> I received a recommendation from LeAnn Collins, Human Resources Director for the termination of your employment with the City of Ardmore. Based on the information available to my office, I understand you are in violation of the following policy:
>
> 132.2.7 Endangering the safety of others through negligent of willful acts.
>
> 132.2.10 Rude or discourteous treatment of other employees or the public.
>
> 132.2.21 Violation of the provisions of these rules and regulations, Department rules and policies, or any written policies that may be prescribed by the City.
>
> Your conduct has put you in direct violation of the above noted personnel policies, therefore, I am confirming the recommendation of Human Resources, and terminating your employment with the City of Ardmore, effective Monday, July 24, 2006.

RX. 13.

Complainant argues that his raising environmental concerns resulted in his discharge. He contends that his argument is supported by direct evidence, animus, timing and deviation from normal procedures.

Direct Evidence

Complainant argues that direct evidence of discrimination includes Parrott's "admission that he placed Complainant on paid administrative leave because of the seriousness of the environmental concerns he expressed to Collins. He did not place the alleged offenders on leave."[7]

Parrott's testimony on the reason Complainant was placed on administrative leave does not support Complainant's position. Parrott testified that he authorized the paid administrative leave, based on the recommendation of Collins, to allow Collins time to "investigate the allegations. I was convinced that [Collins'] concerns might be valid, that [Complainant] was agitated, might do some violence. And those were the primary reasons, I think." Tr. 687. Parrott described Complainant's demeanor at the meeting with Collins as showing a propensity to violence. He recalled Collins telling him that Complainant had made statements indicating that he thought Anderson was out to get him, that Complainant was striking out at Anderson, and that Complainant disclosed he had been terminated from a previous job for making threats, and had beaten someone up. Tr. 686.

Collins testified that she contacted Parrott on July 11, 2006 to recommend that Complainant be placed on paid administrative leave because if his mental state was the same as he revealed at their meeting the previous day, it would be best for the City and Complainant if he was placed on administrative leave. She expressed concern that Complainant was going to lose control. Tr. 612, 613. As previously stated, Collins had advised Parrott that she was "almost downright scared of [Complainant]." Tr. 611, 612. He was slamming his fists and telling stories of violence in his past. Tr. 612. Parrot concurred in the recommendation. Tr. 614, 686. Parrot was convinced that Collins' concerns might be valid, that Complainant was agitated and might "do some violence." Tr. 687.

Thus, the record does not show that Complainant was placed on paid administrative leave because he expressed his environmental concerns. Rather, he was placed on administrative leave because Parrott and Collins were concerned and worried about his state of mind, and because Collins wanted time to investigate Complainant's expressed belief that he was being written-up because he was voicing environmental concerns. The reasons were accurately conveyed to Complainant by Collins on July 11, 2006 when she informed him that he was being placed on leave, and its purpose was to give him time to calm down and the City time to investigate his allegations.

[7] Complainant's Post-hearing brief, p. 46.

Animus

Complainant argues that Anderson expressed animus toward Complainant because he raised environmental concerns and that the animus is evidence that his termination was caused by whistleblower concerns.

Complainant argues that Anderson's written reprimands evidence animus toward him. He characterized the reprimands as bogus write-ups to Collins during their July 10, 2006, meeting. He told Collins that they were bogus write-ups and an indication that Anderson was out to get him. Tr. 596. Collins investigated and found no basis for considering the write-ups to be bogus.

Complainant received three written reprimands from Anderson. There is nothing in the record to support a finding that any were not deserved.

The initial write-up involved a written warning for improper use of a City vehicle on April 20, 2006 when he was observed speeding through a yellow light and traveling to fast for the intersection as other vehicles had to stop to stay out of his way. RX 7. The written warning noted that Complainant had been counseled on two previous occasions regarding excessive speed in City vehicles. *Id.* Complainant signed the warning. *Id.* Although Complainant testified that he did not deserve the April 20, 2006 written warning because he was not speeding, he admitted to Collins that he sped up the tanker truck as he approached the traffic light and went through the yellow light because the truck was hard to shut down. Tr. 599, 600. Complainant testified during his deposition that he was told by a fellow worker that the violation was reported to the City by a retired police officer. Tr. 402 - 404. Complainant admitted that he had been orally counseled at least twice by Anderson regarding excessive speeding in City vehicles. Tr. 401, 402.

Complainant's second reprimand was for reporting to work under the influence of alcohol on June 22, 2006. Anderson sent Complainant home when Complainant told her that he did not think that it was safe for him to work as he did not think that he was in any condition to work. Cx 66, p. 66. Anderson testified that she consulted about the incident with her supervisor, either Geurin or Blake, and was instructed to issue the reprimand. Cx. p. 69, 70. Complainant admitted to Collins that he self-reported because he was concerned about his safety, in that he was unsure about whether he could operate the machinery. Tr. 598, 599. Nevertheless, Complainant testified that he did not expect any repercussions from the incident, as he believed that Respondent had an "open-door" policy whereby he could talk to Anderson under a guise of confidentiality. Tr. 452, 453.

The third written reprimand was for reporting to work late on July 5, 2006, and for failing to notify Anderson until thirty minutes past his starting time. Tr. 325. The reprimand noted that this was his third violation. RX. 8. Complainant denies that he showed up late for work on July 5, 2006. Tr. 325. However, Complainant's time sheet for that day shows that he reported for work at 8:00, one hour after his starting time of 7:00. The time sheet notes in a comment to the starting time: "storm knocked out elec." RX. 25.

It is outside the purview of this proceeding to question the soundness of the reprimands; however, there is nothing to show they were not warranted, or that they were evidence of an animus by Anderson. Nor does the record show that they were motivated by Complainant's raising concerns about environmental compliance.

Complainant also argues that evidence of Respondent's animus toward him was Anderson's change of attitude toward him. But Complainant is unable to provide any examples of a changed attitude. Tr. 415-417. In contrast, he testified that when he reported to her on June 22, 2006, that he was in no condition to work it was because he trusted her. Tr. 453, 454.

More importantly, Complainant has not shown that Anderson had any input in the decisions placing him on administrative leave or terminating his employment. In fact, the record shows that Collins, not Anderson recommended to Parrott that Complainant be placed on administrative leave, and Collins, not Anderson, recommended to Parrott that Complainant be discharged. Parrott made the final decision on administrative leave and Parrott made the final decision to discharge Complainant.

Accordingly, Complainant has not established that animus existed toward him by Respondent because he raised environmental concerns.

Deviation From Normal Practice

Complainant contends that Respondent evidenced discriminatory motive by deviating from its normal procedures when it in imposed administrative leave and terminated Complainant's employment. He argues that the normal procedure when imposing administrative leave is to impose it on a person alleged to have committed misconduct, but here it was imposed for raising serious environmental concerns.

Complainant is incorrect in his contention that Complainant was given administrative leave because he raised serious environmental concerns. Collins and Parrott adequately explained that they placed Complainant on administrative leave because they were concerned over his state of mind, an expressed propensity for violence, and to provide the City time to investigate his allegations that he was being written-up for expressing environmental concerns. See discussion of Direct Evidence, *supra.*

Complainant argues that Respondent deviated from normal procedures when firing Complainant because Respondent did not use an established form for disciplinary action. In support of its argument, Complainant refers to a form used by the Respondent in its reprimand of Complainant for improper or unauthorized use of a City vehicle. RX. 7. However, there is no showing in the record that Respondent's practice is to use the form at RX. 7, or any form, for the discharge of an employee.

Complainant has not shown that Respondent has deviated from its normal procedures in administering leave or discharging Complainant.

Timing

Complainant argues that the close proximity in time between Complainant's expression of environmental concerns and his discharge raises an inference that the protected activity was the likely reason for the adverse action. Although Complainant was unable to recall the dates on which he raised concerns with Anderson, he did establish that he raised environmental concerns with Collins during the July 10 and July 11, 2006, visits to her office. In *Caldwell v. EG&G Defense Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-1 (ARB Oct. 31, 2008), the ARB explained the effect of close proximity in time between the protected activity and adverse employment action. The APB stated:

> temporal proximity between protected activity and adverse personnel action "normally" will satisfy the burden of making a prima facie showing of knowledge and causation. While a temporal connection between protected activity and an adverse action may support an inference of retaliation, the inference is not necessarily dispositive. For example, if an employer has established one or more legitimate reasons for the adverse action, the temporal inference alone may be insufficient to meet the employee's burden of proof to demonstrate that his protected activity was a contributing factor in the adverse action. On the other hand, "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" for an adverse action. The ultimate burden of persuasion that an employer intentionally discriminated because of a complainant's protected activity remains at all times with the complainant, but proof that an employer's "explanation is unworthy of credence" . . . can be quite persuasive." (citations omitted).

Id. slip opinion at 13, 14.

Although an inference of discrimination arises because Complainant's termination closely followed his protected activity, that is, his expressions of environmental problems to Anderson and Collins, the burden of showing that his termination resulted from his protected activity remains with Complainant. *Robinson v. Northwest Airlines, Inc.* ARB No. 04-041, ALJ No. 2003-AIR-22 (ARB Nov. 30, 2005).

Disparate Treatment

Complainant also argues that he suffered disparate treatment because he was the victim of "actual assaults" yet the employees who committed the assaults were not disciplined.[8] His argument centers on two incidents, neither of which is similar to the circumstances here. Both occurred while Complainant was working for Respondent's Street Department. The first occurred when Complainant and two co-workers went outside the work place to a parking lot to look at a black power gun that Complaint had in his car. One of the workers, Robert Phipps, took a gun from his own car and pointed it at Complainant. The testimony of the witness reads:

[8] Complainant's Post-hearing brief, pp. 5, 50, 60.

> JUDGE BURKE: I'm sorry. So, when this incident happened with Mr. Phipps pointing the gun at him, he was - - what did that incident have to do with Mr. Powell having purchased and showing this other gun?
>
> THE WITNESS: It didn't. It didn't. He just had followed us out to look at George's gun, and I guess he thought, well, you know, we were looking at his, he wanted to show us his gun. And that was, you know - -

Tr. 132.

The record is silent on whether Phipps was disciplined for this incident, or even whether he should have been disciplined.

The second incident involved a dispute between Complainant and a co-worker, Lee Freeman. Two witnesses called by Complainant, Mike Miller and Don Olive, testified about the altercation. Miller testified that Freeman "was blowing his chest up and running his gut into [Complainant]." Tr. 106. Olive's testimony denied that an assault occurred. "They probably rubbed bellies together and got nose-to-nose, but it was just a disagreement." Tr. 136.

Neither incident involved a similarly situated employee who was treated differently from Complainant. *Burdine*, 450 U.S. 248, 258. *See also Morgan v. Mass. General*, 901 F.2d at 191; *see McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 n.11 (1976) (plaintiff must show that offenses "of comparable seriousness" were committed by other employees who were not fired); *Moore v. Charlotte*, 754 F.2d 1100, 1107 (4th Cir. 1985) (court must assess "the gravity of the offenses on a relative scale . . . 'in light of the harm caused or threatened to the victim or society and the culpability of the offender.'")

Respondent's Reason For Termination

Respondent contends that Complainant was terminated from his job because of: 1) his threats to do serious bodily harm to Anderson, i.e. throwing her into the digester; 2) his statement that he was going to strike out at Anderson taken in the context of his disclosure of prior acts of violence, including threats of workplace violence against a supervisor at Atlas; 3) his comment to Parrott that he was going to get even with Morse for reporting his threat about Anderson; and 4) his violation of his Return to Work Agreement.[9]

Parrott made the final decision to fire Complainant based on the recommendation of Collins and the information she provided to him. He testified that he considered Collins' investigation of Complainant's environmental concerns, Complainant's threat of harm to Anderson, and the fact that he had gone out on a limb to rehire Complainant, and Complainant had broken his agreement by appearing at work in an unfit state. Parrott presided over a hearing on Complainant's appeal of the termination. After the appeal hearing but before a decision on the appeal Complainant telephoned Parrott. Complainant told Parrott that he had been only kidding about the threat against Anderson, but that he was very, very upset with Morse that he had "squealed" on him, "and that he was going to get even with [Morse]." Tr. 696, 697. Parrott understood Complainant to be referring to a physical confrontation with Morse. Tr. 698. Parrott

[9] Closing brief of Respondent, p. 21, ¶ 19.

consequently contacted Collins and instructed her to prepare a letter affirming his decision to terminate Complainant. Parrott testified that in formulating his decision he took into consideration Complainant's employment with the city, the threats toward Anderson, his threats toward Morse in the August 8, 2006 telephone call, and the fact that he broke his word and the written agreement that he would not relapse into drug and alcohol use. Tr. 698, 699.

Collins' recommendation to Parrott was based on her fear that Complainant was going to do harm to Carol Anderson in light of her discussions with Morse and Complainant's comments to her indicating that he had a violent past and had threatened to kill a supervisor at a prior job. She testified that she factored in Complainant's mental state as very anxious, including his statement "I'm going crazy out here." Tr. 630.

Complainant lost his job as a consequence of Collins' perception that he was dangerous. The reprimands from Anderson had no effect except that they were the reason for Complainant's visit to Collins' office. Nor did Complainant's expression of concern about environmental problems at the treatment plant contribute to his loss of job.

After her investigation, Collins recommended to Parrott that Complainant be terminated from his job at the treatment plant. Tr. 626-627. She explained to Parrot that she felt Complainant "was going to do harm to Carol Anderson," based on her discussion with Morse and Complainant's comments to her indicating that he had a violent past and had threatened to kill a supervisor at a prior job. Tr. 629. She testified that she also factored in Complainant's mental state as very anxious, including his statement "I'm going crazy out here." Tr. 630.

The testimony of Collins and Parrott is accepted. I observed their testimony and find it to be fully creditable, and consistent with the record. The July 10, 2006, meeting between Complainant and Collins in Collins' office is particularly crucial to Collins' decision to recommend termination because it was during that visit when she arrived at the belief that he posed a threat to Anderson. Complainant's testimony of that meeting is corroborative of that of Collins, and shows that her alarm was justified. Complainant testified that during the meeting he complained about write-ups and falsifications from Anderson. Tr. 340. Complainant agreed he used the phrase "striking back," although he couched it to mean "striking back at the situation," not striking back at Anderson. Tr. 338, 339, 462, 463. Complainant also agreed that he told Collins two stories of past violent action against persons with whom he disagreed. He testified that he told Collins that at his prior job at Atlas Roofing, "they said I threatened to kill this guy and his family and kids and all that." Tr. 340. He also agreed that he did tell Collins the story about ordering a guy out of the house while kicking him in the chest. Tr. 342, 243. Claimant denied that he slammed his fist on the table but he admits that he became emotional. Tr. 461, 462. On cross-examination, Complainant was asked whether he was agitated during the meeting with Collins. He answered, "no more than right now." Tr. 460. But, Complainant appeared agitated during a not particularly aggressive cross-examination. At one point, he responded to a question from Respondent's counsel with the answer: "Because as much as you're riling me right now, I'm not acting anything about how I really really really feel, and I don't want to be mad, and I didn't want to be mad while I was talking to her. I was trying to get some help." Tr. 460, 461. And later in response to the question: "And if Ms. Collins was being polite and respectful to you, why were you becoming emotional in the meeting," Complainant answered," I

don't know why I'm getting emotional here. I can't answer that m'am. I'm not a doctor." Tr. 462.

Thus, the testimony of Complainant confirms Collins' depiction of the July 10, 2006 meeting as one in which she had reason to become frightened of Complainant and fearful that he was going to do harm to Carol Anderson.

Also, Morse's testimony that Complainant had threatened harm to Anderson in a conversation with him corroborates Collin's testimony. They separately testified that Morse was concerned with Anderson's safety because of Complainant's comment to Morse that he knew how to deal with his problems and was going to push Anderson into the digester. Tr. 619; CX 67, p. 42. Morse also testified that he took the comment seriously, because of what Morse had told him about his past – that he beat someone up at a prior place of employment. Tr. 498. Complainant argues that Collins' testimony about Morse's statement to her during her investigation-- a key reason given by Respondent for his termination--is not supported by the record because Morse denies speaking to Collins. However, Morse does not deny speaking to Collins. Rather, he expressed difficulty remembering the conversation. Initially, he testified during his deposition that he did meet with Collins. CX 71. p. 20. Subsequently, during his testimony at hearing, he testified he didn't remember the conversation, but he later testified that he met with Collins but didn't remember the date, and finally he testified that his deposition testimony of the meeting with Collins was incorrect as the meeting was actually with Respondent's attorney. Tr. 508-511. Notwithstanding Morse's memory difficulties, Collins definitely remembered her meeting with Morse where he recalled Complainant's threat. Morse's testimony and statement of that threat corroborates her memory.

Thus, Collins' testimony that she recommended Complainant's dismissal because of his threat to harm Anderson and her believe that the threat was real is supported by the record. It is hard to imagine that Collins, as the Human Resource Director for the City, could have made any other recommendation than administrative leave after her two meetings with Complainant and her recommendation for termination after hearing from Morse. Complainant's complaints to Collins about his environmental concerns had nothing to do with his termination of employment.

Complainant has not met his burden of showing that his termination of employment from the position of Heavy Equipment Operator at Respondent's waste water treatment plant was caused or contributed to by his engaging in protected activity.

ORDER

The complaint of Complainant, George W. Powell, III against, Respondent, City of Ardmore, Oklahoma, under the employee protection provisions of the environmental protection statutes is dismissed.

A
THOMAS M. BURKE
Administrative Law Judge

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

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

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

If the Board exercises its discretion to review this Decision and Order, it will specify the terms under which any briefs are to be filed. If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110, found at 72 Fed. Reg. 44956-44968 (Aug. 10, 2007).