U.S. Department of Labor

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Issue Date: 22 December 2010

OALJ CASE NO.: 2009-SDW-00004

In the Matter of:

STEVEN J. ONYSKO,
Complainant in *pro se*,

v.

STATE OF UTAH, DEPARTMENT OF ENVIRONMENTAL QUALITY,
Respondent.

Appearances:

Steven J. Onysko, Ph.D.,
in *pro se*,

Glen E. Davies, Esq.,
Attorney for the Respondent.

BEFORE: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This action involves a complaint under the employee protection provision of the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300j-9i, and its implementing regulations found at 29 C.F.R. Parts 18 and 24.

On June 1, 2008, July 8, 2008, and September 9, 2008, Dr. Steven J. Onysko ("Complainant") filed separate complaints with the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") alleging his employer, the State of Utah, Department of Environmental Quality ("Respondent"), violated the employee protection provisions of the SDWA. On April 3, 2009, OSHA issued the Secretary's findings in which it dismissed Complainant's complaints. On April 6, 2009, Complainant filed his objections to the Secretary's findings, requesting a hearing with this Office.

I conducted a hearing in this matter on June 21 through 24, 2010, in Salt Lake City, Utah. During the hearing, I admitted the following exhibits into evidence: Complainant's exhibits ("CX") 1 through 18, 32 through 41, 58, 59, 66 through 69, 71 through 399, 402 through 417,

419 through 568, 590 through 651, and 713 through 1745;[1] Respondent's exhibits ("RX") 1 through 29; and Administrative Law Judge exhibits ("ALJX") 1 through 19. Hearing transcript ("TR") at 10-17, 375-76, 512, 936-38, 1154-56. On October 22, 2010, this Office received from Complainant and Respondent their posthearing briefs, which I now mark respectively as ALJX 20[2] and 21. These filings were followed by Complainant's and Respondent's simultaneous posthearing reply briefs on November, 29, 2010, which I now mark respectively as ALJX 22[3] and 23, thereby closing the record.

I. Stipulations

The parties were only able to arrive at a single stipulation:

1. Respondent's standard performance evaluation form contains the following language: "Department of Environmental Quality Policies and Procedures are guidelines to insure DEQ compliance with Utah Law and Department of Human Resource Management Rule. In the event that there is a discrepancy between Utah Law, DHRM Rule and/or DEQ Policy/Procedure, Utah Law and/or DHRM Rule will be used. *See* CX 184; TR at 663-64.

II. Procedural History

The procedural history of this case is extensive and began on May 19, 2009, with my issuance of the notice of hearing in this case setting hearing for August 10, 2009. ALJX 1.

On July 20, 2009, this Office received from Respondent a motion for summary decision, which Respondent then amended on July 28, 2009. On August 4, 2009, I issued an order rescheduling the hearing in this case to begin on October 22, 2009. ALJX 2. In this order, I also allowed Complainant until September 2, 2009 to file his opposition to Respondent's motions for summary decision. *Id.* On August 20, 2009, Complainant filed his opposition to Respondent's motion for summary decision.

On September 3, 2009, Respondent filed with this Office a second dispositive motion, this time to dismiss Complainant's complaints. On September 10, 2009, Complainant filed his opposition to this motion.

On September 8, 2009, Complainant filed a motion to compel orders for the production of documents from three separate Utah state agencies. ALJX 4 at 5. As Respondent did not oppose these requests, I issued orders compelling the production of documents from these

[1] Complainant marked each individual page of his documents as a separate exhibit.

[2] Despite my explicit directive to the contrary, TR at 1164, Complainant submitted his posthearing brief in single-spaced font.

[3] These briefs were due to be mailed on November 24, 2010, on which date Complainant submitted two copies of his own posthearing reply brief. In a letter accompanying this second posthearing reply brief, Complainant noted, after noticing typographical errors in the first draft of this brief, he "couldn't help but re-send a corrected version since the Post Office was still open." Respondent made no objection to this second submission, which was timely received. Consequently, I admit Complainant's second-submitted posthearing reply brief into the record while rejecting the first draft of such a brief.

agencies on September 15, 2009. *See generally* ALJX 4-6. The following day, I issued an additional order staying non-discovery proceedings – including those related to the aforementioned motions for summary decision and to dismiss – and vacating the October 22, 2009 hearing date so that the parties could engage in further settlement discussions. ALJX 7; ALJX 9 at 1.

On November 2, 2009, Complainant filed a second motion to compel, this time seeking his and other coworkers' performance evaluations.[4] ALJX 9 at 1. On November 24, 2009, Respondent responded to Complainant's motion, noting it had already provided one of Complainant's performance evaluations and opposing the production of any further documentation requested in the motion. On January 6, 2010, I issued an order denying Complainant's second motion to compel, finding the information sought was irrelevant given the timeline of events allegedly giving rise to his whistleblower complaint.[5] *Id.* at 2-3.

On January 21, 2010, I issued an order rescheduling hearing in this matter for June 21, 2010, as well as setting new procedural deadlines. ALJX 16 at 1.

On April 7, 2010, Complainant filed a third motion to compel, this time seeking answers to interrogatories in addition to documents from Respondent. On April 20, 2010, Respondent filed its opposition to Complainant's third motion to compel. On May 4, 2010, I issued an order granting in part and denying in part Complainant's third motion to compel. *See generally* ALJX 12. Specifically, I ordered Respondent to provide information to facilitate the location of certain personnel policies within Respondent's personnel materials. *Id.* at 10.

On May 24, 2010, Respondent filed a motion *in limine* seeking to limit the scope of Complainant's character evidence to a time period encompassed by a performance review alleged by Complainant to be an adverse action taken against him by Respondent. On May 27, 2010, Complainant filed his opposition to this motion. On May 28, 2010, I issued an order denying Respondent's motion *in limine*. ALJX 13 at 1.

On June 2, 2010, Complainant filed his own motion *in limine*, in this instance seeking to exclude from evidence a letter authored by Respondent in an attempt to mitigate the effects of alleged adverse actions taken against Complainant. On June 7, 2010, Respondent filed its response in opposition to Complainant's motion *in limine*. On June 14, 2010, I issued an order denying Complainant's motion *in limine*, finding the letter relevant to the issue of damages. *See* ALJX 14 at 1-2; ALJX 15 at 1.

On June 16, 2010, the U.S. Attorney's Office filed a motion to quash one of Complainant's subpoenas directed at an employee of the U.S. Forest Service. On June 18, 2010, the U.S. Attorney's Office amended this motion to include a subpoena sent to a second federal employee, this time of the U.S. Department of Agriculture. On June 18, 2010, Complainant filed his response to the U.S. Attorney's motion and amended motion, opposing the quashing of the

[4] Complainant renewed this request on December 19, 2009. ALJX 9 at 2.

[5] Respondent did not file any response to Complainant's second motion to compel until January 7, 2010, a day after I issued my order addressing this motion.

aforementioned two subpoenas. On June 18, 2010, I issued an order quashing the subpoenas directed at these two employees. *See generally* ALJX 17.

III. Summary of Decision

After consideration of the record in this case, I ultimately conclude Complainant is unable to demonstrate the existence of all of the elements of his whistleblower claim by a preponderance of the evidence as required by 29 C.F.R. § 24.109(a). I base this conclusion on two findings. First, Complainant has failed to show he suffered an adverse action for which he timely filed a complaint with OSHA. Second, Complainant has further failed to demonstrate his engaging in protected activity was in any way a motivating factor to any alleged adverse action he suffered at the hands of Respondent. Consequently, I dismiss Complainant's whistleblower complaint.

IV. Background

Below I provide a record of Complainant's work history with Respondent giving rise to Complainant's whistleblower complaint in this case. I begin with Complainant's professional background and a review of his work history prior to his appointment as Engineering Section Manager on July 1, 2007. Following this discussion, I move on to the testimony and evidence reflective of the opinions of various Respondent and non-Respondent employees who managed and interacted with Complainant during his tenure as Engineering Manager – including William Sinclair, Ken Wilde, Fred Duberow, Matthew Cassel, Kurt Baxter, Gregg Buxton, and various District Engineers. I also discuss the circumstances surrounding the various events constituting both the allegations of Complainant's whistleblower complaint as well as the nonretaliatory reasoning given by Respondent for its decision to remove Complainant as Engineering Section Manager and return him to his former position as Environmental Engineer III. Following this discussion, I move on to discuss the letter Complainant received upon being demoted; his performance evaluation associated with his time as Engineering Section Manager; and the testimony of his current supervisor, Ying-Ying Macauley. Finally, I address a letter issued to Complainant on August 19, 2009 as an attempt to mitigate certain alleged adverse acts as well as the testimony of Brooke Baker and that of Complainant himself.

Before moving on to the background of Complainant's work history, however, I here note my reasoning for omitting from the following background discussion the testimony of some witnesses called by Complainant in this case. At the hearing, Complainant, who appears in *pro se*, was afforded substantial leeway regarding the presentation of his case, which included the opportunity to call thirty witnesses (including himself) to offer testimony supporting his complaint against Respondent. After listening to and reviewing such testimony, however, I find a large amount of it to be not probative and either irrelevant or cumulative, and consequently I do not discuss it below before moving on to the analysis supporting my decision in this case. *See* 29 C.F.R. § 18.57(b) (noting Administrative Law Judge's decision "shall be supported by reliable and probative evidence"); *see also id.* § 18.402 (making inadmissible irrelevant evidence); *id.* § 18.403 (allowing exclusion of evidence when "probative value is substantially outweighed by . . . waste of time . . . or needless presentation of cumulative evidence").

For example, Complainant called a number of witnesses to testify to various environmental regulations, standards of professional conduct, and his reputation for top-notch technical work as a professional engineer, but who offered no testimony based on personal knowledge of the circumstances and events and actions giving rise to his whistleblower complaint. *See*, *e.g.*, TR at 52-65 (testimony of Kathleen E. Johnson, Source Protection Supervisor for Respondent), 65-72 (testimony of Hunter Finch, employee of the Utah Governor's office), 82-89 (testimony of Scott Adams, Fire Marshall with the Park City Fire District), 90-95 (testimony of Martha Gee, Assistant Manager at Mountain Regional Water Special Service District), 96-98 (testimony of James Goddard, Geologist for Respondent's Division of Water Rights), 98-103 (testimony of Eric Mills, Respondent's Deputy Director of the Division of Water Resources), 103-15 (testimony of Mike Lefler, Chief of Duchesne County Fire and Emergency Management), 115-33 (testimony of Larry Scanlan, Public Health Laboratory Employee), 301-07 (testimony of Carolyn Fritz, Records Specialist for Respondent's Division of Drinking Water), 526-34 (testimony of Lee Sporleder, Engineering Specialist for Respondent). Although considered, I do not discuss this testimony as I ultimately find other witnesses' testimony is sufficient to establish Complainant's technical expertise and gives merit to Complainant's allegations of having engaged in protected activity.

A. Complainant's Professional Background

Complainant is an employee of Respondent and works as an engineer within its Division of Drinking Water[6] ("DDW"). ALJX 20 at 2; TR at 502. Complainant holds a Ph.D. in engineering from the University of California, Berkeley, and is licensed as a mining engineer in Nevada and a professional engineer in Utah. TR at 740. Furthermore, Complainant holds other credentials in water and wastewater operations and engineering. *Id.* Complainant testified to having gained "significant regulatory experience" during the course of his career as an engineer, a statement not challenged by Respondent. *Id.* Complainant has worked as an engineer for approximately thirty-five years. *Id.*

B. Beginning of Complainant's Tenure with Respondent

Although Complainant did not testify to the exact date on which his employment with Respondent began, he did include numerous performance evaluations covering periods beginning on July 1, 1998. CX 1705-32. These performance evaluations indicate Complainant worked for Respondent from July 1, 1998 through June 30, 2006 in the capacity of Engineer III. CX 1713-32. Complainant received an overall rating of "successful" on each of his performance evaluations within this time period. CX 1713, 1715, 1717, 1719, 1721, 1723, 1725, 1727, 1729, 1731. These performance evaluations indicate Complainant performed a number of tasks consistently during this period, including conducting sanitary surveys and water treatment plant inspections, interacting with water system staff and employees, accompanying new employees on surveys, completing monthly reports, maintaining professional licenses, and understanding and applying Respondent's Operating Principles. CX 1705-32. These reviews contain multiple comments encouraging Complainant to complete certain work in a more timely or rapid fashion, *see* CX 1712, 1716, 1722, 1725, as well as comments requesting Complainant review and study

[6] Two major functions of DDW are the issuance of Operating Permits and the approval of plans for the construction or expansion of drinking water systems. Utah Admin. Code § R309-500-4; *see also* TR at 77.

"modern personnel management techniques" and work on building better relationships with coworkers. CX 1720, 1724. Michael Georgeson completed Complainant's reviews from July 1, 1998 through June 30, 2004, CX 1717-32, while Ken Wilde completed the remainder of such reviews. CX 1713-16.

Complainant's job title changed to "Environmental Engineer" from Engineer III for the period of July 1, 2006 through June 30, 2007. CX 1711-12. Mr. Wilde again completed the review of Complainant's work for this period. CX 1711. Complainant continued to perform sanitary surveys during this time, work he was complimented on by Mr. Wilde, who noted he often sent new engineers with Complainant on such surveys due to the exemplary way in which Complainant performed such work. *Id.* Mr. Wilde did note, however, that Complainant could continue to improve the efficiency of his work pace and better meet deadlines. CX 1712.

C. Complainant's Tenure as Engineering Section Manager

Sometime between May 30 and July 1, 2007, Respondent promoted Complainant to the position of Engineering Section Manager of DDW.[7] TR at 754-55. This promotion coincided with the dividing of the engineering section in 2007 and Mr. Wilde's simultaneous move to become manager of the Construction Assistance Section. *Id.* at 431. Prior to this division of responsibilities, Mr. Wilde had been Respondent's Engineering Section Manager. *Id.* Complainant's promotion occurred via a two-to-one vote of a three person panel. *Id.* at 864. Mr. Wilde was a participant on this panel and the lone vote against Complainant's appointment to the position of Engineering Section Manager. *Id.* at 866.

As part of this promotion, Complainant reviewed and signed a new performance plan detailing the responsibilities associated with the Engineering Section Manager position. *See generally* RX 2. This performance plan included a number of responsibilities, such as the development and adoption of rules, *id.* at 226-27, the development of a tracking scheme for rule exceptions, *id.* at 228, the enabling of web access for DDW clients and partners, *id.* at 229, evaluating the feasibility of a DDW newsletter, *id.* at 226, ensuring the quality of data entered by subordinate staff, *id.* at 230, managing the engineering section of DDW, *id.* at 222, implementing Respondent's Operating Principles, *id.*, keeping the Division Director informed of customer concerns, *id.*, and the provision of weekly intra-section reports. *Id.* Additionally, Complainant's promotion brought with it a twelve-month career mobility period, during which Respondent "reserve[d] the right to terminate or end this assignment, without prior notice, at anytime for any reason." RX 1 at 292. Were Complainant to complete this career mobility period, he was to be placed in the position of Engineering Section Manager of DDW permanently. *Id.*

[7] The record is unclear on exactly when Complainant's tenure as Engineering Section Manager began. For example, Complainant alleges in his posthearing brief that he moved to this position on May 30, 2007. *See* ALJX 20 at 1. This date coincides with the date on which Complainant signed Respondent's Career Mobility Agreement associated with such a position. RX 1 at 292. At the hearing, however, Complainant testified that he held the position of Engineering Section Manager of DDW "[b]etween . . . July 1, 2007 and October 25, 2007." TR at 754. Despite such conflicting evidence, no party asserts the date of the beginning of such tenure has any bearing on the merits of Complainant's whistleblower complaint. As Complainant's performance evaluation for July 1, 2006 through June 30, 2007 reflects his holding the position of Engineer III, however, CX 1711-12, I find July 1, 2007 constitutes the start date of Complainant's tenure as Engineering Section Manager.

2. Issuance and Revocation of Hollow Springs No. 1 Permit

Sometime around the beginning of Complainant's tenure as Engineering Section Manager of DDW, certain conflicts began to arise between Complainant and various coworkers within Respondent's organizational hierarchy. The first of these noted by Complainant involved the issuance of an Operating Permit by Mr. Wilde. *See* ALJX 20 at 1. This Operating Permit went to Sunrise Engineering for the Hollow Springs No. 1 Source Well and was signed by Mr. Wilde. CX 385-86. The letter accompanying the permit was dated June 7, 2007, and noted it was for a period of five years (after which time the well had to be discontinued as a source of drinking water) and that its issuance was contingent upon the submission of a drinking water protection plan within one year of the date of the letter. CX 385-86.

Two months later, on August 10, 2007, this permit was rescinded in a separate letter signed by Mr. Kenneth Bousfield, then Executive Secretary of DDW. CX 388-89. Mr. Bousfield's letter noted DDW had not received from Sunrise Engineering certain construction plans, and, consequently, the permit's issuance "was premature." CX 388. Complainant was listed as the contact for any questions arising from Mr. Bousfield's letter. CX 389. This letter also listed Complainant's initials below Mr. Bousfield's signature, *id.*, a trait indicating Complainant had prepared the letter for Mr. Bousfield's signature. *See* TR at 54-55, 436.

Complainant questioned[8] Mr. Wilde about the issuance and subsequent revocation of the July 7, 2007 permit at hearing. When asked by Complainant how such an error came about, Mr. Wilde stated is was due to the trust he placed in the engineers he supervised and refused to agree with Complainant's characterization of the July 7, 2007 letter as "indicative of the way [Mr. Wilde] ran the engineering section." TR at 437-38.

3. Testimony of William Sinclair Regarding Complainant's Tenure as Engineering Section Manager

William Sinclair also testified to certain conflicts that arose during Complainant's tenure as Engineering Section Manager. Mr. Sinclair served as a Deputy Director with Respondent from 2003 through 2009, *id.*, and was therefore in such a capacity during Complainant's tenure as Engineering Section Manager. Mr. Sinclair does not possess a degree in engineering, although he does hold a master's degree in environmental health and had been employed by Respondent for nearly thirty years at the time of the hearing. *Id.* at 947-48. In his capacity as Deputy Director, Mr. Sinclair supervised all of the District Engineers[9] employed by Respondent. TR at 947. During the hearing, Mr. Sinclair was questioned about a number of what

[8] A significant portion of the direct examination Complainant conducted of the twenty-nine witnesses he called consisted of leading questions or questions before which Complainant attempted to read long portions of exhibits into the record. While I recognize Complainant appeared in *pro se* and is not an attorney, he was admonished repeatedly during the proceedings that such questions carry with them inherent credibility issues and often make such testimony unusable in creating the record in this case. *See* TR at 219-20, 306, 366, 504-05, 546-47. Respondent's counsel, although engaging in such questioning to a lesser degree, also received such an admonition. *See id.* at 591-92, 804.

[9] The District Engineers are grade IV employees within Respondent's organizational structure. TR at 950. Complainant, by contrast was a grade III employee. *Id.* Mr. Sinclair noted the primary difference between grade III employees and grade IV employee was "their ability to make judgments [and] to work independently." *Id.*

Complainant characterized as allegations contained in two memoranda from Mr. Sinclair discussing incidents and conduct during Complainant's tenure as Engineering Section Manager. *See generally* RX 10, 11.[10]

In the first memorandum, dated October 12, 2007 ("October 12th Memorandum"), Mr. Sinclair outlined a number of items he discussed with Mr. Bousfield. First, Mr. Sinclair noted discussing with Mr. Wilde Complainant's having "circumvented" a District Engineer subordinate to Mr. Wilde charged with making certain county planning decisions. RX 10 at 245; *see* RX 9 at 244. Mr. Sinclair went on to note this behavior was emblematic of Complainant's failure to utilize and trust District Engineers, a management and work style he characterized as the opposite of that of Mr. Wilde when he was Engineering Section Manager. RX 9 at 244. In Mr. Sinclair's opinion, there existed an "expectation" that Complainant would have coordinated and communicated with the District Engineer having "jurisdiction" over an area that included such a local government body. TR at 958. Mr. Sinclair further noted in his memo that this episode had caused the District Engineer, Scott Hacking, later to request that his performance plan be modified so as to remove the responsibility of interacting with DDW employees. *Id.*; *see* RX 9 at 244.

Mr. Sinclair's memorandum also discussed other conduct attributable to Complainant, including his "burning bridges" with private engineers who interfaced with Respondent as well as Complainant's insistence on "gold standard" work. RX 10 at 245. Both of these comments were attributable within the memorandum to Mr. Wilde, however. *Id.*

With respect to Complainant's insistence on "gold standard" work, Mr. Sinclair further noted this caused increased frustration with Complainant by others employed by Respondent as well as placed increased pressure on deadlines and "time frames." *Id.* According to Mr. Sinclair, such a standard could also impose additional costs on operators. TR at 978. Mr. Sinclair characterized Complainant as someone who engaged in "micro-managing everything" when it came to his performance of the Engineering Section Manager responsibilities. RX 10 at 245. Mr. Sinclair later went on to define micro-managing as "being heavily involved in your position beyond what is really required of your position." TR at 979. When asked for examples of how Complainant engaged in such micro-management, Mr. Sinclair noted Complainant's unnecessarily reviewing correspondence and "making decisions on interpretations." *Id.*

At the hearing, Mr. Sinclair testified about a number of these comments. With respect to the meeting with Mr. Wilde discussed in the October 12th Memorandum, Mr. Sinclair admitted Mr. Wilde, in making his comments about Complainant, did not in any way supervise Complainant. TR at 370. Mr. Sinclair further noted, however, that it was not uncommon for such conversations to occur, although he was "hesitant" to give Complainant an example of another such conversation because employees sometimes did not want managers to be made

[10] Complainant also submitted Mr. Sinclair's memoranda as a portion of his exhibits; however, these copies contain highlighting and notations made by Complainant which, in essence, amount to argument. *See* CX 425, 427, 429, 431. For example, Complainant placed the numbers one through twenty-seven on the October 12th Memorandum along with a caption reading, "27 allegations against Onysko by Sinclair on October 12, 2007." CX 425. There is no indication Mr. Sinclair agreed with this characterization regarding whether his comments constitute "allegations," nor did Respondent stipulate to such. Given such circumstances, I therefore refer to Respondent's copies of exhibits, which do not contain such notations.

aware of such dialogue. *Id.* at 370-71. Complainant also questioned Mr. Sinclair about what he meant by a "gold standard." *Id.* at 372. Mr. Sinclair provided an example in the field of waste management where Respondent invoked a higher-than-minimum standard with respect to incinerator capacity. *Id.* Mr. Sinclair could not, however, provide a similar example with respect to drinking water projects. *Id.* at 373. Mr. Sinclair further noted the observation regarding Complainant's "micro-managing" contained within the memorandum was attributable to Mr. Wilde. *Id.* at 374.

In the second memorandum, dated October 15, 2007 ("October 15th Memorandum"), Mr. Sinclair detailed a second discussion with Mr. Bousfield, again about Complainant. *See generally* RX 11. Mr. Sinclair stated this memorandum was prepared for his own purposes and memorialized the details of a conversation he had with Mr. Bousfield that same day. TR at 968. Mr. Sinclair did, however, provide Mr. Bousfield with a copy of the memorandum. *Id.* As with the October 12th Memorandum, the October 15th Memorandum again addressed the issues of Complainant "burning bridges" with consultants, Complainant's communications with members of the county planning commission, further necessitation of the "gold standard," and Mr. Hacking's request that he no longer have responsibilities associated with DDW. RX 11 at 247-48. The October 15th Memorandum, however, provided further details about discussion between Mr. Bousfield and Mr. Sinclair of "a serious process issue" associated with Complainant's work as Engineering Section Manager. *Id.* Mr. Sinclair expanded on this allegation in the memorandum, noting the issue rooted in the length of time it took Complainant to review plans as well as the existence of "several instances where complaints have been [made] that [Complainant] is 'too' [sic] focused on his interpretation of the rules." *Id.* On the second page of the October 15th Memorandum, Mr. Sinclair presented a number of "options" for addressing the totality of Complainant's behavior as Engineering Section Manager. *Id.* at 248. These options included one scenario in which Complainant would be presented with the issues discussed by Mr. Wilde and Mr. Sinclair and allowed to improve on such behavior with an understanding that failure to do so could result in demotion. *Id.* In three additional scenarios, Complainant would be placed back in his former nonmanagerial engineering position. *Id.* Mr. Sinclair stated he did not reveal to Mr. Bousfield which, if any, of these options he favored should one be implemented. TR at 967.

Mr. Sinclair also testified at the hearing about the comments contained within the October 15th Memorandum. When asked about the "process issue" involving the slow approval of plans, Mr. Sinclair could not recall specific instances of what caused this impression. *Id.* at 379. However, he did recall communications from District Engineers regarding Complainant's work coming via a variety of channels, including email, phone conversations, and face-to-face meetings with District Engineers. *Id.* at 948. Mr. Sinclair did concede, however, that the District Engineers spent only a portion of their time – approximately forty percent – dealing with issues in the field of drinking water, in which Complainant held the greatest degree of expertise. *Id.* at 951. Complainant also questioned Mr. Sinclair about his comment in the October 15th Memorandum in which he reiterated Mr. Hacking's request to have responsibilities of interfacing with DDW employees removed from his performance plan. *Id.* at 382. Mr. Sinclair agreed such a statement was not meant to be taken literally, but that it did indicate frustration on Mr. Hacking's part related to Complainant's comments to the county planning commission. RX 11 at 247; TR at 382. Mr. Sinclair agreed with Complainant that it was "possible" Complainant

may not have been aware he was speaking with a county planning commissioner if he had fielded such a call over the telephone that had led to the dispute with Mr. Hacking; however, Mr. Sinclair further stated it was the "responsibility" of an employee taking such a call to "try to get as much information as possible from whoever is calling." TR at 383.

Mr. Sinclair also elaborated on his comments in the October 15th Memorandum regarding Complainant's limited communication with staff and District Engineers as well as his penchant for micro-managing. With respect to Complainant's communication skills, Mr. Sinclair noted some District Engineers who he supervised had expressed to him that they "would have liked more communication" with Complainant. *Id.* at 384. Mr. Sinclair could not recall, however, an instance where "staff" expressed such sentiments. *Id.* at 385. When asked about micro-managing, Mr. Sinclair agreed with Complainant's characterization of this as a "negative term." *Id.* at 385-86. In expounding on Complainant's engaging in such behavior, Mr. Sinclair recalled Complainant giving heightened scrutiny to the approval letters prepared by District Engineers, in some cases correcting grammatical mistakes and citing rules in instances where Mr. Sinclair thought such details were unnecessary. *Id.* at 386. While Mr. Sinclair indicated such heightened attention was "not all bad," he noted it was in many instances unnecessary in view of the entire process of plan approval. *Id.* at 386-87.

Mr. Sinclair also discussed the "fight" he noted in the October 15th Memorandum "between managers regarding a rulemaking . . . at a Drinking Water Board meeting." *See* RX 11 at 247. When questioned by Complainant, Mr. Sinclair agreed this was not a physical altercation but instead a "heated dispute" between Complainant and Mr. Wilde. TR at 381. Mr. Sinclair further noted, when questioned by Complainant, that he had included this incident in his memorandum because he wanted to discuss it with Mr. Bousfield. *Id.* Mr. Sinclair elaborated on this incident when questioned by Respondent's counsel, noting Mr. Bousfield later expressed to Mr. Sinclair that such a dispute should not have occurred before the Drinking Water Board, but that instead Mr. Wilde and Complainant should have presented a "unified position." *Id.* at 975.

Mr. Sinclair further testified to the details of emails received by numerous District Engineers – including Mr. Hacking, John Chartier, Randy Taylor, and Roger Foisy[11] – commenting on Complainant's performance as Engineering Section Manager. Mr. Sinclair supervised these District Engineers. *Id.* at 946-47. Mr. Sinclair agreed he had forwarded to Mr. Bousfield on September 14, 2007 an email from Mr. Foisy. *See id.* at 954; RX 4 at 241. In the email, Mr. Foisy noted he would then have been willing to "give [Mr. Sinclair] an ear full" about Complainant's performance as Engineering Section Manager. RX 4 at 241. Mr. Sinclair recalled, at the time this email was sent, that Mr. Foisy had concerns "related . . . to timing [and] process" issues of Complainant's performance as Engineering Section Manager. TR at 954-55. Mr. Sinclair also commented on a chain email from Mr. Taylor, Mr. Chartier, and Mr. Hacking. This email chain occurred on October 5, 2007, and began with Mr. Taylor posing the question, "Do you guys spend more time dealing with [Complainant] than reviewing projects?" RX 7 at 242. Mr. Chartier next responded, "That's the hardest part of the review, isn't it?," to which Mr.

[11] At the time of hearing, Mr. Hacking was the District Engineer in the Uintah Basin Area of Eastern Utah. TR at 947. Mr. Chartier served as District Engineer for the "Cedar City area," which consisted of Iron and Beaver Counties. *Id.* Mr. Taylor served as the District Engineer of "the St. George area," and Mr. Foisy was the District Engineer for "the central part of the state." *Id.*

Hacking responded "ditto" in forwarding the email chain on to Mr. Sinclair. *Id.* When asked about his understanding of these communications, Mr. Sinclair stated he felt they were representative of these District Engineers' "difficulties . . . in terms of getting projects accomplished, going through" Complainant. TR at 956. Mr. Foisy also responded to Mr. Taylor's email in the chain by labeling Complainant as a "micro-manager" and comparing Complainant's management style to that of another of Respondent's employees, Kiran Bhayani. RX 9 at 243; TR at 957. Mr. Sinclair further testified to phone and face-to-face conversations with "all the district engineers." TR at 963. Although he could not recall the details of specific conversations, he did state that the conversations centered generally on "issues related to communication, collaboration, [and] micro-management" on the part of Complainant. *Id.* at 963-64. Mr. Sinclair concluded by stating his belief that these issues on Complainant's part inhibited the District Engineers' ability to do their own jobs efficiently, specifically their ability "to get operating permits that needed to be accomplished out the door." *Id.* at 964.

4. Testimony of Ken Wilde Regarding Complainant's Tenure as Engineering Section Manager

Mr. Wilde also testified about Complainant's tenure as Engineering Section Manager. Respondent has employed Mr. Wilde since 1999, and he currently serves as the manager of its Construction Assistance Section. *Id.* at 431. Prior to Complainant's tenure, Mr. Wilde served as Engineering Section Manager from 2004 through 2007. *Id.* However, in 2007 a new Section – Construction Assistance – was carved from the Engineering Section, and Mr. Wilde was given the choice to either manager the new Section or remain Manager of the Engineering Section. *Id.* at 431-32. Mr. Wilde at that point chose to become Manager of the Construction Assistance Section. *Id.* Mr. Wilde testified he has experience designing water treatment facilities from projects undertaken in Arizona, Montana, Utah, Wyoming, and the Navajo Nation and possesses engineering licenses in Montana and Utah. *Id.* at 432-33.

Mr. Wilde's testimony began by his responding to Complainant's questions about issuance of the Hollow Springs No. 1 Permit. Mr. Wilde agreed he issued this permit, which he further agreed was prepared by Mr. Taylor. *Id.* at 435-36; CX 385-86. Mr. Wilde agreed the permit was later revoked due to the permitee's failure to comply with a certain groundwater rule. TR at 437-38; CX 387. Mr. Wilde conceded failure to recognize this instance of noncompliance with a groundwater rule constituted grounds not to have issued the permit initially, although he placed blame for any such oversight on Mr. Taylor. TR at 438. When asked if any of this blame was his due to his signature appearing on the permit itself, Mr. Wilde stated he did not believe he was to blame as he "has a certain amount of trust" for the District Engineers he supervises. *Id.* at 438. When pressed further as to whether such an oversight was "indicative of the way [he] ran the Engineering Section" from 2004 to 2007, Mr. Wilde disagreed with such characterization, noting such an oversight was "an exception" to his customary work during such time. *Id.* at 438-39.

Complainant next questioned Mr. Wilde about written comments he made in association with the issuance of a temporary Operating Permit. *See* CX 360-61. In this instance, Mr. Wilde noted Complainant was "to be written[ ]up . . . because [Complainant] had taken over five months to respond to an Operating Permit request that could have been done within a couple of

days," TR at 440, behavior Mr. Wilde characterized as "embarrassing." CX 361. Mr. Wilde refused to agree with Complainant's characterization that such delay in this case was the result of the client's failure to "meet our minimum requirements," instead insisting Complainant's response was "untimely" and his handling of the situation was inappropriate under the circumstances. TR at 443. Indeed, Mr. Wilde had earlier – as Complainant's superior – raised the issue of Complainant's failure to review plans in a timely fashion. CX 357-58.[12]

Mr. Wilde also gave examples of ways in which Complainant engaged in "burning bridges" with Respondent's clients. According to Mr. Wilde, Complainant had a derogatory nickname for at least one of Respondent's clients, and other clients expressed sentiments causing Mr. Wilde to believe they felt Complainant "didn't think they were very good engineers." TR at 450-51. Complainant pressed Mr. Wilde for "specific language" regarding such comments, specifically whether these two clients had recalled Complainant stating verbatim whether they "were not good engineers," but Mr. Wilde could not recall this exact, word-for-word phrasing. *Id.* Mr. Wilde also testified to an instance where Complainant asked a client to format well-drilling specifications in his own personal format – which the client stated would cost it extra money – as opposed to using the format "that follows [Respondent's] rules." *Id.* at 486-87.

Mr. Wilde testified about his own tenure as Complainant's manager. At one point during this time, Mr. Wilde had nearly given Complainant an "unsuccessful" rating with respect to certain aspects of Complainant's job performance. *Id.* at 452. Mr. Wilde noted he prepared an initial draft of Complainant's performance plan in which he originally gave Complainant a rating of "unsuccessful" in one of six categories for the period of July 1, 2006 through June 30, 2007. *Id.* at 458-59; *see* CX 79-81.[13] Mr. Wilde testified he later changed this "unsuccessful" rating to "successful" somewhat at the behest of Mr. Bousfield, although Mr. Wilde further noted he "had the choice" and could have kept the rating at "unsuccessful" despite Mr. Bousfield's request. TR at 459.

Complainant next questioned Mr. Wilde about a memorandum dated October 19, 2007 ("October 19th Memorandum") that Mr. Wilde prepared about Complainant and then sent to Mr. Bousfield.[14] *See* CX 471-73. Mr. Wilde admitted he prepared the October 19th Memorandum during his working hours for Respondent, which began with Mr. Wilde noting, "I am deeply concerned about the problems [Complainant] is causing in the Division, with our relationship with our partners and customers, and with my Section." TR 461; CX 471. Mr. Wilde raised a number of loosely grouped "items" in the October 19th Memorandum, the first of which was Complainant's allegedly discussing with one of Mr. Wilde's employees "a personnel matter being considered by management." *Id.* Mr. Wilde went on to note at trial that this matter concerned the potential transfer of one of his employees to Complainant's section, a matter that had been discussed between Complainant, Mr. Wilde, and Mr. Bousfield but had not been

[12] Complainant also questioned Mr. Wilde about the current whereabouts of this letter of warning, but Mr. Wilde could not recall if it had been revoked by another employee of Respondent's or was still contained in Complainant's personnel file. TR at 477.

[13] In questioning Mr. Wilde, Complainant referred to this period as "the year ending July 1st, 2007." TR at 458. All of Complainant's full-year performance evaluations included in the record, however, end on June 30th of each year. *See, e.g.*, CX 1698, 1705, 1707, 1711, 1713, 1715, 1717, 1719, 1721, 1723, 1725.

[14] Complainant, in questioning Mr. Wilde, characterized this memorandum as containing "114 allegations." TR at 460. Mr. Wilde did not explicitly agree with such characterization, however. *See id.*

revealed to that particular employee. *Id.*; TR at 462. Mr. Wilde testified Complainant had discussed this matter with the employee without his knowledge or approval, an action Mr. Wilde believed was not Complainant's role to undertake. TR at 462-63.

Mr. Wilde further noted in the October 19th Memorandum Complainant's "do[ing] some good things" but also "driving wedges between the sections" during his time as Engineering Section Manager. TR at 463-64; *see* CX 471. When asked to give an example of a "good thing" Complainant did while Engineering Section Manager, Mr. Wilde noted Complainant was "trying to get a bigger awareness of source protection and get the engineers to cooperate more with the . . . section." TR at 463. Complainant also asked Mr. Wilde to provide examples of him "driving a wedge" between their respective sections. *Id.* at 464. In response to this request, Mr. Wilde noted instances of Complainant making requests of the employees Mr. Wilde supervised to correct grammatical mistakes in their work as well as an instance where Complainant requested one of Mr. Wilde's employees, Michael Grange, speak to Mr. Wilde about "something . . . that [Mr. Wilde] should give [Complainant] the authority to do." *Id.*

With respect to Complainant's communications with Mr. Grange, Mr. Wilde also testified to the circumstances surrounding an email chain occurring on September 6, 2007 between Complainant, Mr. Grange, and Karin Tatum, a grade II Engineer in the Construction Assistance Section.[15] CX 34; *see* TR at 404-05. This email chain began with a message from Mr. Grange to Complainant. CX 34. In the message, Mr. Grange informed Complainant he had left in Complainant's mailbox a loan application requiring a "Capacity Assessment" for a project. *Id.* Mr. Grange concluded the email by requesting Complainant provide "the results of your analysis in as timely a manner as possible," *id.*, and did not himself request to be shown how to conduct such an assessment. Complainant replied to Mr. Grange's request approximately a half hour later, stating, "Let me know if any one [sic] wants to learn how I do these. I'll be happy to show 'n tell." *Id.* In this response, Complainant copied Julie Cobleigh and Dev Nagendra in addition to Mr. Grange and Ms. Tatum. *Id.* Approximately an hour-and-a-half later, Ms. Tatum responded to Complainant. *Id.* In addition to the recipients of Complainant's response as well as Complainant himself, Ms. Tatum also included Mr. Wilde and Mr. Bousfield in her response. In her response, she stated,

> Ken Wilde and I have already discussed who will learn Capacity Assessments. That person will be Michael Grange. In the future, will you please check with Ken Wilde to see who has been assigned specific programs before sending out a general email to people in our section. [sic] We have a lot of responsibility and we are working hard to spread that out equally amongst all of us while keeping peoples [sic] schedules and talents in mind.

Mr. Wilde expressed the opinion during the hearing that the above communication was an example of Complainant's "interference" with the Construction Assistance Section. TR at 468. Mr. Wilde expressed such an opinion in light of DDW Operating Principles citied by Complainant encouraging teamwork, collaboration, and the familiarization of every DDW employee with "every aspect of the Division's responsibilities." *Id.* at 467-68; *see* CX 186. Mr.

[15] At the time of hearing, Ms. Tatum worked for the U.S. Environmental Protection Agency and was consequently no longer employed by Respondent. TR at 819.

Wilde further noted the "real issue" regarding this exchange was Complainant's failure to first seek his permission before offering such assistance to Mr. Grange. TR at 488.

Complainant also questioned Mr. Wilde about language in the October 19th Memorandum related to Complainant's delegation of work to subordinates and his inability to make eye contact with Mr. Wilde during conversations. Regarding the delegation of work, Mr. Wilde expressed at hearing the opinion that Complainant failed to delegate work efficiently to his subordinate engineers during his time as Engineering Section Manager, stating Complainant could have given such engineers "a lot more work." TR at 469-70. Regarding eye contact, Mr. Wilde expressed the opinion this was an issue of "character" and indicative of the truthfulness of a person's statements. *Id.* at 471. He stated Complainant "rarely" looked him in the eye during their concurrent tenure as managers. *Id.*

Mr. Wilde also expressed his opinion as to whether any of his comments to others about Complainant's tenure as Engineering Section Manager violated certain rules of professional conduct applicable to engineers. Mr. Wilde agreed with Complainant's statement that such rules existed prohibiting him, as a licensed engineer, from "attempt[ing] to injure, maliciously or falsely, directly or indirectly, the professional reputation, prospects, practice, or employment [or] indiscriminately criticiz[ing]" the work of a fellow engineer such as Complainant. *Id.* at 475; *see* CX 340. When asked by Complainant, however, if the characterization of Complainant's conduct contained in the October 19th Memorandum violated such an edict, Mr. Wilde expressed the opinion that such comments did not run afoul of such rules. TR at 475. When pressed by Complainant for his rationale for such a view, Mr. Wilde stated his comments were all true and further justified given what Mr. Wilde again characterized as Complainant's "interfering" with the Construction Assistance Section during his tenure as Engineering Section Manager. *Id.* at 475-76.[16] Complainant concluded his questioning of Mr. Wilde by asking him if he and Complainant "had a stormy relationship" during their tenure together. *Id.* at 482. Mr. Wilde agreed with this characterization, *id.*, although he characterized Complainant's technical and field work as "excellent." *Id.* at 488-89.

5. Testimony of Ken Bousfield Regarding Complainant's Tenure as Engineering Section Manager

Mr. Bousfield also testified regarding Complainant's tenure as Engineering Section Manager. At the time of the hearing, Mr. Bousfield served as the Director of DDW, a position

[16] Complainant also questioned Mr. Wilde about a number of unrelated incidents occurring before Complainant's tenure as Engineering Section Manager. These included Mr. Wilde making disparaging comments related to Complainant's attending an anti-war rally in Salt Lake City, TR at 478-89, and whether or not Mr. Wilde "overly insinuated" himself into Complainant's personal life during the time he was Complainant's supervisor prior to Complainant's tenure as Engineering Section Manager. *Id.* at 479-80. Mr. Wilde denied engaging in this sort of conduct. *Id.* at 478-80. When asked about an incident where Mr. Wilde asked Complainant not to park his car in a certain area, Mr. Wilde noted he had made such request at the behest of others. *Id.* at 479. Complainant also questioned Mr. Wilde about whether he had once called the location of a conference Complainant was to attend as a speaker to see if Complainant had arrived for his speech on time. *Id.* at 480-81. Mr. Wilde agreed to having called such a conference to "see if [Complainant was] there yet," *id.* at 481-82, but he disagreed with Complainant's characterization that such as call was for the purpose of finding "someone that would assert that [Complainant] was late for his speaking engagement." *Id.* at 481.

he had held since February of 2007. *Id.* at 626. Prior to this time, Mr. Bousfield served as Respondent's Compliance Section Manager from 1985 to 2007, and prior to this time served as a Plan Review Engineer from 1976 to 1985. *Id.* at 626, 634. During his time as a Plan Review Engineer, Mr. Bousfield testified he gained design review experience equal to or greater than that of his contemporaries by reviewing "hundreds of plans." *Id.* at 635-36. Mr. Bousfield testified about a number of events and circumstances during Complainant's tenure as Engineering Section Manager, some of which were included in the October 25, 2007 letter ("Demotion Letter"). Mr. Bousfield began his testimony, however, by agreeing with the assessment of other of Respondent's employees that Complainant generally possessed excellent technical skills and knowledge with respect to the work he performed for Respondent. *Id*. at 632-33.

The first project Mr. Bousfield testified about with respect to Complainant's tenure as Engineering Section Manager was the Pheasant Meadows Phase I Project ("Pheasant Meadows Project"). *See* CX 366-67. Mr. Bousfield agreed this project involved "after-the-fact plan approval of a subdivision that had already been built without Division approval" and that he signed a letter informing the client associated with this project of its failure to meet certain minimum technical requirements. TR at 638; *see* CX 366-67. Mr. Bousfield agreed with Complainant's characterization that this project involved 'a grossly undersized [four-inch] water line" that fed fire hydrants, and that such a sizing issue could be problematic in providing water to such hydrants. TR at 638-39. Mr. Bousfield also agreed with Complainant's characterization that this particular project involved the seeking of approval by a client with whom Mr. Bousfield had known for some time and may have been somewhat close with due to past "dealings on a number of issues." *Id.* at 639. Mr. Bousfield further recalled discussions with Complainant regarding this particular approval in which Complainant stated he could not find a way to approve such a project given the technical details presented to him. *Id.* at 640. The letter prepared by Complainant and signed by Mr. Bousfield on July 12, 2007 reflects this conclusion in that it informs the client that "the only solution" would be to upsize the aforementioned water line in order to receive approval for its use. CX 366-67. Mr. Bousfield further agreed with Complainant's assessment that any problems associated with this project involved the client's inability to meet minimum technical requirements and not Complainant's inter-personal or management skills. TR at 640.

Complainant next questioned Mr. Bousfield about Complainant's involvement in the issuance of an Operating Permit for the Slate Canyon Spring Boxes and Transmission Line Project ("Slate Canyon Project"). *See generally* CX 520-22. In this instance, Mr. Bousfield signed a letter dated October 29, 2007 and prepared by Complainant granting an Operating Permit for such a project but that also contained information regarding potential problems. The first problem noted in this letter was the client's substitution of air vents for air valves in certain areas of a pipeline, which Complainant discovered in an inspection of this project on October 4, 2007. CX 520-21. The second issue discovered by Complainant during this same visit was the client's use of certain non-approved glues and sealants on spring box lids. CX 521. Mr. Bousfield agreed Complainant had brought both of these issues to his attention prior to his signing the approval letter. TR at 641. The letter contained language requesting the client address these issues, but ultimately also granted the requested Operating Permit. CX 520-22.

Mr. Bousfield next testified about funding from the U.S. Environmental Protection Agency for arsenic removal equipment for a project involving the Utah public water systems. TR at 642. Correspondence involving Complainant and regarding this project occurred in September and of October 2007. *See* CX 433-67. Mr. Bousfield stated he suggested the owner of this particular water system apply for such funding. TR at 642. Mr. Bousfield further recalled the existence of email correspondence between Don Lore, a grade-III Environmental Scientist employed by Respondent, and Complainant in which Complainant expressed concerns about the scope of this project, specifically that it would involve not only the removal of arsenic but also of iron. *Id.* at 643-44. Mr. Bousfield did not agree with Complainant's characterization of Mr. Lore's comments about Complainant's opinion in this instance as "negative," however, and instead chose to label their exchange as a "discussion back and forth" between two employees. *Id.* at 644.

According to Mr. Bousfield, he eventually intervened in this project in an email in which he told Complainant he "want[ed] this project to be approved and built." *Id.* at 644-45; CX 433. He noted further his involvement in the project was "triggered" by a call he received from Tom Sorg of the U.S. Environmental Protection Agency. *Id.* at 644. According to Mr. Bousfield, Mr. Sorg informed him that to address the issues being raised by Complainant would mean loss of the funding being offered by the U.S. Environmental Protection Agency in this instance. *Id.* at 644-45. Mr. Bousfield agreed that Complainant's professional assessment of this project "was not faulty," but that he also trusted Mr. Sorg's assessment that the proposed removal system "had a high probability of being effective." *Id.* at 645. When asked by Complainant why he would not defer to his own employee's judgment on such an issue, especially when such an employee, like Complainant, possessed a Ph.D. in chemistry, Mr. Bousfield noted Mr. Sorg also possessed a Ph.D., and that the his decision was ultimately driven by it being "a financial and timing issue." *Id.* at 645-46. When pressed by Complainant as to where there was evidence in written communications that the possibility of not being awarded funding existed for this particular project, Mr. Bousfield noted no such evidence existed but that he had been told by Mr. Sorg that such a possibility loomed. *Id.* at 647.

Complainant also questioned Mr. Bousfield about the circumstances of and information contained in the Demotion Letter. Complainant first asked Mr. Bousfield about two letters Complainant gave him to sign advising two different clients look into possible U.S. Department of Agriculture funding. *Id.* at 648; CX 499. Mr. Bousfield agreed this incident involved certain areas of Complainant's technical competence, which he again stated he did not challenge or doubt, but that this issue also raised concerns about Complainant's customer service skills. *Id.* at 649-50. Mr. Bousfield expanded on these non-technical concerns in the Demotion Letter, where he noted Complainant's opinion that these two clients seeking the aforementioned funding should have first been given to Mr. Wilde, not submitted directly to Mr. Bousfield. CX 499.[17]

[17] Complainant next questioned Mr. Bousfield extensively about the issuance by Respondent of exceptions to certain of its rules. *See generally* TR at 651-662. This testimony consisted largely of Complainant making lengthy assertions with which Mr. Bousfield agreed, including the broad grouping of these exceptions into two categories. *See id.* at 656. When asked about a specific instance involving Mr. Foisy's procuring of such an exception, however, Mr. Bousfield had no recollection of this specific request noted by Complainant. *See id.* at 657-60. Consequently, I find such testimony constitutes little more that Complainant's own assertions – not that of the witness – and do not consider such testimony in my analysis. I do note, however, that Utah does allow the granting

When asked by Complainant why Mr. Bousfield "would have accepted [Mr. Wilde's] word for a project that was delegated to" Complainant, Mr. Bousfield noted Mr. Wilde's position, as Division of Facilities and Construction Management ("DFCM") Section Manager, involved "administering the federal and state loan programs." TR at 679. Mr. Bousfield further stated he believed Mr. Wilde was the correct person to render an opinion regarding such funding requests even though the instance referenced in the Demotion Letter dealt with U.S. Department of Agriculture funding – not U.S. Environmental Protection Agency funding, with which Mr. Wilde had greater familiarity. *Id.* at 680-81. Mr. Wilde ultimately concluded, after a "cursory review," that the two applicants identified for such funding by Complainant were ineligible. CX 499. Mr. Bousfield did concede, however, that given facts that had later come to light, Mr. Wilde's initial determination of these applicants' ineligibility was erroneous. TR at 685.

Complainant next questioned Mr. Bousfield about the claim contained within the Demotion Letter that Complainant had refused to meet with Kurt Baxter,[18] a Project Manager in Respondent's DFCM, regarding the aforementioned Slate Canyon Project. *Id.* at 664; CX 484. In the letter, Mr. Bousfield noted his concern that Complainant had apparently refused to participate in such a meeting. Mr. Bousfield cited several of Respondent's Operating Principles that encouraged collaboration and cooperation and concluded, "If these principles had been followed with the consultant and DFCM staff, I doubt [Mr. Baxter] would have left the message that he did." CX 484-85. Complainant's failure to meet with Mr. Baxter stemmed from a series of emails cited by Complainant in his questioning of Mr. Bousfield. *See, e.g.*, TR at 665-72. Although Mr. Bousfield had not seen many of these emails prior to the hearing, *see, e.g.*, *id.* at 666-70, he was aware such correspondence did occur. *Id.* at 665. Complainant sent the first of these emails on October 4, 2007, when he informed Mr. Baxter of a number of deficiencies related to the Slate Canyon Project. CX 136. On October 10, 2007, Mr. Baxter subsequently asked Matthew Cassel, the consultant affiliated with the Slate Canyon Project, to "deal directly with [Complainant]" regarding these issues, something Mr. Cassel took upon himself by sending an email to Complainant shortly thereafter in which he stated he was "trying to help [Mr.] Baxter provide you with the information you need." CX 137. Mr. Bousfield recalled there were "several issues" impeding completion of this project when these emails were exchanged. TR at 666. Mr. Bousfield further noted it was important for Respondent to develop positive and healthy relationship with outside consultants such as Mr. Cassel. *Id.* at 705. On October 23, 2007, Mr. Baxter emailed Mr. Cassel and noted his desire to "get this wrapped up before we lose access to the springs" as well as the inability to operate the water line associated with this project was costing the client approximately $6,000 per day. CX 142. Mr. Bousfield stated he had no knowledge of whether this cost estimate was correct. TR at 668.

That same day, Mr. Cassel emailed Complainant to request a meeting to "hash through the issues with the pipeline" associated with the Slate Canyon Project, asking also if Mr. Bousfield would be available for such a meeting. CX 142. This began a flurry of communications between Complainant and Mr. Cassel on October 23, 2007. Complainant next responded by stating, in part, "What exactly do we need to work out?" CX 142-43.

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of such exceptions under its Administrative Code "if it can be shown that the granting of such an exception will not jeopardize the public health." *See* Utah Admin. Code § R309-500-4(1).

[18] Complainant at some point filed a criminal complaint against Mr. Baxter, which was not pursued due to the unlikelihood of success. *See* CX 403; *infra* Parts IV.C.8, IV.J.

Complainant went on to reiterate that Mr. Cassel and his client "should submit corrected as-built drawings and . . . should re-do the spring box gaskets and seal the spring box seams" associated with the Slate Canyon Project. CX 143. Complainant also noted he was "reluctant" to involve Mr. Bousfield in such a meeting at that point. *Id.* Complainant eventually agreed to a meeting, but sent two additional emails to Mr. Cassel attempting to seek further specifics on what would be discussed. CX 143-44. Mr. Cassel responded to the first of these email somewhat vaguely, noting that he wanted to make sure he and Complainant were "on the same page." CX 144. In the second email, Mr. Cassel noted more specifically that "the [Slate Canyon Project] system was constructed in accordance with the Division-approved plans and we need to figure out a solution so the State Hospital can start receiving their water." CX 145.

On the October 24, 2007, Complainant responded to Mr. Cassel's final email of the previous day. *See generally* CX 147. In this email, Complainant, for the first time, provided specific details regarding the two problems with the Slate Canyon Project. First, Complainant noted there existed a discrepancy between the construction plans for the Slate Canyon Project's water line – which called for six air release valves and three air vents – and the actual construction of the line – which revealed, during Complainant's inspection of it, only one air release valve. *Id.* Complainant noted further, however, that this discrepancy was not holding up the issuance of an Operating Permit so long as Mr. Cassel could provide "an accurate representation of the filed construction in the as-builts." *Id.* Second, Complainant notified Mr. Cassel that he had not been provided with documentation demonstrating "the Sykaflex sealant and the mastic tape used in the spring boxes" were approved for contact with drinking water. *Id.* Complainant noted it was this second point that was holding up the issuance of an Operating Permit. *Id.* Complainant concluded by reiterating he had "first raised these issues on . . . October 4, 2007," *id.*, although he did not reference another instance where he provided the same amount of detail as in the October 24, 2007 email. Complainant again stated he was available for a meeting then "tentatively scheduled" for October 31, 2007, but hoped the above issues could be resolved prior to such a meeting. *Id.* Complainant ultimately prepared an Operating Permit letter for the Slate Canyon Project that Mr. Bousfield signed on October 29, 2007. CX 520-22. Mr. Bousfield would not agree with Complainant's characterization that Mr. Sinclair ultimately "ordered" this to occur. TR at 723, 826. Mr. Bousfield further asserted the technical issues discovered by Complainant and associated with the Slate Canyon Project played no role in Complainant's demotion. *Id.* at 826. Instead, Mr. Bousfield testified it was solely Complainant's failure to respond in a timely fashion to Mr. Baxter's inquiry that contributed to his decision to remove Complainant from his position as Engineering Section Manager. *Id.* at 827. Mr. Bousfield further noted of the five managers who were subordinate to him as Director of DDW, none had generated complaints anywhere "near comparable" to those received involving Complainant.[19] *Id.* at 827.

Complainant next questioned Mr. Bousfield about the second customer service issue in the Demotion Letter. As described in the letter, Fred Duberow, a consultant, expressed displeasure that Complainant, as of October 23, 2007, had "not begun the plan review process" for plans submitted by Mr. Duberow to Complainant on July 30, 2007. CX 485. With respect to this comment, Complainant first questioned Mr. Bousfield as to whether he was aware of at least

[19] Mr. Bousfield stated Mr. Wilde had generated the second-most complaints of this group of managers, although such complaints came almost "exclusively" from Complainant. TR at 828.

one other instance where Mr. Duberow had failed to submit sufficient information on a project. TR at 673; *see* CX 934. Mr. Bousfield was familiar with this occurrence. TR at 673. Complainant did not explain, however, how Mr. Duberow's failure to provide such documentation in one instance affected his own ability in another instance to begin reviewing plans submitted by Mr. Duberow where no such documentation was cited as lacking. Complainant next asked Mr. Bousfield if he was aware of another instance where Complainant had filed a professional engineering complaint against Mr. Duberow. *Id.* at 676. In this instance, the State of Utah Department of Commerce's Division of Occupational and Professional Licensing ("DOPL") issued a "Letter of Concern" on September 2, 2009 in response to Complainant's complaint. CX 944-45. The Letter of Concern noted the DOPL had "declined . . . to investigate the matter any further or to seek formal action" against Mr. Duberow, although it did issue the following caveat to Mr. Duberow:

> It was brought to our attention that you were sending letters of complaint against a few state employed engineers at the [DDW] and the Division of Water Quality (DWQ) for their review processes taking too long and delaying the approval of your projects. The other engineers feel that their professional reputations have been negatively impacted and they have suffered unfairly from your allegations.

CX 944. The Letter of Concern, however, did "not constitute a legal finding that [Mr. Duberow] ha[d] or ha[d] not engaged in unlawful conduct."[20] *Id.* Mr. Bousfield testified he was not aware of the issuance of the Letter of Concern, but further noted it did not change his mind regarding his inclusion in the Demotion Letter of the incident involving Mr. Duberow. TR at 677-78.

Mr. Bousfield also testified about his own performance review during the time Complainant was Engineering Section Manager; a meeting between himself, Complainant, and Ms Tatum; and certain of what Complainant characterized as allegations by Mr. Wilde about Complainant. Mr. Bousfield agreed that in his own review he had received comments regarding his own inability to control certain subordinates as well as a greater need to "be realistic about plans" from Rick Sprott, his supervisor and Respondent's Director. TR at 687-89; CX 117-18.

[20] Wayne Jeppson, who was involved in the investigation of Complainant's professional engineering complaint, was called by Complainant as a witness and testified at the hearing. *See generally* TR at 245-59. When asked if Mr. Duberow's allegation that Complainant had failed to begin his review of the plans submitted on June 30, 2007 two-and-a-half months after this date was a "false statement," Mr. Jeppson stated, "I would think so . . . as I recall." *Id.* at 251-52. On cross-examination, however, Mr. Jeppson admitted he did not know when Complainant started his review of such plans. *Id.* at 254-55. On re-direct examination, Mr. Jeppson further noted that two incidents in addition to that of Complainant's complaint about Mr. Duberow had instigated the sending of the Letter of Concern. *Id.* at 257. Complainant also called Svetlana Kopytkovskiy, an Engineer Level C in Respondent's Division of Water Quality, to testify about one of these additional incidents with Mr. Duberow investigated by Mr. Jeppson. *See id.* at 534-35, 537-40. Ms. Kopytkovskiy, a licensed professional engineer, characterized Mr. Duberow's behavior toward her in her professional dealings with him as "kind of rude." *Id.* at 539. When asked by Complainant if Mr. Duberow had violated the rule of professional conduct applicable to professional engineers, Ms. Kopytkovskiy responded she thought such a violation had occurred "[i]n some way." *Id.* at 540. Finally, Complainant called Walt Baker, the Director of Respondent's Division of Water Quality, to testify regarding the aforementioned incident between Mr. Duberow and Complainant. *See generally id.* at 544-50. Mr. Baker, however, had no personal knowledge of the documentation submitted by Complainant supporting the occurrence of this incident, *see id.* at 545-49, and was consequently able to answer only two leading questioned posed by Complainant, neither of which answers supported Complainant's whistleblower complaint. *See id.* at 549-50. Consequently, I give no weight to the testimony of Mr. Baker.

Mr. Bousfield stated he was informed by Mr. Sprott verbally that Complainant's actions within Respondent's organizational structure were the root of the criticism about Mr. Bousfield being unable to control subordinates. TR at 698. Mr. Bousfield further agreed these comments were somewhat similar to the same criticisms leveled at Complainant during his Engineering Section Manager tenure, although he, unlike Complainant, was not removed from his position for such performance issues. TR at 688-89. Mr. Bousfield also recalled a meeting between himself, Complainant, and Ms. Tatum in which there was "a lot of contention." *Id.* at 691. Mr. Bousfield further recalled Ms. Tatum had blocked Complainant from leaving the room during this meeting as well as that she had no supervisory authority over Complainant. *Id.* at 692. Mr. Bousfield stated it was "probably inappropriate" for Ms. Tatum to have involved herself with management issues between Mr. Bousfield and Complainant.[21] *Id.* Complainant also questioned Mr. Bousfield generally about Mr. Wilde's October 19th Memorandum, although Mr. Bousfield did not agree with Complainant's characterization that Mr. Wilde was "insinuating himself into every detail" of Complainant's job duties. *Id.* at 696.

6. Testimony of Fred Duberow Regarding His Interactions with Complainant

Respondent called Mr. Duberow as a witness at the hearing. At the time of Complainant's tenure as Engineering Section Manager as well as at the time of the hearing, Mr. Duberow worked as a consultant for Stantec Consulting, Inc. TR at 1047-48; *see* CX 936. Mr. Duberow testified his position at Stantec was as "a principal in charge of mainly water resource and municipal engineering type projects." TR at 1048. He possesses a bachelor's degree in civil engineering as well as professional engineering licenses from the states of Utah, Nevada, Oregon, Colorado, Wyoming, and New Mexico. *Id.*

Mr. Duberow began by testifying as to his familiarity with Complainant and DDW. When asked if he was acquainted with Complainant, Mr. Duberow stated he did not know him personally, although they had spoken on the phone a few times. *Id.* at 1049-50. With respect to DDW, Mr. Duberow stated through his work he presented plans for their review between three and six times per year. *Id.* at 1049. Mr. Duberow stated through the submission of such plans he worked with Complainant in his capacity as a DDW employee. *Id.* at 1050.

After establishing his professional background and discussing his relationship to Complainant and DDW, Mr. Duberow went on to testify about the email he sent to Complainant and Mr. Bousfield[22] on October 23, 2007. *See generally* CX 476. As background to the email, Mr. Duberow noted Stantec had submitted to DDW for approval on July 30, 2007 a "construction drawing for a very large pump station." TR at 1051; *see* CX 476. Prior to the submission of these plans, Mr. Duberow testified to receiving approval of "a large 700,000 gallon water storage tank and some water transmission . . . and . . . distribution lines." TR at 1051. Mr. Duberow also believed at the time he submitted the pump station plans that "plans for drilling a new well" had also been submitted and "the Preliminary Evaluation Report had been

[21] Mr. Bousfield's testimony at trial as well as notations made on at least one email from Ms. Tatum demonstrate he gave very little consideration, if any, to her opinions and allegations about Complainant's professional behavior as Engineering Section Manager. *See* TR at 820; CX 28.

[22] Mr. Duberow also copied Bill Birkes and Ken Orton on this email. However, neither of these persons was called as witnesses at the hearing.

completed . . . and approved." *Id.* at 1051, 1063-64. In the email, Mr. Duberow inquired into the status of the plans for the pump station. CX 476. He began this inquiry rather bluntly, noting in the second sentence of the email, "Now after over two and a half months I find out from [Complainant] that the plan check hasn't even begun." *Id.* Mr. Duberow went on to further note in the email the significant progress Stantec had made on this project as a whole and concluded the email by imploring Complainant and Mr. Bousfield to complete the review on behalf of DDW and inquiring into exactly when he should expect such a review to be complete. *Id.* Mr. Duberow did not recall receiving any response from DDW regarding these plans between July 30, 2007 and the sending of his email on October 23, 2007. TR at 1052. Mr. Duberow testified also to calling Complainant prior to sending his October 23, 2007 email. *Id.* at 1053. According to Mr. Duberow, it was during this conversation that he first learned that the plan approval process had not begun because the project "needed more source" water. *Id.*

On cross-examination, Complainant began by questioning Mr. Duberow about a separate project in which approximately ten months were needed for plan approval to occur. *See id.* at 1055-56; CX 1384. Mr. Duberow agreed that such an interval between the submittal of plans and approval was "unusual," although he characterized this project as involving water turbidity issues and therefore "totally different" than the one discussed in the October 23, 2007 email. *Id.* at 1056-57. When asked for the interval between plan submittal and approval of other recent projects involving Mr. Duberow and DDW, Mr. Duberow estimated his most recent project of this type had received approval "in less than [thirty] days." *Id.* at 1057. Complainant also questioned Mr. Duberow on when he became aware of Complainant's involvement in the project that was the subject of the October 23, 2007 email. Mr. Duberow believed he did not become aware of Complainant's involvement until he called DDW shortly before sending his email to inquire into the status of plan approval. *Id.* at 1058-59. Mr. Duberow further stated he was not aware of Complainant's status of Engineering Section Manager at this time. *Id.* at 1059.

Complainant also asked about the professional engineering complaint he filed against Mr. Duberow. Mr. Duberow stated he was aware of such a complaint. *Id.* at 1068. However, when asked if the allegation in Complainant's complaint accusing Mr. Duberow applied to the same project that was the subject of Mr. Duberow's October 23, 2007 email, Mr. Duberow asserted such an allegation did not apply to his communications with Complainant regarding this project. *Id.* at 1069-70. Complainant further questioned Mr. Duberow about the Letter of Concern. *Id.* at 1070. Here, however, Mr. Duberow asserted it had "never been [his] intent to cause the review engineer to not make a thorough review" with regard to any of his communications. *Id.* Instead, Mr. Duberow characterized the communications cited by Complainant in his professional engineering complaint as simply attempts to discover the status of a plan review. *Id.*

7. Testimony of Matthew Cassel Regarding His Interactions with Complainant

Complainant also called Mr. Cassel as a witness. Mr. Cassel is an engineer for Psomas, a consulting company, *see* CX 137, and interacted with Complainant on the Slate Canyon Project. *See supra* Part IV.C.5. After being admonished by me for asking Mr. Cassel a series of leading questions, *see id.* at 213-20, Complainant questioned Mr. Cassel about his understanding regarding Complainant's refusal to meet with him and Mr. Baxter in regard to the Slate Canyon

Project. When asked by Complainant exactly when he began requesting a meeting with Complainant, Mr. Cassel noted his belief that such a meeting was requested at "whatever time we started emailing you asking for a meeting." *Id.* at 221. Mr. Cassel further noted at least one of Complainant's emails to him, sent on October 23, 2007, created the inference that Complainant was averse to such a meeting because he was "too busy to meet." *Id.* at 222; CX 143.

On cross-examination, Mr. Cassel testified to having "a couple phone conversations" with Complainant regarding the Slate Canyon Project. TR at 224. When asked about the subject or purpose of such conversations, Mr. Cassel replied they were also an attempt to schedule a meeting regarding problems with the Slate Canyon Project. *Id.* According to Mr. Cassel, however, none of the phone conversations were successful in setting up a meeting with Complainant to discuss these problems. *Id.* When asked what the purpose of such a meeting would have been, Mr. Cassel responded he and Mr. Baxter "were on different pages" from Complainant and therefore "needed to understand what the differences were" with respect to the Project. *Id.* When asked to expand on this, Mr. Cassel further noted his belief the "as-builts were accurate" differed from the belief of Complainant, who believed they were inaccurate. *Id.* at 225. Mr. Cassel further asserted the water line associated with the Slate Canyon Project was built in accordance with plans previously approved by Mike Pfeiffer of DDW. *Id.* at 226. Mr. Cassel further noted the location of air release valves and air vents on this water line were in locations consistent with these plans; however, he added that some of the valves and vents may have been "difficult to locate" during an inspection due to their placement "off to the side." *Id.* at 226-27. Mr. Cassel also stated the problematic tapes and sealants first located by Complainant during his inspection were changed out. *See id.* at 228-29; CX 521.

8. Testimony and of Kurt Baxter Regarding Complainant's Tenure as Engineering Section Manager

Complainant also called Mr. Baxter to testify. As noted, Mr. Baxter served as a Project Manager in Respondent's DFCM at the time Complainant served as Engineering Section Manager. TR at 164. Specifically, Mr. Baxter was the Project Manager for the Slate Canyon Project. *Id.* Mr. Baxter agreed his interaction with Complainant on the Slate Canyon Project was the "only time" he ever dealt with Complainant in a professional capacity. *Id.* at 201.

According to Mr. Baxter, his interactions with Complainant came primarily during the aforementioned process of the attempt to gain an Operating Permit for the Slate Canyon Project. *Id.* at 190-92. Mr. Baxter testified plans for the Slate Canyon Project had received DDW approval, but problems arose during a post-construction inspection of the Project. *Id.* at 191. At this time, Mr. Baxter testified Complainant informed him and the engineer with whom he was working, Mr. Cassel, that certain "details were wrong." *Id.* Mr. Baxter further testified this caused confusion in his mind being that prior approval had been given to construct the Slate Canyon Project. *Id.* at 192. Such circumstances, according to Mr. Baxter, "thr[e]w up some red flags" and were the impetus for a proposed meeting with Complainant. *Id.* at 192-93. Additionally, Mr. Baxter noted certain other circumstances associated with the Slate Canyon Project – specifically its altitude at near seven-thousand feet and the cost incurred by the client

associated with having to pay for water while the line was nonoperational – made time of the essence. *Id.* at 193-94; *see* CX 142.

Complainant questioned Mr. Baxter about several of the details of their interaction during the Slate Canyon Project. For instance, Mr. Baxter on cross-examination stated he received "two emails [and] one letter" from Complainant in which Complainant refused to meet with him regarding the Slate Canyon Project. *Id.* at 190-91. On re-direct examination, however, Mr. Baxter clarified these refusals were actually sent to Mr. Cassel, who in turn forwarded them on to Mr. Baxter. *Id.* at 202-03.

Complainant also questioned Mr. Baxter about his knowledge of the use of certain air valves and air vents on the construction of the water line associated with the Slate Canyon Project. *Id.* at 209. Specifically, Complainant sought Mr. Baxter's understanding of the types of valves used in constructing this water line. *Id.* In this instance, Mr. Baxter was somewhat evasive, noting he was not aware of the cost of the valves or whether the valves used conformed to the preapproved plans for the water line. *Id.* Mr. Baxter instead noted only that the engineer working on the project informed him the water line was constructed in conformity with the plans, and that he relied on such a representation. *Id.* at 209-10.

Mr. Baxter also testified about the chain of emails associated with the Slate Canyon Project. *See supra* Part IV.C.5. When asked by Complainant why he directed Mr. Cassel to meet with Complainant on October 10, 2007, Mr. Baxter noted Mr. Cassel was the "engineer of record" for the Slate Canyon Project. TR at 166-67. As such, Mr. Baxter testified Mr. Cassel had "stamped the drawings," "designed the thing," and "gone through the approval process." *Id.* at 167. When asked by Complainant what his view was in terms of Complainant's willingness to meet to discuss the Slate Canyon Project on October 23, 2007, Mr. Baxter stated Complainant's repeated requests for an agenda for such a meeting were superfluous. *Id.* at 173-74. This was because – according to Mr. Baxter's view – everyone to be associated with such a meeting already knew what needed to be discussed. *Id.* at 174. Although Complainant repeated his request for an agenda or issues to be discussed at such a meeting, Mr. Baxter noted he was surprised at the question itself. *Id.* at 175-76. Mr. Baxter believed, at this point, there was "no question in anybody's mind we needed to meet weeks before" October 23, 2007 about issues associated with the water line in the Slate Canyon Project. *Id.* at 177-78; *see* CX 147.

Complainant also questioned Mr. Baxter about the timing of the issuance of the Operating Permit for the water line at the Slate Canyon Project. Such a permit was issued on October 29. 2007. *See generally* RX 19. This was, however, only four days after Complainant was removed as Engineering Section Manager. *Compare id. with* RX 18. When asked if he felt the issuance of such an Operating Permit only a few days after Complainant's removal was somewhat suspicious, Mr. Baxter testified this was not necessarily a circumspect coincidence given the water line "was never a poor system to begin with." *Id.* at 181. Mr. Baxter further stated the water line needed only "a few minor repairs to make it a hundred percent." *Id.* Mr. Baxter did concede, however, that he had not seen written evidence of any post-project inspection of the Slate Canyon Project's water line other than that conducted by Complainant prior to the issuance of the Operating Permit. *Id.* at 183.

Complainant also asked Mr. Baxter about a criminal complaint he instigated against Mr. Baxter as well as other projects Mr. Baxter had supervised aside from the Slate Canyon Project. With respect to the criminal complaint, Mr. Baxter stated he had heard such a complaint had been instigated and characterized as "fictitious" Complainant's assertion that he had been threatened by Mr. Baxter. *Id.* at 186. With respect to his management of other DFCM projects, Mr. Baxter estimated that there were some problems with approximately twenty percent of such projects. *Id.* at 186. When asked specifically about a project at the Palisades Golf Course, Mr. Baxter stated such a project "went well," although it did have "a few issues." *Id.* at 186-87. Mr. Baxter was not aware, however, with drainage problems associated with this project's campsites and restrooms. *Id.* at 187-88.

9. Testimony and Opinions of District Engineers Regarding Complainant's Tenure as Engineering Section Manager

Evidence was offered at the hearing reflecting the assessment of Complainant's job performance as Engineering Section Manager by several of Respondent's employees who worked as District Engineers. This evidence reflected the opinions of Mr. Ariotti, Mr. Hacking, Mr. Taylor, and Mr. Foisy.

Mr. Ariotti and Mr. Hacking were the only District Engineers to testify at trial. During Complainant's tenure as Engineering Section Manager, Mr. Ariotti was employed as the District Engineer in the southeastern region of Utah, a position he had held since 1985. TR at 273. In this position, Mr. Ariotti served as the representative for that portion of the state of all six divisions contained within Respondent, including DDW. *Id.*

Mr. Ariotti testified about an email he sent to Mr. Hacking critiquing Complainant's management style. Mr. Ariotti sent this email to Mr. Hacking on October 10, 2007, which sparked additional responses from Mr. Foisy and Mr. Taylor – also critiquing Complainant – and which Mr. Hacking ultimately forwarded on to Mr. Sinclair. CX 413. Mr. Ariotti's initial email, sent at 9:20 A.M. on October 10, 2007, critiqued Complainant regarding a variety of issues. Mr. Ariotti characterized Complainant's "rework[ing of his] draft approvals" as "making them mini dissertations of the project." *Id.* Mr. Ariotti expressed further frustration at what he characterized as Complainant's practice of circumventing the District Engineers by communicating "directly with the . . . local officials[,] indicating he has no confidence in" the District Engineers. *Id.* Mr. Ariotti further criticized Complainant for requiring what he viewed as unnecessary citations to rules and questioned the necessity of the District Engineers themselves in light of Complainant's managerial style. *Id.* Mr. Ariotti posed the question, rather sarcastically, "Should [DDW] let all of the engineers under [Complainant] go, re-classify [Complainant] chief engineering regulator and save the State hundreds of thousands of dollars?" *Id.*

At hearing, Mr. Ariotti expanded on his comments in the email as well as his critique generally of Complainant's management style during his tenure as Engineering Section Manager. When questioned by Complainant about whether the October 15, 2007 email constituted "concern . . . about the level of letter oversight" exerted by Complainant over Mr. Ariotti, Mr. Ariotti did not explicitly agree. TR at 287. Instead, Mr. Ariotti noted this specific comment

instead expressed concern over Complainant's involvement in "minor" issues related to the District Engineers' work and stated he was questioning Complainant's "practical experience." *Id.* Complainant did call Mr. Ariotti's attention, however, to two typographical errors in two letters, *see* CX 399, 415, although Complainant did not create a foundation that Mr. Ariotti had drafted either of such letters. Nevertheless, Mr. Ariotti, when shown such errors, agreed such letters "should be as accurate as possible" and therefore free of such mistakes. TR at 290.

When asked to expand on his critique of Complainant's management style during cross-examination, Mr. Ariotti described a focus on details as impeding Complainant's ability to produce timely work. Mr. Ariotti further described Complainant as someone who "was not seeing the forest for the trees" during his time as Engineering Section Manager. *Id.* at 291. When asked for a specific example of such behavior, Mr. Ariotti noted an example of a letter that he believed took thirty days longer than necessary due to Complainant's involvement in the issuance process, and that this example reflected Complainant's inability at the time to work "efficiently." *Id.* at 291-92. Mr. Ariotti also described examples of Complainant requesting unnecessary details in certain projects. Mr. Ariotti noted he had become accustomed only to including what he viewed as essential technical specifications and "major components of the project" in his draft approval letters, but that he viewed the inclusion of other "appurtenances" as superfluous. *Id.* at 292. According to Mr. Ariotti, when Complainant became Engineering Section Manager, however, he began to request the inclusion of these additional details. *Id.* at 293. Mr. Ariotti was of the opinion that such details did not "add[] anything to the clarity . . . of the approval process." *Id.* Mr. Ariotti further noted he became aware – through conversations with local officials and non-Respondent engineers – that Complainant was communicating directly with such officials but "not keeping [Mr. Ariotti] in the loop as to what the nature of those conversations were" despite Mr. Ariotti's job being to interface with such actors on Respondent's behalf in his capacity as a District Engineer. *Id.* at 293-94.

Mr. Ariotti was also questioned as to whether his critical attitude toward Complainant's tenure as Engineering Section Manager applied to any other managers employed by Respondent. Specifically, I questioned Mr. Ariotti as to whether he had critiques to offer with respect to the management or work styles of Mr. Wilde, Mr. Bousfield, Mr. Hacking, or Ms. Macauley. *Id.* at 295-92. Mr. Ariotti did not, however, share similarly critical opinions of the work of these employees. *Id.*

Mr. Hacking also testified at the hearing in this case. At the time of hearing, Mr. Hacking served as a District Engineer for Respondent in the Northeast region of Utah. *Id.* at 1072. Respondent has employed Mr. Hacking since 1992, and he has worked as a District Engineer since 1994. *Id.* Mr. Hacking possesses bachelor's degrees in mining engineering and geology and a master's degree in environmental civil engineering, all of which he obtained from the University of Utah. *Id.* His primary responsibilities as a District Engineer are to work in the areas of Drinking Water and Water Quality for Respondent, although he also noted he sometimes performed work associated with Respondent's Divisions of Hazardous Waste, Environmental Response, and Air Quality as well. *Id.* at 1072-73. Mr. Hacking estimated that, as a group, the District Engineers spent approximately fifty percent of their time on issues related to Drinking Water. *Id.* at 1073-74.

Mr. Hacking began by testifying about his interactions with Complainant prior to his becoming Engineering Section Manager. Mr. Hacking described such interactions as not occurring often, characterizing Complainant then as "more of an acquaintance." *Id.* at 1074. Nevertheless, Mr. Hacking noted at this time he did have a lot of interaction with DDW due to the rapid development of several subdivisions in his area of the state. *Id.* at 1075.

Mr. Hacking's relationship and interactions with Complainant changed, however, after Complainant was elected as Engineering Section Manager. Mr. Hacking began by noting his position as District Engineer required he "interface extensively" with the Engineering Section Manager, a position Mr. Hacking called the "gatekeeper" of DDW. *Id.* at 1076. Soon after Complainant was appointed to the position of Engineering Section Manager, Mr. Hacking described problems that began to arise. When asked for specific types of recurring problems with Complainant, Mr. Hacking noted "[c]ommunication issues," including "problems getting answers on some of our questions," "issues of [Complainant] contacting local officials without interfacing" with Mr. Hacking first, and "trust issues." *Id.* at 1077.

When asked to give specific examples of a trust issues, Mr. Hacking expounded on Complainant's interaction with the county planning commission, *see supra* Part IV.C.3, and Complainant's editing of plan review letters. On October 5, 2007, Mr. Hacking sent an email to Mr. Sinclair, expressing frustration over Complainant's management style as Engineering Section Manager. *See generally* RX 9. Mr. Hacking noted specifically his learning of Complainant's communication with a county planning commissioner discussed in Part IV.C.3. RX 9 at 244. Mr. Hacking noted Complainant had made what Mr. Hacking characterized as "good" decisions on behalf of Respondent, but he expressed frustration nevertheless as he viewed such a task as his own responsibility as a District Engineer and not part of the duties of the Engineering Section Manager. *Id.*; TR at 1080. Much like Mr. Ariotti's complaints in his October 10, 2007 email and Mr. Foisy's complaints in the September 14, 2007 email to Mr. Bousfield, Mr. Hacking also expressed displeasure in his being removed from the channels of communication as the county planning commission officials had begun communicating directly with Complainant.[23] RX 9 at 244. He further accused Complainant of not trusting the District Engineers. *Id.* As for plan review letters, Mr. Hacking agreed with others' characterization of Complainant as a micro-manager, noting Complainant's tendency to apply such a work style to his editing of the District Engineers' plan review letters. *Id.* at 1080. Mr. Hacking described Complainant's tendency to "dictate wording" in his review of such letters, which converted into "an arduous process" the issuance of such letters. *Id.* at 1081. Mr. Hacking also described Complainant as a person who required very strict and to-the-letter applications and interpretations of DDW rules, but admitted this impression of Complainant's work style originated more from the experience of other District Engineers' interactions with Complainant as opposed to his own. *Id.* at 1081-82.

Mr. Hacking was next asked about the various response times for plan review letters before, during, and after Complainant's tenure as Engineering Section Manager. According to Mr. Hacking, plan review letters received final approval "generally . . . within days, a week at the longest" prior to Complainant's becoming Engineering Section Manager. *Id.* at 1082. In Mr.

[23] Mr. Bousfield testified Respondent had a "policy" of having local officials "work with and through" the District Engineers. TR at 807.

Hacking's estimation, this interval changed to "a matter of weeks" and a process "involving multiple follow-up emails, sometimes multiple phone calls" during Complainant's tenure as Engineering Section Manager. *Id.* at 1082. Mr. Hacking noted the interval returned to "usually one or two days" since Mrs. Macauley's being appointed Engineering Section Manager. *Id.* at 1083.

Mr. Hacking also testified as to when he and the other District Engineers first began voicing concerns to Mr. Sinclair regarding Complainant's work style as Engineering Section Manager. Mr. Hacking stated such communications to Mr. Sinclair began in a quarterly meeting that occurred in August 2007. *Id.* at 1084. When asked to identify the specific issues raised at this meeting, Mr. Hacking stated they had generally discussed "trust issues" and "[c]ommunication issues." *Id.* As a result of this meeting, Mr. Hacking and the other District Engineers were directed by Mr. Sinclair to pass along information on any "egregious conduct" or "serious problems" they encountered in their interactions with Complainant. *Id.* at 1084-85.

On cross-examination, Complainant questioned Mr. Hacking about Complainant's tenure as Engineering Section Manager, specifically the level of scrutiny he turned toward the work of the District Engineers and his role as "gatekeeper." *Id.* at 1102-04. Mr. Hacking agreed with Complainant's characterization that plan review letters should have "sufficient detail . . . so that an otherwise uninitiated reader could . . . get a feel for what the project description is," *id.* at 1103, but he could not speak from his own experience to any letters issued prior to Complainant's tenure as Engineering Section Manager that were "just generic" and did not contain such project details. *Id.* at 1103-04. Mr. Hacking did agree with the assessment that Complainant's approval letters contained "more detail" than those issued prior to his tenure as Engineering Section Manager. *Id.* at 1114-15. However, when asked by Complainant if his delay in completing review of approval letters could be attributed to certain responsibilities imposed on Complainant by rules of professional conduct applicable to engineers, Mr. Hacking noted these rules were "not the only reason there [could] be delay" with respect to such reviews. *Id.* at 1118. Mr. Hacking further agreed, on re-direct examination, that DDW did no better job protecting the public health under Complainant's tenure as Engineering Section Manager as opposed to that of Mr. Wilde. *Id.* at 1142.

When asked about a specific instance where a letter was issued by DDW with an incorrect agency name, however, Mr. Hacking agreed that such seemingly minor errors as those caught by Complainant could reflect poorly on Respondent professionally. *Id.* at 1105. Mr. Hacking nevertheless remained somewhat unconvinced of his own responsibility as a District Engineer for such errors when shown this example, stating instead that he "assume[d] that would have been caught by either [Complainant] or the secretary." *Id.* Mr. Hacking further agreed that plan approval letters were issued at a slower pace under Complainant's as opposed to Mr. Wilde's tenure as Engineering Section Manager. *Id.* at 1122-23. Mr. Hacking also stated he wished Ms. Tatum would have applied for and been chosen as Engineering Section Manager as opposed to Complainant. *Id.* at 1135. Mr. Hacking conceded that a change in leadership such as that associated with Complainant's taking over as Engineering Section Manager would involve "a period of transition" that could consequently have associated with it a certain amount of "friction" due to the implementation of changes in management style. *Id.* at 1141.

On re-cross examination, Complainant asked about Mr. Hacking's multiple requests to remain anonymous in his reports of Complainant's behavior to Mr. Sinclair. *Id.* at 1145. Mr. Hacking responded to this inquiry by stating, "There was a real concern about retribution, quite frankly." *Id.* When asked about the foundation for such a fear, Mr. Hacking reported hearing about such retribution directed by Complainant at other DDW staff, including "legal issues, complaints, . . . [and] frivolous work complaints." *Id.* at 1146. Mr. Hacking agreed, however, with Complainant's own characterization of himself as someone who would not deliver criticism anonymously as evidenced by his email to Mr. Jordan. *Id.* at 1146-47. On re-direct examination, Mr. Hacking agreed with Respondent's counsel's characterization of Complainant's "GRAMA[24] requests with regard to [Respondent's employees'] employment history and personal files" also constituting such retribution. *Id.* at 1147.

Complainant also questioned Mr. Hacking about the granting of exceptions to certain rules imposed by Respondent. Specifically, Complainant asked Mr. Hacking if he was familiar with an exception sought by Mr. Foisy in connection with a storage tank at a gas station. *Id.* at 1125. In this instance, Mr. Foisy expressed frustration with Complainant over his refusal to grant an exception for a rule requiring a water storage tank in light of Complainant's earlier granting of another exception for a rule requiring a fence around a groundwater spring in a rural area. *Id.* at 1124-25; CX 170-17. Mr. Hacking remembered being a "little" familiar with this situation, although he agreed with Complainant's characterization that the exception sought for a groundwater spring fence could be granted "a little quicker" than the exception sought by Mr. Foisy. TR at 1125. Mr. Hacking further noted, however, that neither exception should "take too much time." *Id.* at 1126.

Complainant also questioned Mr. Hacking about how Respondent addressed requests for after-the-fact approval of certain projects. Here, Mr. Hacking noted the consequence of a request for approval of a project with problems but for which no before-the-fact approval was not received would be for it "technically not [to be] approved." *Id.* at 1107. However, Mr. Hacking also agreed with Complainant's statement that the withholding of such approval would carry with it "implications" because "somebody has spent a lot of money building it already." *Id.* As a result of these circumstances, Mr. Hacking also agreed a certain amount of pressure existed to approve such flawed projects. *Id.* at 1107-08.

Although they did not testify at trial, also contained within the record are the opinions of several of the other District Engineers regarding Complainant's work as Engineering Section Manager as reflected in various emails. The first of these messages is contained in a chain of emails forwarded by Mr. Foisy to Mr. Bousfield on September 14, 2007. *See generally* RX 5. In this email chain, Mr. Foisy had been corresponding with Complainant on September 10 and 11, 2007, regarding the issuance of an exception to one of Respondent's clients. *Id.* at 238. In his initial email to Complainant, Mr. Foisy stated to Complainant, "Something [is] wrong here," due to one client having waited for nearly four months without having received an exception while another client received such an exception within two days. *Id.* Complainant responded by noting the applicable rules clearly addressed the granted exception while not speaking to the

[24] "GRAMA" is the acronym for Utah's Government Records Access Management Act. *See* Utah Code §§ 63G-2-101 to -901.

pending exception request. *Id.* Complainant also noted the pending exception was for a specific requirement within a rule requiring water storage. *Id.*

Mr. Foisy did not reply to Complainant's second response in this chain, but instead forwarded the email chain on to Mr. Bousfield on September 14, 2007. *Id.* In his accompanying email, Mr. Foisy noted his frustration with the situation that had arisen due to the pending exception request, faulting Complainant "because he says there has been no approval letter for a specific project . . . and because he obviously hates to assign another file number to the project." *Id.* Mr. Foisy did not, however, explain in his email to Mr. Bousfield how Complainant's reason for not issuing the exception was unsound or what his basis was for believing Complainant disliked assigning additional file numbers. *Id.* Mr. Foisy further noted the building frustration on behalf of the client in this instance also led to him being cut out of the loop of communication as the client had begun directly calling Complainant regarding the pending exception request. *Id.*

Also included in the record are two additional emails from Mr. Taylor and Mr. Foisy[25] accompanying the email from Mr. Ariotti on October 10, 2007. In his email on this date, Mr. Foisy stated he had previously complained to Complainant that he was micromanaging in his position as Engineering Section Manager. RX 13 at 251. Complainant responded such a style – as compared to Mr. Wilde's previous way of doing things – now provided greater attention to detail. *Id*. Mr. Taylor, also in an email on October 10, 2007, accused Complainant of "taking over the Div[ision] of Water Rights" in that he was requesting the updating of water rights numbers and corresponding water companies. *Id.* Mr. Taylor noted such a task was "good to have done," but he questioned whether it should be a function of DDW. *Id.*

D. Complainant's Demotion on October 25, 2007

On October 25, 2007, Respondent issued the Demotion Letter removing Complainant from his position as Engineering Section Manager and reassigning him to his prior position as an Environmental Engineer. *See generally* RX 18. Mr. Bousfield authored the letter. *Id.* at 210. In its introduction, the letter faulted Complainant for his "inability to effectively and appropriately deal with Division and Department staff as well as the Division's customers." *Id.*

The Demotion Letter set forth three reasons for Complainant's employment reassignment, the circumstances of which are set forth in detail in Part IV.C.5, *supra*. First, Mr. Bousfield noted the instance involving what he characterized as Complainant refusing to meet with Mr. Duberow regarding the Slate Canyon Project. RX 18 at 210. In this instance, Mr. Bousfield chastised Complainant for not following Respondent's Operating Principles, noting following such principles would likely have averted Mr. Baxter's complaint. *Id.* at 210-11. Second, Mr. Bousfield described an email sent by Mr. Duberow to both himself and Complainant in which Mr. Duberow "expressed his frustrations" upon discovering plans he

[25] Complainant also called Kiran Bhayani to testify at the hearing regarding another email sent by Mr. Foisy on October 5, 2007. Mr. Bhayani served as the Engineering Section Manager of Respondent's Division of Water Quality at the time of hearing. TR at 497. Mr. Foisy, in the October 5, 2007 email, referred to Complainant as someone who "seems like Kiran, in that he wants to micro-manager [sic] every single project." RX 8 at 243. When asked to put this comment in context at hearing, Mr. Bhayani noted he sometimes had to interact with the District Engineers in his capacity as Engineering Section Manager, and he noted they sometimes did "less-than-perfect" work. *Id.* at 497-99. Mr. Bhiyani further agreed "micro-management" was a negative term. *Id.* at 499.

submitted on July 30, 2007 had not yet begun to be reviewed by Complainant as of October 23, 2007. *Id.* at 211. Mr. Bousfield again cited Complainant's failure to follow Respondent's Operating Principles as the source of this frustration. *Id.* Third, Mr. Bousfield summarized the incident of his being given by Complainant two letters to sign. *Id.* These letters were addressed to Respondent's clients and advised them to explore U.S. Department of Agriculture Rural Development funding. *Id.* Mr. Bousfield noted an investigation by Mr. Wilde revealed these clients were ineligible for such funding,[26] and he reprimanded Complainant for failing to involve Mr. Wilde in the process of investigating such funding. *Id.* After discussing the three above instances specifically, Mr. Bousfield included a broader indictment of Complainant's managerial tenure, stating as follows:

> In addition I have been made aware of complaints involving you and your inability to effectively and appropriately deal with: District Engineers, staff within the Construction Assistance Section, and Secretarial staff. The specific issues involving the three identified group [sic] are irrelevant, [sic] the relevant point is that you have demonstrated the inability to work with others, which is in violation of [Respondent]'s Operating Principles and your specific performance plan.

Id. at 212. Mr. Bousfield concluded the Demotion Letter with a "challenge" to Complainant to remedy the described behavior and also included a caveat that failure to do so "may result in corrective and/or disciplinary action." *Id.*

E. Correspondence and Testimony of Gregg Buxton Regarding Interactions with Complainant During and After His Tenure as Engineering Section Manager

Complainant also called Gregg Buxton as a witness in his case-in-chief. Mr. Buxton served as the Director of DFCM during and immediately proceeding Complainant's Tenure as Engineering Section Manager. *See* CX 542, 548; TR at 159-60. In this capacity, Mr. Buxton supervised Mr. Baxter. TR at 160.

Mr. Buxton's involvement with Complainant came primarily through Complainant's refusal to meet with Mr. Baxter regarding the Slate Canyon Project. *See supra* Part IV.C.5. On November 28, 2007, Complainant emailed Mr. Buxton. *See generally* CX 542. In this email, Complainant summarized for Mr. Buxton his characterization of Mr. Baxter's behavior toward him during their interactions on the Slate Canyon Project. *See id.* In doing so, Complainant cited "behavior [by Mr. Baxter] towards me in retaliation for simply doing my job" and took issue with what he found to be "the professional harm" caused to him by Mr. Baxter's behavior "within [DDW] and the Department of Environmental Quality." *Id.* Complainant labeled an October 24, 2007 phone message left by Mr. Baxter for Mr. Bousfield as "inappropriate," but did not provide a basis for such a characterization other than it being cited by Mr. Bousfield in the Demotion Letter. *Id.* Complainant concluded the email by stating he was "prepared to make

[26] As discussed, Mr. Bousfield admitted during the hearing that Mr. Wilde's determination regarding these clients' eligibility for this funding was erroneous. *See* TR at 685; *supra* Part IV.C.5.

specific charges against Mr. Baxter for his DFCM actions" and requesting an in-person meeting with Mr. Buxton "as a prelude to [these] charges."[27] *Id.*

Mr. Buxton responded in writing on December 14, 2007 to Complainant's November 28, 2007 email. *See generally* CX 548. In his response, Mr. Buxton stood by the behavior of Mr. Baxter regarding his interactions with Complainant on the Slate Canyon Project. *Id.* In doing so, Mr. Buxton noted Mr. Cassel's attempts to schedule a meeting with Complainant "on a number of occasions," and stated Complainant's refusal to meet with either Mr. Cassel or Mr. Baxter regarding the Project left him with "no alternative but to report the situation to [Mr.] Bousfield." *Id.* Mr. Buxton further expressed a view that a meeting between Mr. Cassel, Mr. Baxter, and Complainant would have likely "alleviated some of the frustration at both ends," noting the "main concern was to secure the operating permit and move forward with our Project in order to satisfy our customer." *Id.* Mr. Baxter concluded his letter to Complainant by restating his support for Mr. Baxter's actions and noting he did not feel a meeting with Complainant was necessary. *Id.* Mr. Buxton copied Mr. Bousfield on this letter. *Id.* at 548.[28]

At the hearing, Complainant called Mr. Buxton as a witness. Complainant began his questioning of Mr. Buxton by presenting to him a number of documents with which Mr. Buxton had little or no personal knowledge. *See* TR at 143-55. Complainant eventually moved on to question Mr. Baxter about his December 14, 2007 letter, specifically the statement Mr. Buxton made reflecting his "main concern" to be issuance of an Operating Permit in association with the Slate Canyon Project. *Id.* at 155-56; CX 548. Here, Complainant questioned whether the issuance of such a permit superseded the importance of ensuring water quality in Mr. Buxton's mind. TR at 156. Mr. Buxton recounted communications with Mr. Baxter at this point regarding problems with contaminated seals that had allegedly been resolved, and further noted he trusted Mr. Baxter's representation that "the water was safe drinking water." *Id.* at 156-57. Mr. Buxton further admitted it was at his directive that Mr. Baxter contacted Mr. Bousfield. *Id.* at 157. Mr. Buxton did admit, however, that Mr. Baxter was not qualified to make the ultimate decision regarding the safety of drinking water, although he further noted a belief that a sense of teamwork should exist between DFCM employees and the engineers and inspectors to ensure problems were solved. *Id.*

F. Complainant's Performance Evaluation for His Tenure as Engineering Section Manager and Separate Warning Letter Received on August 11, 2008

Following his tenure as Engineering Section Manager, Respondent directed at Complainant two pieces of written documentation that Complainant viewed as retaliatory conduct: a performance evaluation completed on July 3, 2008 ("July 3rd Evaluation") for his tenure as Engineering Section Manager and a warning letter on August 11, 2008 ("Warning Letter"). *See* RX 26 at 218. Mr. Bousfield completed the July 3rd Evaluation, in which Complainant received marks of "successful" on six of the seven objectives and a mark of "unsuccessful" on the seventh objective. *Id.* at 214-15. On the objective for which Mr. Bousfield rated Complainant "unsuccessful," he made the following comments:

[27] Complainant also copied Utah State Representative Melvin R. Brown on this email. *See* CX 542.

[28] Following Mr. Buxton's letter to Complainant, Complainant filed a GRAMA request seeking "any documents that relate to the subject matter of [Mr.] Baxter's actions and [Mr.] Buxton's statements." CX 545.

> [Complainant] views DEQ's Operating Principles (DEQ-OP's) as an impediment to enforcing the Safe Drinking Water Act and Rules. [Complainant] demonstrates an unwillingness to see that one can achieve compliance with Rules by implementing DEQ-OP's. [Complainant] is also unwilling to accept management's directions regarding DEQ-OP's. This disconnect between DEQ-OP's and Rule compliance overshadowed [Complainant]'s good work and showed he was not ready for leadership within DDW.

Id. at 215. Mr. Bousfield concluded the July 3rd Evaluation in the "Employee Development/Performance Improvement" section by again noting Complainant's need to adhere to Respondent's Operating Principles. *Id.* He gave Complainant an overall rating of "unsuccessful" for this period. *Id.* at 214.

Complainant included extensive feedback in the "Employee comments" section of the July 3rd Evaluation. He began by characterizing his reassignment from Engineering Section Manager to Environmental Engineer III as well as the July 3rd Evaluation itself as "retaliation for [his] refusal to provide DDW customer service that would violate the oath of [his] professional engineering license in the State of Utah and violate the federal [SDWA]." *Id.* at 215. Complainant went on to allege further retaliation in the form of a written warning he received stemming from an "incident between front office staff person Lind Matulich" and himself.[29] *Id.* Complainant also challenged Mr. Bousfield's characterization that he viewed Respondent's Operating Principles as an impediment to enforcing the SDWA, instead accusing Mr. Bousfield himself of viewing the SDWA's requirements as an impediment to the Operating Principles. *Id.* at 216. Complainant expressed his belief that Respondent's management's application of these Operating Principles, however, created "a *de facto* conflict" with the rules of professional conduct applicable to Complainant in his capacity as an engineer. *Id.* According to Complainant, he attempted to raise this point with Mr. Sprott, Respondent's Director, but in response was called by Mr. Sprott "a dime-a-dozen technical engineer lacking people skills . . . [who] was the type of person to blame others for . . . [his] troubles." *Id.* Complainant also attached to the July 3rd Evaluation his subsequent performance review associated with his return to the position of Environmental Engineer III for the period of October 25, 2007 through June 30, 2008, in which he received an overall rating of "Exceptional." *Id.* at 216-17. Complainant concluded by asserting this review served "as a poignant counterpoint to the retaliatory intent of the unsuccessful [four]-month performance review by Mr. Bousfield." *Id.* at 216.

Mr. Bousfield offered testimony regarding several aspects of Complainant's July 3rd Evaluation. When asked why Complainant received an overall "unsuccessful" rating on the evaluation despite receiving a rating of "unsuccessful" in only one individual category, Mr. Bousfield agreed with Respondent's counsel's question that this category "overrode" the others. TR at 777. Mr. Bousfield further noted Respondent had no rule regarding how an evaluator arrived at an overall rating, although in some instances he had assigned overall ratings based on

[29] Complainant received this warning on February 25, 2008, *see* TR at 757, and filed his three separate OSHA complaints on June 1, 2008, July 8, 2008, and September 9, 2008. *See* ALJX 20 at 2-3. As none of these complaints occurred within thirty days of such an action, *see* 42 U.S.C. § 300j-9(i)(2)(A), I do not determine whether Complainant's receipt of such a letter constitutes an adverse act. *See also* TR at 755-56.

the most-received individual rating on an employee's evaluation. *Id.* at 778. He could not recall another instance, however, where he had given another employee an overall rating of "unsuccessful" despite only receiving one "unsuccessful" rating associated with an individual category. *Id.* at 893.

Mr. Bousfield next testified about Complainant's Career Mobility Agreement associated with the position of Engineering Section Manager. Mr. Bousfield noted the Engineering Section Manager position was created when DDW was divided into the Construction Assistance and Engineering Sections. *Id.* at 780. According to Mr. Bousfield, both Complainant and Mr. Wilde gave input into how this division occurred, with the final structure being that the Construction Assistance Section took projects "that had a financial assistance package," where the Engineering Section took projects that "did not have [a] financial assistance package." *Id.* at 781. Despite this division, however, Mr. Bousfield further noted the sections were nevertheless required to coordinate with one another regarding work flow. *Id.* at 781-82. Mr. Bousfield also denied the creation of two sections had anything to do with "Mr. Wilde's technical shortcomings." *Id.* at 862.

Mr. Bousfield also testified about Complainant's performance as Engineering Section Manager in light of Respondent's Operating Principles. According to Mr. Bousfield, there existed no conflict between the Operating Principles that existed and applied to Complainant during his tenure as Engineering Section Manager and the rules of professional conduct applicable to professional engineers such as Complainant and Mr. Bousfield. *Id.* at 788-91. Mr. Bousfield stated these Principles served broadly as "goals, objectives, [and] requirements that govern how we do our work," including how "we work with people." *Id.* at 788. Mr. Bousfield also testified as to how the events detailed in the Demotion Letter violated the Operating Principles. For example, when asked about Complainant's failure to return Mr. Duberow's phone call, Mr. Bousfield described a conversation in which he counseled Complainant to delegate more work to subordinates in order to accomplish his Section's tasks in a more timely fashion. *Id.* at 793-94. Mr. Bousfield further encouraged Complainant to "mov[e] away from a practitioner in the section and into the role of a manager." *Id.* at 794. According to Mr. Bousfield, Mr. Duberow's message created the impression in his mind that Complainant had never assigned this project to a subordinate engineer, and this failure to delegate had consequently resulting in Mr. Duberow's frustration in having not received approval for this particular project. *Id.* Mr. Bousfield further noted Respondent has a "policy" of completing plan reviews within thirty days and agreed with Respondent's counsel's characterization of such a policy being "well understood" by all of its engineers. *Id.* at 823. Mr. Bousfield qualified this statement, however, by further noting not all reviews were completed within this timeframe. *Id.* Nevertheless, Mr. Bousfield expected engineers at a minimum to inform the client of the status of reviews within thirty days regardless of whether approval would be given within such a timeframe. *Id.*

Brooke Baker, a Human Resources Manager for Respondent, composed the Warning Letter under direction from Mr. Sinclair, who provided guidance regarding its contents. TR at 551, 567-68, 571. The Warning Letter chastised Complainant for the email he sent to Mr. Jordan on July 18, 2008. RX 27 at 284. Mr. Jordan served as an Environmental Engineer under Mr. Hacking. *Id.* In his email to Mr. Jordan that served as the basis for the Warning Letter,

Complainant cautioned Mr. Jordan about listening to directives given to him by Mr. Hacking. *Id.* at 286. Complainant further accused Mr. Hacking of having made a "secret complaint" to Respondent and having "got[ten] his wish to have me demoted from Engineering Section Manager." *Id.* Complainant copied Mr. Hacking on his email to Mr. Jordan containing these allegations. *Id.* With respect to this incident, Mr. Hacking was further asked if he desired for Complainant to suffer any consequences as the result of this incident or the other incidents he reported to Mr. Sinclair during Complainant's time as Engineering Section Manager. *Id.* at 1098-99. Mr. Hacking replied such considerations and actions were "above [his] pay grade," although he did hear Complainant received the Warning Letter for his email to Mr. Jordan. *Id.*

Mr. Hacking offered testimony as to these circumstances at the hearing. According to Mr. Hacking, Complainant's contact with Mr. Jordan was enabled by "an unfunded routine extension to a distribution system." TR at 1096. Mr. Hacking stated this project was one Complainant had done the plan review on, and, as such, Complainant would also therefore usually complete the steps necessary for an Operating Permit, including final inspection. *Id.* However, according to Mr. Hacking the client had contacted Mr. Jordan and not Complainant to conduct such an inspection. *Id.* Because Mr. Hacking had "other priorities" at this time, he consequently told Mr. Jordan either he or Complainant could conduct the inspection. *Id.* When asked about the email and attachment sent to Mr. Jordan and for which Complainant was disciplined, Mr. Hacking characterized this as "very inappropriate." *Id.* at 1097.

The Warning Letter subsequently informed Complainant he should not again engage in similar behavior involving communications directly with a subordinate employee over which he held no managerial responsibilities. RX 27 at 284. Complainant was instead told to direct such complaints to his own supervisor. RX 27 at 284. The Warning Letter characterized Complainant's behavior as "disruptive to the workplace," "extremely unprofessional," and "not an appropriate use of state time." *Id.* The Warning Letter concluded by informing Complainant his work communications could be monitored more closely and that he must refrain from using "state resources and work time" for sending such emails, and noted "disciplinary action" would be taken in the instance of any further unprofessional conduct. *Id.* at 285.

G. Testimony of Ying-Ying Macauley Regarding Complainant's Work Following His Tenure as Engineering Section Manager

Mrs. Macauley testified as a witness for both Complainant and Respondent at the hearing. At the time of hearing, Mrs. Macauley served as the Engineering Section Manager of DDW and, consequently, Complainant's supervisor. TR at 502. Mrs. Macauley testified to serving as Engineering Section Manager since Complainant's removal from the position at the end of 2007. *Id.* at 1014.

Complainant began by questioning Mrs. Macauley about the Warning Letter. Mrs. Macauley stated although she was not involved in the issuance of the Warning Letter, she did engage in "private discussion" with Complainant about the circumstances giving rise to its issuance. *Id.* at 505-06. Mrs. Macauley further testified it was not "unusual" for her to have not been involved in the issuance of such a letter given the dispute discussed in the letter having

involved Mr. Sinclair and his subordinate, Mr. Wilde. *Id.* at 506. Mrs. Macauley disagreed with Complainant's characterization of his email to Mr. Jordan as "an effort at mentoring him." *Id.*

Mrs. Macauley completed Complainant's performance evaluation for his work as an Environmental Engineer III from July 1, 2008 through June 30, 2009 ("June 19th Evaluation").[30] *See id.* at 513-18; CX 1698-1704.[31] Here, Complainant received an overall mark of "successful," which comprised marks of "exceptional" in three individual categories and marks of "successful" in five other categories. CX 1698-99. In the "Employee Development/Performance Improvement" section of the June 19th Evaluation, Mrs. Macauley encouraged Complainant to improve his prioritization of tasks and time-management skills. CX 1699. Complainant also attached his own comments, in which he challenged his not having received an "exceptional" rating for the line item associated with his performance of sanitary surveys as well as an overall "exceptional" rating for this evaluation period. CX 1700. Also attached were several communications involving the process of issuing a permit for Mr. Duberow. *See* CX 1701-04. These communications included an October 23, 2007 email from Mr. Duberow inquiring as to the issuance of a permit associated with plans submitted on July 30, 2007, CX 1701; a portion of Complainant's Demotion Letter addressing Complainant's failure to begin the review process associated with such plans, CX 1702; a May 2, 2008 email from Mr. Duberow expressing discontent on a different project regarding the issuance of another permit, CX 1703; and a May 8, 2008 email from Ed Macauley[32] faulting Mr. Duberow for his failure to submit requested necessary documentation associated with the second permit request. CX 1704.

Complainant also questioned Mrs. Macauley about her recollection of the circumstances giving rise to the June 19th Evaluation. Complainant specifically asked Mrs. Macauley if she at any time prior to the issuance of his signed performance evaluation for this period had prepared an earlier "draft" evaluation in which she had given him a rating of "exceptional" with respect to his performance of sanitary surveys. TR at 518. Mrs. Macauley responded she did not recall ever having prepared such a draft evaluation. *Id.* Complainant further pressed the issue, next asking Mrs. Macauley if she had ever discussed the distribution of his individual line-item ratings on the evaluation for this time period with Mr. Bousfield and if Mr. Bousfield had ever consequently "advise[d], counsel[ed], coerce[d], or otherwise influence[d]" Mrs. Macauley to rate Complainant "successful" as opposed to "exceptional" on his sanitary survey work. *Id.* at 520. Mrs. Macauley testified Mr. Bousfield never took any such action toward her. *Id.* When

[30] This evaluation was signed by Complainant, Mrs. Macauley, and Mr. Bousfield on June 16, 2009, June 19, 2009, and June 17, 2009, respectively. CX 1704. No party, however, offers and explanation as to how such an evaluation was completed prior to the end of the review period it purports to encompass.

[31] At hearing, Complainant referred to exhibits numbered 67 through 69 as his performance evaluation for the period of July 1, 2008 through June 30, 2009. *See* TR at 513-14. However, these exhibits were not admitted at the time of Mrs. Macauley's testimony due to Complainant's failure to have then submitted into evidence a signature page authenticating such a review. *Id.* at 511. On the last day of the hearing, however, this review and its accompanying signature page were marked as CX 1698 through 1704 and received into evidence. *See* TR at 913, 1156. I refer to these exhibit numbers in discussing this review.

[32] Complainant called Mr. Macauley – who is Mrs. Macauley's husband, *see* TR at 502 – as a witness at the hearing; his testimony, however, consisted in large part of Complainant reading to him the October 23, 2007 and May 2, 2008 emails from Mr. Duberow into the record. *See id.* at 236-39. Mr. Macauley did not agree, however, with Complainant's characterization that there existed "divergent pathways" with the handling of his response to Mr. Duberow's May 2, 2008 email and Complainant's handling of the events detailed in Mr. Duberow's October 23, 2007 email. *Id.* at 240.

asked then by Complainant why he received "successful" as opposed to "exceptional" on his sanitary survey work, Mrs. Macauley explained she had "a couple of criteria" she used to make such determinations. *Id.* at 521. These included whether the performer of the survey followed the established protocol, completed each survey in a timely manner, and efficiently gathered information and data for the write-up associated with each survey. *Id.* at 521-22. Mrs. Macauley noted it was with respect to timeliness where Complainant's performance was less than exceptional.[33] *Id.* at 522.

When questioned by Respondent's counsel, Mrs. Macauley was asked if she faced "difficulties or constraints" as Complainant's supervisor in assigning him projects. TR at 1014-15. In responding, Mrs. Macauley noted she did face such constraints generally with all of her subordinate engineers based on their individual limitations. *Id.* at 1015. Mrs. Macauley described Complainant as "very competent technically," but noted there were certain constraints in assigning tasks to Complainant which were "unique compared to other engineers." *Id.* Mrs. Macauley characterized Complainant as specifically hampered by certain personality conflicts, and gave examples where an unnamed consulting engineer had specifically requested not to work with Complainant and another firm that had encountered problems in working with Complainant, causing Mrs. Macauley not to assign Complainant work on projects with that firm. *Id.* at 1015-16. Mrs. Macauley admitted that past instances did exist, however, where certain consultants requested not to work with certain engineers because those engineers performed more thorough reviews or took longer to complete reviews. *Id.* at 1023-24. Mrs. Macauley gave further examples of other constraints, including her choice not to assign Complainant projects involving coordination with District Engineers due to past problems, *id.* at 1016, and not assigning Complainant well-drilling projects due to his insistence that consultants use a special template he had designed, which the consultants viewed as both needlessly time and capital intensive. *Id.* at 1016-17. According to Mrs. Macauley, certain District Engineers had mentioned problems in communicating with Complainant, and she believed such communication was integral given the level of "multiple party coordination" involved on the projects on which District Engineers worked. *Id.* at 1026. Mrs. Macauley noted these constraints were not directives received from outside her office, but instead constituted choices she made in order to make sure the projects falling within her section "g[o]t reviewed smoothly and timely without any delay." *Id.* at 1017. Mrs. Macauley testified the Warning Letter Complainant received did not influence how she managed Complainant, and she was not aware of the outcome of Complainant's performance evaluation for his tenure as Engineering Section Manager. *Id.* Mrs. Macauley further noted Complainant's reassignment from Engineering Section Manager to Environmental Engineer III had in no way influenced how she managed him in her capacity as Engineering Section Manager. *Id.* at 1018.

Mrs. Macauley was also questioned as to her appointing of acting managers during instances where she traveled away from her office. Mrs. Macauley could not recall an instance of appointing Complainant as acting manager during such an absence. *Id.* at 1028. When asked why this was the case, Mrs. Macauley responded she had "not felt comfortable" putting

[33] At hearing, Complainant called David F. Hansen, an Environment Scientist with DDW responsible in part for reviewing sanitary surveys after they have been completed by other of Respondent's employees. TR at 260. While Mr. Hansen characterized Complainant's surveys as "professional in manner," *id.* at 261, he was able to offer no opinion as to whether or not Complainant completed such surveys in a timely fashion.

Complainant in a position such as that where he would be potentially required to interact with various District Engineers and managers within Respondent's hierarchy. *Id.* at 1028-29. Mrs. Macauley insisted this hesitation to appoint Complainant as acting manager was in no way related to his technical competence, however. *Id.* at 1029. Mrs. Macauley also testified to Complainant's attendance at certain professional development conferences, noting she had offered Complainant the opportunity to attend such conference but he wished not to attend such conferences if they requested his to "be out of town for [a] long time." *Id.* at 1030. Mrs. Macauley believed Complainant attended local conferences that did not require he stay out of town sometimes, but with less frequency than the other engineers she supervised. *Id.*

Complainant asked Mrs. Macauley additional questions regarding his travel to conferences. When asked if he had expressed interest in two conferences outside of Utah – in California and Arizona – Mrs. Macauley agreed Complainant had expressed such interest. *Id.* at 1031. Mrs. Macauley further noted requests for such travel had to be received the prior year and that Complainant had failed to submit these requests prior to such a deadline in these cases. *Id.* at 1031-32. Complainant also questioned Mrs. Macauley about his not being allowed to attend an AutoCAD conference and other employees being able to attend the American Backflow Prevention Association Conference and American Water Resource Association Conference. *Id.* at 1032-33. With respect to the American Water Resource and American Backflow Prevention Conferences, Mrs. Macauley noted these were respectively not an overnight event and were paid for not by Respondent but by a third party. *Id.* at 1033. With respect to the AutoCAD conference, Mrs. Macauley testified this was an area in which Complainant was personally interested but was not "directly related" to Respondent's function. *Id.*

H. August 19, 2009 Letter

On August 19, 2009, Respondent issued an additional letter ("August 19th Letter") to Complainant. Amanda Smith, who at the time served as Respondent's Acting Executive Director, signed the August 19th Letter, in which she informed Complainant she had removed both the Warning Letter and July 3rd Evaluation from Complainant's personnel file. CX 813. Ms. Smith noted the removal of the July 3rd Evaluation was made after consultation with both the Utah Attorney General's Office and Respondent's Human Resources management, and that the Warning Letter was being replaced with a verbal warning. *Id.* Ms. Smith further noted her belief that Complainant's review from October 25, 2007 through June 30, 2008 – for which period Complainant received an overall evaluation score of "Exceptional," CX 71-72 – was "an adequate review of [Complainant's] work year subsequent to [his] career mobility." CX 813. The August 19th Letter was also marked as "Confidential/Certified." *Id.*

At hearing, Ms. Smith testified about the circumstances giving rise to the August 19th Letter. Ms. Smith stated at hearing she had then been Respondent's Executive Director for approximately one year, nine months of which had been in the capacity of Acting Executive Director. TR at 311. Ms. Smith stated she came to the conclusions and positions stated in the letter by reviewing the documentation associated with the letter as well through conversations with Mr. Sinclair, Ms. Baker, Mr. Bousfield, and Complainant himself. *Id.* at 312-13. According to Ms. Smith, there was no performance evaluation present in Complainant's personnel file as a result of her actions as outlined in the August 19th Letter. *Id.* at 320. Ms.

Smith added, however, the Complainant may still have a letter in his personnel file reflecting his time as Engineering Section Manager, although no "formal evaluation" remained, although no documentation remained associated with the Warning Letter. *Id.* at 321-23.

Complainant questioned Ms. Smith as to her opinion expressed in the August 19th Letter that the Warning Letter was appropriate. *Id.* at 323. Ms. Smith characterized Complainant's behavior meriting the Warning Letter as "inappropriate," noting a problem with Complainant having attempting to influence a new and entry-level employee of Respondent's about that employee's supervisor instead of addressing such an issue through Respondent's management chain. *Id.* at 324-25. Ms. Smith characterized this as "inserting doubt into how [Respondent's] system works." *Id.* at 328.

I. Testimony of Brooke Baker

Ms. Baker also testified to the circumstances associated with the July 3rd Evaluation, the Warning Letter, and the August 19th Letter. As noted, Ms. Baker is a Human Resources Manager for Respondent, a position she had held for approximately three years at the time of the hearing. TR at 551-52.

Complainant began by questioning Ms. Baker about the August 19th Letter. Ms. Baker agreed with the representation in the August 19th Letter that the July 3rd Evaluation and Warning Letter had both been removed from Complainant's personnel file and into a "separate confidential file." *Id.* at 553-54. Ms. Baker further clarified Ms. Smith's comment that a letter remained in Complainant's personnel file, however, which discussed Complainant's tenure as Engineering Section Manager, and that this letter was in fact the Demotion Letter. *Id.* at 555; *see generally* RX 18.

Ms. Baker also discussed the characteristics of the confidential file to which the July 3rd Evaluation and Warning Letter had been moved. Ms. Baker noted this file was accessible to "management, a direct supervisor or a manager, an executive director, [or] someone who was supervising that employee" within Respondent's organizational structure, but she labeled the information within the file as "historical." TR at 556. Ms. Baker stated this file would not be available to potential future employers, but then hedged somewhat, noting it could be accessible for security background checks to certain employers under court order. *Id.* at 556-57.

Ms. Baker further discussed the difference between "probationary" and "career mobility" positions within Respondent's organizational structure. According to Ms. Baker, newly hired employees served a probationary period, which could start anew if such an employee changed job titles during such a period. *Id.* at 559-60. Conversely, career mobility positions, according to Mr. Baker, were used as "trial period[s]" when currently employed employees transferred from one position to another within Respondent's organizational structure. *Id.* at 560. Ms. Baker noted employees who failed to finish probationary periods were terminated, while those who failed to fulfill career mobility positions simply went back to the positions they occupied prior to entering into the agreements. *Id.* at 610. Ms. Baker further stated Complainant was occupying a career mobility position during his tenure as Engineering Section Manager, *id.* at

559, and that Respondent did indeed have rules applicable to such positions, although she could not recall them specifically at hearing. *Id.* at 560-61.

Complainant then moved on to question Ms. Baker about the Warning Letter, which Ms. Baker admitted drafting with guidance from Mr. Sinclair. *Id.* at 567, 571. Ms. Baker agreed with the Warning Letter's characterization of Complainant having "counsel[ed]" Mr. Jordan, and further agreed the letter Complainant sent to Mr. Jordan supported this interpretation. *Id.* at 570. However, Ms. Baker was hesitant to agree that such counseling extended to Complainant's telling Mr. Jordan "not to listen to District Engineers for anything," instead deferring to Mr. Sinclair with respect to this more sweeping characterization of Complainant's behavior. *Id.* at 571-72. Ms. Baker noted certain Human Resources rules were referred to in deciding to issue the Warning Letter to Complainant, specifically Utah Administrative Code Section R477-9-1(1)(a)(i), which states, "An employee shall comply with the standards established in the individual performance plans." *Id.* at 576-77. Ms. Baker noted on cross-examination that this Rule made individual agencies' policies enforceable. *Id.* at 595. Ms. Baker added, however, that she could not locate or did not think it appropriate to attempt to locate language within Respondent's Operating Principles specifically prohibiting Complainant's email to Mr. Jordan. *Id.* at 577-78.

Complainant next questioned Ms. Baker about the conduct of other employees similar to that for which he had received the Warning Letter. Complainant first asked Ms. Baker's opinion on the verbal warning received by his coworker, Ms. Tatum, for an email sent by her to certain colleagues of Complainant. *Id.* at 580-81. In this email sent on June 5, 2007, Ms. Tatum expressed her significant displeasure with Complainant's having then recently been chosen for the Engineering Section Manager position, labeling Complainant as "insubordinate," "confrontational," and "disrespectful not only to staff but [Respondent's] management." *See generally* CX 32. Ms. Baker did not disagree with Mr. Sinclair's earlier testimony that Ms. Tatum received a verbal warning for this incident. TR at 582. Ms. Baker further noted Ms. Tatum's insubordination was similar to that of Complainant sending his email to Mr. Jordan despite Complainant's allegation that he used a non-work computer to do so while Ms. Tatum used her work computer. *Id.* at 582-83. Complainant next asked Ms. Baker about another email sent by Mr. Hacking to Mr. Wilde in which Mr. Hacking expressed his regret that Ms. Tatum did not apply for the Engineering Section Manager position. *Id.* at 584; *see* CX 36. In this instance, Ms. Baker again noted a difference in Mr. Hacking's email from the one sent by Complainant to Mr. Jordan in that Mr. Hacking's email was directed to his supervisor, Mr. Sinclair. TR at 584-85; *see* CX 36. Ms. Baker concluded by noting Complainant's conduct was not "deemed more egregious" because he received a letter in contrast to Ms. Tatum's verbal warning. TR at 585-86. Instead, Ms. Baker stated individual circumstances applicable to each employee's situation dictated the level and type of warning issued to that employee for particular conduct. *Id.*

Complainant also asked Ms. Baker about an instance in which Walt Baker, the Director of the Division of Water Quality, had disclosed to Mr. Bousfield Complainant's having made a public records request. *See* CX 935. Ms. Baker was aware such a request had been made, but again did not consider it on par with the email sent by Complainant to Mr. Jordan. TR at 587. When asked to explain this view, Ms. Baker noted such records requests were public information, and therefore did not consider it inappropriate for Mr. Baker to have disclosed to

Mr. Bousfield that Complainant made such a request. *Id.* at 588. Ms. Baker did concede, however, that the document Complainant attached to his email to Mr. Jordan was also received through a similar public records request. *Id.* at 588-89. Ms. Baker was of the opinion that Mr. Baker's action in this instance did not violate Respondent's Operating Principles. *Id.* at 589.

On cross-examination, Ms. Baker testified to the distinction between warning letters and discipline. According to Ms. Baker, Respondent uses warning letters as "a management tool to bring the employee's attention to something that they [sic] need to change or stop." *Id.* at 590. Conversely, Ms. Baker depicted a discipline letter as something that included disciplinary intent directed toward the employee as well as a separate appeals process not associated with warning letters. *Id.* She further agreed with Respondent's counsel's characterization that warning letters typically would not affect employees' pay or benefits, while discipline letters could affect such things. *Id.* at 591-92. Ms. Baker also agreed employment evaluations, without further action, also could not alone affect employees' pay or benefits. *Id.* at 597-98.

Ms. Baker was also asked about the frequency of warning letters and any negative performance evaluations being removed from employees' personnel files. With respect to warning letters, Ms. Baker recalled two instances in three years of such letters being removed from employees' personnel files. *Id.* at 603. With respect to negative performance evaluations, however, Ms. Baker could think of no such instances. *Id.*

J. Complainant's Own Testimony

Complainant himself also testified at the hearing.[34] Complainant noted he held the position of Engineering Section Manager for Respondent between July 1, 2007 and October 25, 2007. *Id.* at 754. Complainant admitted this was a "career mobility position," and further stated he was removed from this position and returned to his former staff position on October 25, 2007. *Id.* at 754-55.

Complainant next recounted the Pheasant Meadows Project permit issuance process. Here, Complainant agreed, in part, with the account of this process given in Part IV.C.5, *supra*, insofar as Complainant testified to his authoring of a letter dated July 12, 2007 informing the client its water system did not meet minimum requirements and that the client here was an "old friend" of Mr. Bousfield. *See id.* at 754-55.[35] Complainant, however, added further details to this process, noting an after-the-fact Operating Permit was ultimately issued for this project on August 24, 2007. *Id.* at 755.

Complainant also offered testimony regarding the Slate Canyon Project. Here, Complainant testified to his performance of an inspection of this project on October 4, 2007. *Id.* at 756. According to Complainant, he returned to his office that same day to discover a voicemail message from Mr. Baxter, to which Complainant replied to "at the close of business on October 4, 2007." *Id.*

[34] Complainant began his testimony by discussing his credentials and professional background. *See* TR at 740. This information is included in Part IV.A, *supra*, however.

[35] Such similarity is perhaps unsurprising, however, given the portion testimony discussing this process was elicited by Complainant via leading questions during direct examination of Mr. Bousfield. TR at 638-39.

Complainant also testified to the circumstances surrounding his reassignment from Engineering Section Manager back to Environmental Engineer III. According to Complainant, he was informed of this reassignment by Mr. Sinclair on October 25, 2007. *Id.* Complainant followed this information by noting he had filed religious harassment complaints against Mr. Wilde, Mr. Bousfield, and Mr. Sinclair, although he did not state whether such complaints related in any way to his reassignment. *Id.* at 757. Complainant also noted an instance in which he received a second warning letter dated February 25, 2008 from Respondent for allegedly raising his voice to a coworker on February 10, 2008. *Id.* at 757-58; *see supra* Part IV.F. I allowed this testimony in at trial for the purposes of establishing a timeline, but cautioned Complainant as to the lack of relevance of such an incident given his failure to file a timely complaint alleging such an incident constituted adverse action. TR at 758; *see supra* note 29. Complainant then went on to note his receipt of the July 3rd Evaluation,[36] characterizing it as "the unsuccessful, un-promotable employee notice." TR at 758. Claimant also testified to receiving the Warning Letter, which he instead characterized as a "discipline letter." *Id.* at 759. Complainant concluded his direct testimony by describing the GRAMA request he made on May 12, 2009. *Id.* With respect to this request, Complainant also testified to his later learning of Mr. Baker's phoning of Mr. Bousfield about such a request, an action Complainant characterized as having occurred "serendipitously." *Id.* at 759-60.

On cross-examination, Complainant was asked by Respondent's counsel how his attitude toward other engineers and consultants had changed since his time as Engineering Section Manager. *Id.* at 761. To this inquiry, Complainant stated he had "been profoundly touched by the allegiance and the generosity of [his] professional colleagues to come to [his] defense in this whole matter." *Id.* Complainant compared this "outpouring" to "the famous movie[,] 'It's a Wonderful Life[,]' with Jimmy Stewart where he's just overwhelmed by the good actions of those around him." *Id.* at 762.

I also asked Complainant several of my own questions, beginning with his assessment of how his job duties had changed between his two stints as Environmental Engineer III before and after his tenure as Engineering Section Manager. *Id.* at 762. Here, Complainant noted generally he believed such a transition had resulted in his having "less responsibility" after being reassigned. *Id.* When pressed to give specific examples of this, Complainant noted instances where newly hired engineers were asked to serve as acting Engineering Section Manager as well as his "never being called upon for anything of responsibility with respect to professional credentials" since being reassigned. *Id.* at 762-63. Complainant further noted "reduced opportunities to go to conferences" and to participate in extracurricular-type activities since his reassignment. *Id.* at 763.

I next asked Complainant about the Slate Canyon Project, the outcome of some of the various complaints he filed against certain coworkers, and the U.S. Department of Agriculture funding that was noted in Complainant's Demotion Letter. When asked if the issues noted by Complainant in his inspection of the Slate Canyon Project were ever resolved, Complainant

[36] In his testimony, Complainant stated he received such notice on "July 3, 2007." *Id.* at 758. This date must be in error, however, as such notice would have occurred on the third day of his tenure as Engineering Section Manager. *Compare id.* at 754 *with id.* at 758. Consequently, I find Complainant here meant the same date in the year 2008.

stated it was doubtful such repairs and changes had occurred. *Id.* at 764-65. Complainant noted the problems he found required invasive structural repairs and that a copy of the specifications for the project, to his knowledge, were never located. *Id.* Complainant doubted the needed repairs could have occurred during the three-day interval between his inspection of the project and the issuance of the Operating Permit. *Id.* at 765. When asked about the outcome of his criminal complaint against Mr. Baxter, Complainant conceded to being informed by the assigned associate prosecutor that there existed "insufficient documentation to believe either side." *Id.* Complainant's assessment of these circumstances is somewhat at odds with the written response of the associate prosecutor sent to Complainant, which instead notes that there did "not appear to be a reasonable likelihood that filing charges against Mr. Baxter would result in a successful prosecution," CX 403, and makes no assessment as to the believability of either side. When asked about the outcome of his religious harassment complaints, Complainant also conceded these "did not proceed past the intake stage." TR at 766. When asked about the U.S. Department of Agriculture funding and whether Mr. Wilde was qualified to give a second opinion on the eligibility criteria for such funding, Complainant stated neither he, Mr. Bousfield, nor Mr. Wilde were qualified to give such an opinion. *Id.* Given these circumstances, Complainant noted he consequently "proceeded in the manner [he] thought would be necessary, which would be to solicit the information from the source itself." *Id.*

V. Analysis

I base the following findings of fact and conclusions of law on my observation of the appearance and demeanor of the witnesses who testified at the hearing; analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 24.109. In deciding this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it. *See Id.* § 18.29. Furthermore, although Complainant and Respondent previously engaged in proceedings regarding Complainant's whistleblower complaint at the OSHA level, my review of the record and evidence is conducted *de novo*. *Id.* § 24.107(b).

A. Credibility Determinations

Although dozens of persons appeared in this case, the majority of the hearing testimony was provided by a small number of witnesses. These witnesses include Complainant, Mr. Wilde, Mr. Sinclair, Mr. Bousfield, Mr. Duberow, Mr. Cassel, Mr. Baxter, Mr. Hacking, Mr. Ariotti, Mr. Buxton, Mrs. Macauley, and Ms. Baker. Below I assess their credibility.

Of the above group, I found Complainant, Mr. Wilde, and Mr. Baxter to be the least credible witnesses I observed – although neither so lacked credibility as to undermine completely their testimony. As I noted multiple times during hearing, I found most troubling with respect to Complainant his tendency to ask long leading questions and argue with witnesses who did not agree with his phrasing of events. *See id.* at 219-20, 306, 366, 504-05, 546-57, 847. In cautioning Complainant about leading questions, I went so far as to inform him that such questions served as a type of "anti-credibility" device aimed at the proponent of such questions. *Id.* at 547. Complainant's questions were also sometimes infused with extreme characterizations of events and descriptions of circumstances, *see, e.g., id.* at 327 (characterizing situation as

"Draconian" or "blatantly subversive"), 585 (attempting to have witness agree that conduct toward Complainant was "more egregious" than that directed toward other employee), 876 (attempting to get witness to agree Respondent created a "climate of . . . ingratiation" with its clients), and devolved into arguments with witnesses. *See, e.g.*, TR at 564, 607, 633-34, 722, 847, 1004, 1020-21. Such traits attributable to Complainant's questions of witnesses serve to undermine his own credibility.[37] I also find troubling Complainant's misrepresentation of certain events within the record. A prime example of this is the Letter of Concern received by Mr. Duberow as a result of Complainant's professional engineering Complaint. CX 944-45. Complainant repeatedly characterized this document as a "finding" or "sanction." *See, e.g.*, TR at 247, 882-83, 897; ALJX 20 at 26. The plain text of the Letter of Concern, however, demonstrates such a characterization is disingenuous as it clearly declines to impose sanctions upon Mr. Duberow and clearly states no formal investigation resulting in "findings" occurred. CX 944-45 ("The complaint received raises concerns that you *may* have engaged in unlawful or unprofessional conduct. *However, we have declined, at this time, to investigate the matter any further or to seek formal action against you. . . . This letter does not constitute a legal finding that you have or have not engaged in unlawful conduct.*") (emphasis added); *see also* TR at 252. Such circumstances give me substantial pause in accepting wholesale Complainant's version of the events giving rise to his whistleblower complaint.

Nevertheless, there were incidents at trial that served to bolster Complainant's credibility, especially with respect to his professional and technical knowledge. Examples of this included Mr. Bousfield's admission that Complainant had actually been right regarding the eligibility requirements of certain U.S. Department of Agriculture funding discussed in the Demotion Letter, *see id* at 685; *supra* Part IV.C.5, as well as the admitted trust Mr. Wilde, Mr. Bousfield, and Mrs. Macauley had – despite other personal conflicts – in Complainant's technical capabilities as an engineer. *See, e.g.*, TR at 488-89, 632-33, 1015. Such evidence causes me to find more credible Complainant's assertions as to other technical details relevant to this case.

I found Mr. Wilde's credibility to be undermined most significantly by his past relationship with Complainant. Mr. Wilde agreed with Complainant's characterization of his and Complainant's professional relationship over the years as "stormy." TR at 482. Mr. Bousfield testified Mr. Wilde's October 19th Memorandum, which strikes a very accusatory tone toward Complainant, came to Mr. Bousfield unsolicited. TR at 812-13. The record further contains an instance of Mr. Wilde's labeling of Complainant as "confrontational, manipulative, and defiant" in an August 24, 2005 letter, *see* CX 357, a statement which supports the existence of the tension between Complainant and Mr. Wilde I observed at hearing. Similarly, as the aforementioned instance of Complainant's correct assessment of the eligibility requirements for the U.S. Department of Agriculture funding supports Complainant's credibility regarding his technical credentials, it undermines that of Mr. Wilde, who incorrectly determined the applicants to be ineligible after only a "cursory review." CX 499. Mr. Bousfield further had "some reservations" regarding Mr. Wilde's ability to evaluate objectively work done by Complainant. TR at 686. Given the above circumstances and the fact that this case involves Complainant's own complaint, I find Mr. Wilde also to be somewhat lacking in credibility.

[37] While Respondent's counsel was also admonished for argumentative and leading questions, unlike Complainant he did not serve as a witness at the hearing.

I found Mr. Baxter also to suffer from credibility issues. For example, Mr. Baxter originally testified, when questioned by Respondent's attorney, to receiving emails directly from Complainant regarding the Slate Canyon Project, only to correct such testimony by noting on re-direct examination that such emails were not sent to him from Complainant but instead forwarded to him from Mr. Cassel. *Id.* at 190-91, 202-03. Mr. Baxter was also somewhat evasive when questioned directly by Complainant, specifically when asked about the details of the Slate Canyon Project. *See, e.g.*, *id.* at 209-10. Complainant also filed a criminal complaint against Mr. Baxter. *See* CX 403. These circumstances collectively make me doubt both the credibility of and motivation behind the testimony given by Mr. Baxter.

In contrast to Complainant, Mr. Wilde, and Mr. Baxter, I found more credible the testimony of Mr. Sinclair, Mr. Bousfield, Mrs. Macauley, Mr. Ariotti, and Mr. Hacking. Mr. Sinclair's involvement with Complainant came primarily as one who gathered, memorialized into two memoranda, and passed along the complaints of the District Engineers to Mr. Bousfield. *See supra* Part IV.C.3. When questioned about these memoranda at the hearing, I observed Mr. Sinclair to be straightforward and respectful toward Complainant, despite discussing accusations casting Complainant's management capabilities in an unflattering light. While Mr. Sinclair suggested certain courses of action to Mr. Bousfield in the October 15th Memorandum – including both the removal of Complainant from his position as Engineering Section Manager as well as an attempt to allow him to remain as a Manager while correcting certain behavior, *see* RX 11 at 248 – Mr. Sinclair further testified he did not advocate for a particular course of action in meeting with Mr. Bousfield. TR at 967.

I likewise observed Mr. Bousfield also to be a credible witness at the hearing. Despite being the individual who ultimately signed Complainant's Demotion Letter removing him from his position as Engineering Section Manager, *see* CX 498-500, I found him also to be very respectful toward Complainant, in two instances complimenting Complainant's technical competence. *See* TR at 632-33, 649-50. Mr. Bousfield offered credible answers when challenged by Complainant on certain issues. For example, when asked why Complainant's opinion was not given greater weight, given his possession of a Ph.D., with respect to a decision to be made about U.S. Environmental Protection Agency funding, Mr. Bousfield noted he had received another opinion with respect to such funding from another professional who also possessed such a degree. *Id.* at 644-45. Mr. Bousfield further admitted freely to receipt of criticism by his own supervisor during the same period in which Complainant occupied the position of Engineering Section Manager. *Id.* at 687-89. Such examples as well as my observation of Mr. Bousfield as a witness lead me to find his testimony trustworthy.

I also found Mrs. Macauley to be a credible witness. As did Mr. Wilde and Mr. Bousfield, Mrs. Macauley offered praise for Complainant's technical competence as an engineer. *Id.* at 1015. Unlike Mr. Sinclair, Mr. Wilde, and Mr. Bousfield, however, Mrs. Macauley was not involved in the events giving rise to Complainant's whistleblower complaint, although she did follow as Engineering Section Manager after his demotion from such a position. *Id.* On multiple instances, I found Mrs. Macauley's testimony credible when challenged by Complainant regarding his treatment by her since returning to the position of Environmental Engineer. For example, when questioned about Complainant's not attending various professional development conferences, Mrs. Macauley gave many valid reasons for

Complainant's abstention from such opportunities, including his failure to make such requests in a timely fashion, *id.* at 1031-32, his attempt to attend conferences beyond his area of expertise, *id.* at 1033, and his desire not to travel out of town. *Id.* at 1030. Similarly, Mrs. Macauley also offered a credible explanation for her failure to rate Complainant as "exceptional" regarding his work on sanitary surveys, noting Complainant needed to complete such surveys in a more timely manner. *Id.* at 522. Such rationale is consistent with other instances in the record where Complainant received feedback or criticism for his failure to complete work within a desired timeframe. *See* CX 1712, 1716, 1722, 1725. I consequently find Mrs. Macauley's testimony very credible.

I also found credible the testimony of the two District Engineers – Mr. Hacking and Mr. Ariotti – who testified at the hearing, although I give greater weight to the testimony of Mr. Hacking than Mr. Ariotti. As District Engineers, neither Mr. Hacking nor Mr. Ariotti had the type of everyday contact with Complainant as others involved in this case. Mr. Hacking specifically testified to having very limited contact with Complainant prior to his appointment as Engineering Section Manager, TR at 1074-75, something I find notable as demonstrating the absence of circumstances giving rise to, for example, the long-term animosity present between Complainant and Mr. Wilde. Furthermore, both struck me as pragmatic and concerned primarily with maintaining relationships within their respective areas and completing their work in an efficient manner as opposed to focused on acting with animosity toward Complainant. Nevertheless, I find Mr. Hacking more credible than Mr. Ariotti given Mr. Bousfield's labeling of the latter District Manager as somewhat of an embellisher. *Id.* at 796-97.

I also found credible Mr. Cassel and Mr. Duberow, although I give greater weight to the testimony of Mr. Cassel. Neither of these witnesses were employed by Respondent and therefore less influenced by the type of office politics and work histories present between Complainant and other Respondent-employed witnesses. Mr. Cassel's testimony was limited to his interactions with Complainant on the Slate Canyon Project, *id.* at 221-29, and the record does not demonstrate any sort of longstanding animosity between these two outside of such an endeavor. Mr. Duberow, like Mr. Cassel, also had limited contact with Complainant, *id.* at 1049-50, as well as limited knowledge of Complainant's role within Respondent's organizational structure. *Id.* at 1058-59. Mr. Duberow – while also an engineer independent of Respondent – was however subject to a professional misconduct complaint by Complainant, *see* CX 944-45, although he disagreed at hearing with Complainant's characterization of his conduct giving rise to this complaint. TR at 1068-70. Given such a circumstances, I consequently find the testimony of both of these witnesses credible, although Mr. Cassel's somewhat more so than Mr. Duberow's.

Finally, I found largely credible as witnesses both Mr. Buxton and Ms. Baker, although I note their testimony in this case was somewhat limited. Mr. Buxton's primary involvement in this case came through his supervision of Mr. Baxter during the Slate Canyon Project. The record contains a letter written by Mr. Buxton to Complainant, CX 548, as well as Mr. Buxton's testimony about the circumstances giving rise to it. *See* TR at 155-57. Both of these portions of the record serve as recollections of a specific event, and I found Mr. Buxton's testimony regarding his rationale for his actions toward Complainant to be consistent with his reasoning set forth in the December 14, 2007 letter. Ms. Baker testified credibly to details about Respondent's maintaining of personnel records, *id.* at 553-56, as well as Respondent's use of probationary

periods for various employees. *Id.* at 559-61. However, I found her somewhat evasive in discussing her role in drafting the Warning Letter. *Id.* at 570-78. Consequently, while finding largely credible the testimony of both Mr. Buxton and Ms. Baker, I give greater weight to the testimony of the former.

B. Substantive Analysis of the Elements of Complainant's Whistleblower Complaint

29 C.F.R. § 24.102(b) places restrictions on employer behavior under the environmental acts, including the SDWA. Under this Regulation, an employer may not discriminate against an employee, including "intimidat[ing], threaten[ing], restrain[ing], coerc[ing], blacklist[ing], discharg[ing], or in any other matter retaliat[ing] against" that employee because of three subsets of activity: (1) "[c]ommenc[ing] or caus[ing] to be commenced, or [being] about to commence or cause to be commenced, a proceeding under . . . of the" SDWA; (2) "[t]estif[ying] or [being] about to testify in such a proceeding"; or (3) "[a]ssist[ing] or participat[ing], or [being] about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of" the SDWA. *Id.*; *see Carpenter v. Bishop Well Servs. Corp.*, No. 07-060, slip op. at 5 (ARB Sept. 16, 2009). To succeed in his whistleblower complaint under the SDWA, Complainant therefore bears the burden to prove by a preponderance of the evidence he engaged in some form of protected activity and that such activity was a motivating factor in some adverse action taken against him by Respondent. *See* 29 C.F.R. § 109(a). This equates to four elements for a successful claim: (1) Complainant's engaging in protected activity, (2) knowledge on behalf of Respondent of such activity; (3) some adverse action taken by Respondent; and (4) a causal connection between Complainant's protected activity and Respondent's adverse action. *See, e.g.*, *Carpenter*, No. 07-060, slip op. at 5; *Cante v. N.Y. City Dep't of Educ.*, No. 08-012, slip op. at 4-5 (ARB July 31, 2009); *Culligan v. Am. Heavy Lifting Shipping Co.*, No. 03-046, slip op. at 6 (ARB June 30, 2004). If a complainant demonstrates the existence of these four elements by a preponderance of the evidence, the burden then shifts to the employer to demonstrate it would have nevertheless taken the adverse action despite the complainant engaging in protected activity. 29 C.F.R. § 24.109(b). I now discuss each of the four aforementioned elements as they apply to the facts and circumstances giving rise to Complainant's whistleblower complaint.

1. Protected Activity

An employee engages in protected activity if he or she "provides information grounded in conditions constituting reasonably perceived violations" of one of the environmental acts. *Carpenter*, No. 07-060, slip op. at 6; *see Kesterson v. Y-12 Nuclear Weapons Plant*, No. 96-173, slip op. at 4 (ARB Apr. 8, 1997). In doing so, the employee providing such information is not held to so exacting a standard as to require an actual violation of a specific act, nor must he or she actually be correct in the assessment of the perceived hazard. *Dixon v. U.S. Dep't of the Interior*, Nos. 06-147, 06-160, slip op. at 9 (ARB Aug. 28, 2008). This does not mean, however, an employee's protected activity may consist entirely of vague complaints with only the weakest connection to an environmental act under which that employee seeks protection. To be protected activity, the provision of information by an employee must "relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." *Carpenter*, No. 07-060, slip op. at 7 (quoting *Kester v. Carolina Power & Light Co.*, No. 02-007, slip op. at 9 (ARB Sept. 30, 2003)).

Complainant in his prehearing statement lists three protected activities: (1) his bringing to the attention to his superiors his discovery of "an apparent egregious under-sizing of the already-constructed [sic] waterlines responsible for supplying normal-use drinking water and emergency-use fire-flow water" to the subdivision associated with the Pheasant Meadows Project, ALJX 18 at 34; (2) his discovery of and communication about "glues, sealants, etc., not allowed under the Utah Administrative Rules for Public Drinking Water Systems" and the "substitution of substandard air relief valves" associated with the Slate Canyon Project, *id.* at 37; and (3) the renewal of his prior findings associated with the Slate Canyon Project on October 25, 2007. *Id.* at 42. Respondent argues Complainant has engaged in no protected activities. ALJX 21 at 3. I examine these contentions and the categorization of these actions as protected activities below.[38]

a. Pheasant Meadows Water Line

Respondent concedes the inappropriately sized water line discovered by Complainant during his inspection of the Pheasant Meadows Project presented the danger of "backflow and contamination of the water" within the line. ALJX 21 at 3. Furthermore, Complainant presented witnesses to support the existence of such a hazard. Michael Moss, an expert in "backflow hazards and cross-connections in drinking water systems," TR at 134, offered testimony to the existence of such a danger. Mr. Moss agreed with Complainant's characterization of a cross-connection as the interfacing of drinking water with water of "unapproved quality for drinking water." *Id.* at 135. According to Mr. Moss, a resultant drop in water pressure could result in "back siphonage of water from some other source into [a] drinking water system." *Id.* at 137, 142. Mr. Moss further noted such siphonage could produce a "serious event" of contamination. *Id.* The Pheasant Meadows Project's line supplying water for fire suppression presented just such a danger of a low-pressure event as demonstrated by the August 22, 2007 Operating Permit, which required the fire hydrants associated with the line be deemed "nonfunctional," CX 369, and the subsequent labeling of such hydrants with the language, "DO NOT USE INADEQUATE FIRE FLOW MAY COLLAPSE WATER LINE." CX 373. Finally, Respondent does not challenge Complainant's having informed Mr. Bousfield of these inadequacies as described in

[38] Complainant rather opaquely attempted to leave the door open in his prehearing statement for later alleging additional protected activities. *See* ALJX 18 at 32 ("Claimant [sic] alleges that the unsuccessful/unpromotable employee notice, dated July 3, 2008, ostensibly pertaining to the time period July 1, 2007 to October 25, 2007, is, in fact, a retaliatory action for Claimant's [sic] protected activities *from commencement of employment on March 22, 1998*, through July 3, 2008, issuance of the unsuccessful/unpromotable employee notice.") (emphasis added). Unsurprisingly, Complainant does just this in his posthearing brief, in which he makes fourth and fifth allegations of protected activity in the form of his first and second OSHA complaints as being motivation for the Warning Letter. *See* ALJX 20 at 13, 18. I give such an allegation no consideration for several reasons. First, such a posthearing amendments directly contradict the explicit language of the prehearing notice, which required Complainant then to set forth "a list . . . of the . . . alleged protected activities, the date of each such activity, and a detailed description of the activity." ALJX 1 at 2. Second, Complainant attempts to demonstrate the relevancy of the date of the filing of his first OSHA complaint via submission of additional evidence. However, the evidence he attempts now to submit was clearly available and sent to Complainant in June 2008, and is therefore in no way "new and material" to him. *See* 29 C.F.R. § 18.54. Third, even were I to consider such evidence, it does not in any way impute knowledge onto Ms. Baker or Mr. Sinclair – the authors of the Warning Letter – of Complainant having filed such a complaint. The letter from OSHA is addressed only to Complainant and does not contain proof of service on any other party. *See* ALJX 20, Ex. 1. Consequently, it in no way demonstrates either Ms. Baker's or Mr. Sinclair's knowledge of Complainant's first OSHA complaint prior to the issuance of the Warning Letter.

the July 12, 2007 letter to Lanny Ross. *See* CX 366-67. This letter contains Complainant's initials below Mr. Bousfield's signature, CX 367, indicating Complainant is its author. *See* TR at 54-55, 436.

Given such circumstances, I find the record demonstrates Complainant informed his superior, Mr. Bousfield, about a low-pressure water-line hazard which clearly carried with it a risk of contamination of drinking water. Furthermore, based on Complainant's own technical knowledge of drinking water hazards and the testimony presented by his witnesses, I find Complainant harbored an actual and reasonable belief that the undersizing of the Pheasant Meadows Project's water line carried with it this hazard. Complainant's informing his superior about such a hazard therefore constitutes protected activity under the SDWA. *See* 42 U.S.C. 300j-9(i)(1); *see Melendez v. Exxon Chems. Ams.*, No. 96-051, slip op. at 25 (ARB July 14, 2000) (citing *Minard v. Nerco Delamar Co.*, No. 92-SWD-1, slip op. at 7-16 (Sec'y Jan. 25, 1994)) (holding alleged protected activity must be founded on complainant's actual *and* reasonable belief that violation of environmental statute has occurred) This is true despite Complainant's providing such information solely on an internal basis to his supervisor. *See Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985).[39]

In asserting Complainant did not engage in protected activity through his complaints about water-pressure problems associated with the Pheasant Meadows Project's water line, Respondent makes two arguments.[40] First, Respondent asserts it was not Complainant but Lanny Ross who informed Mr. Bousfield of the low-pressure problem associated with the Pheasant Meadows Project's water line. Second, Respondent asserts Complainant could not have engaged in protected activity as his concerns about the low-pressure problem were voiced within the parameters of the job as a government employee. I examine these contentions in turn.

Respondent asserts only that Mr. Bousfield "first learned about this problem not from [Complainant] but from Lenny [sic] Ross, the subdivision developer." ALJX 21 at 4. Although Respondent cites a portion of the hearing transcript to support such an assertion, it does so in error. In the portion of the transcript cited, Mr. Bousfield testified, "I had a conversation with Lenny [sic] Ross, the manager of the district. I specifically told him, 'The pipeline is inadequate. It needs to be upgraded.'" TR at 701. Such testimony does not support an assertion that Mr. Ross informed Mr. Bousfield of any such problem; indeed, Mr. Bousfield's testimony reveals instead that he informed Mr. Ross of the water line's deficiency. *Id.* Such testimony does not contradict Complainant's assertion that it was him who informed Mr. Bousfield of the problems with the Pheasant Meadows Project's water line. Furthermore, even if Mr. Bousfield had been aware of the problem with the Pheasant Meadows Project's water line prior to being told of it by Complainant, Respondent provides no authority for how such a circumstance has any bearing on Complainant's having engaged in protected activity.

[39] As Complainant's claim arises in Utah, I apply the law of the Tenth Circuit where applicable.

[40] Respondent additionally argues, in passing and without support, that Complainant "never testified in any proceeding, nor did he threaten to initiate or testify in any such proceeding." ALJX 21 at 5. There is no support in case law for such a formalistic interpretation. *See Brock*, 780 F.2d at 1513.

Respondent next asserts Complainant's voicing concerns over the Pheasant Meadows Project's water line equated to "simply . . . the performance of his job duties," a circumstance Respondent argues precludes a finding of protected activity. ALJX 21 at 5. In doing so, Respondent relies on an incomplete and misguided reading of *Sasse v. Office of the U.S. Attorney*, No. 02-077 (ARB Jan. 30, 2004). In *Sasse*, the complainant argued his actions of "prosecuting environmental crimes" within his capacity as a U.S. attorney amounted to protected activity under various environmental whistleblower provisions. *Id.* at 1-2, 7. In hearing the complaint, the administrative law judge assigned to the case erroneously relied on the a scope of protected activity associated with the Civil Service Reform Act, however, instead of the correct scope associated with the environmental whistleblower provisions under which Sasse filed his complaint. *Id.* at 12-13 ("The environmental whistleblower provisions are significantly broader in scope than the [Civil Service Reform Act] whistleblower protection provision."). Respondent nevertheless relies on the administrative law judge's erroneous labeling of protected activity to argue Complainant failed to engage in protected activity in informing Mr. Bousfield of the low-pressure problem. *Compare* ALJX 21 at 7 *with Sasse*, No. 02-077, slip. op at 12-13. Such reasoning is wholly unpersuasive. Consequently, after considering Respondent's arguments to the contrary, I find Complainant indeed engaged in protected activity in communicating his analysis of the problems associated with the Pheasant Meadows Project's water line to Mr. Bousfield.

b. Slate Canyon Project

Complainant's next alleged protected activity takes the form of the information he conveyed regarding the use of certain sealants and glues and the installation of certain air valves on the water line associated with the Slate Canyon Project. *See* ALJX 18 at 37. I again find Complainant's provision of such information, at least in part, constitutes protected activity. The October 29, 2007 Operating Permit for the Slate Canyon Project establishes an actual and reasonable belief on behalf of Complainant that unapproved glues and sealants were present and posed a danger of drinking water contamination. *See* CX 521. Mr. Bousfield testified such issues were brought to his attention by Complainant prior to his signing of the Operating Permit. TR at 641. Additionally, Mr. Cassel similarly testified it was Complainant who discovered the use of such improper sealants and glues on the Project. *Id.* at 229. Mr. Cassel further admitted his firm used "the wrong type of material" in terms of glues and sealants on the Slate Canyon Project's water line. *Id.* at 228. Given such evidence and again account for Complainant's technical background, I again find his voicing such concerns to Mr. Bousfield again constituted protected activity under the SDWA. *See Melendez*, No. 96-051, slip op. at 25.

Complainant's discovery and reporting of the use of air vents in place of air valves, however, does not constitute protected activity. Although Complainant provided sufficient testimony to demonstrate the shortcomings of the Pheasant Meadow Project's water line presented the risk of back siphonage – which in turn presented a risk of contaminating drinking water – the record contains no evidence to support such a risk accompanied the use of air vents in place of air valves on the Slate Canyon Project's water line. Indeed, Complainant himself in questioning witnesses presented this risk as one of potential "spewing" or "spurt[ing]" as water made its way down the grade associated with the Slate Canyon Project's water line. TR at 45, 215. The testimony of one of Complainant's own witnesses – Paul Hansen, Chairman of the

Drinking Water Board, *id.* at 30 – additionally refuted the possibility of contamination through the use of air vents. When asked directly if the use of an air vent presented the risk of contaminants being "sucked back in through the vent," Mr. Hansen answered, "Generally, air vents don't allow air back into them." *Id.* at 44. Given such a response as well as Complainant's failure to express such a risk to Mr. Cassel, Mr. Baxter, or Mr. Bousfield, I find Complainant could not have harbored an actual and reasonable belief that the use of air vents on the Slate Canyon Project's water line presented the risk of contaminating drinking water through back siphonage.

Respondent sets forth similar arguments as discussed in Part V.B.1.a, *supra*, with respect to a finding that Complainant's discovery of and communications about the sealants and glues associated with the Slate Canyon Project's water line constitutes protected activity. *See* ALJX 21 at 3-8. The only distinction in this instance is Respondent's argument that Complainant here conveyed his findings "not . . . to [Mr.] Bousfield but Kurt Baxter, a project manager with" DFCM. *Id.* at 4. Again, I find such reasoning erroneous and unsupported by the record. As an initial matter, Respondent fails to reconcile such a position with the aforementioned erroneous argument that Complainant's *failure* to inform an actor outside of its organizational structure precludes a finding of protected activity. *See Sasse*, No. 02-077, slip. op at 12-13; *supra* Part V.B.1.a. Furthermore, the portions of the record cited by Respondent to support its assertion that Mr. Baxter – not Complainant – first communicated the issues involving the glues and sealants to Mr. Bousfield is again in error. *See* TR at 664 (noting Demotion Letter's discussion of Complainant's failure to meet with Mr. Baxter to discuss problems with Slate Canyon Project but failing to mention Mr. Bousfield's learning of such problems from Mr. Baxter), 715 (noting Mr. Baxter left Mr. Bousfield a voicemail stating only, "[H]e wasn't able to meet with [Complainant]," but failing to mention any communication by Mr. Baxter to Mr. Bousfield about glues or sealants). Finally, Mr. Bousfield's awareness or lack thereof regarding the use of such glues and sealants at the time of Complainant's communications to him about such has no bearing on his ability to engage in protected activity. *See McCafferty v. Centerior Energy*, No. 96-ERA-6, slip op. at 3 (ARB Oct. 16, 1996) ("[I]t matters not that an employee complains about a hazard that has already been corrected, or complains . . . about a condition that the employer is already aware of."). Consequently, I remain unpersuaded by Respondent's arguments and again find Complainant's communications about the glues and sealants amount to protected activity under the SDWA.

c. Renewal of Slate Canyon Findings on October 25, 2007

For his third protected activity, Complainant asserts he renewed the communication of his findings regarding the use of improper glues and sealants after being "ordered" by Mr. Sinclair to compose an Operating Permit for the Slate Canyon Project. ALJX 18 at 41-42. Although Respondent makes no assertion as to whether Complainant made such a communication during the October 25, 2007 meeting or whether Mr. Sinclair made such a statement, I find the record supports such an event did occur. When asked if such a conversation occurred on October 25, 2007 regarding the Slate Canyon Project or whether he requested Complainant prepare the letter constituting the Operating Permit, Mr. Sinclair could not recall. TR at 988. Complainant, however, testified such a meeting occurred, during which Mr. Sinclair "ordered" him to prepare the aforementioned Operating Permit. *Id.* at 757. While I find

somewhat unpersuasive Complainant's characterization of being "ordered" to compose such a letter, I find the October 29, 2007 Operating Permit letter supports the existence of some communication between Complainant and Mr. Sinclair regarding the problematic glues and sealants associated with the Slate Canyon Project's water line. This letter discusses the problems associated with the glues and sealants used and further contains Complainant's initials, indicating he is its author. *See* CX 520-22. As this letter is dated four days after the conversation claimed by Complainant to have occurred, *see* CX 520, I find it coupled with Complainant's recollection of his conversation with Mr. Sinclair on October 25, 2007 constitutes sufficient evidence to demonstrate by a preponderance of the evidence his engaging in protected activity on this date.[41]

2. Adverse Action

Adverse action is action taken by an employer that a reasonable employee would have found to be "materially" adverse. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58 (2006); *Melton v. Yellow Transp., Inc.*, No. 06-052, slip op. at 14 n.10, 24 (ARB Sept. 30, 2008) (Transue, J., concurring) (adopting by majority of review panel *Burlington Northern* standard "in cases arising under the employee protection sections of all of the statutes that the Labor Department adjudicates"). In order for action to be "materially" adverse, it must be capable of "dissuad[ing] a reasonable worker" from his or her having engaged in protected activity. *Burlington N.*, 548 U.S. at 58 (quoting *Rochon v. Gonzalez*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)); *Powers*, No. 04-111, slip op. at 24. The determination of whether or not a specific action is adverse under this standard is fact-specific and must take into account the circumstances surrounding such action. *Burlington N.*, 548 U.S. at 69 ("Context matters.") However, actions found to be only "petty slights and minor annoyances" do not rise to the level of being materially adverse. *Id.* at 68.

In this case, Complainant sets forth five acts he asserts constitute adverse action by Respondent against him as a consequence of his having engaged in protected activities. *See* ALJX 18 at 44-67. The second of these actions, however, is the warning letter Complainant received on February 25, 2008. As discussed, Complainant failed to file a timely complaint with OSHA related to such adverse action, and I do not now consider it. *See supra* note 29.

The remaining four adverse acts are as follows: (1) Complainant's demotion from the position of Engineering Section Manager to Environmental Engineer on October 25, 2007, ALJX 18 at 44-47; (2) Complainant's July 3rd Evaluation, *id.* at 49-57; (3) Complainant's receipt of the Warning Letter, *id.* at 57-63; and (4) Mr. Baker's informing Mr. Bousfield of Complainant's May 12, 2009 GRAMA request. *Id.* at 63-67. I examine each of these actions in turn.

a. Complainant's Demotion

While there is little doubt demotion constitutes an adverse action, *see Burlington Indus. V. Ellerth*, 524 U.S. 742, 761 (1998), *Shabestari v. Utah Non-Profit Housing*, 377 Fed. App'x 770, 772-73 (10th Cir. 2010) (citing *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1059 (10th Cir.2009)), Complainant here again did not timely file a complaint alleging the occurrence

[41] Respondent sets forth no argument with respect to this specific claim of protected activity.

of his removal from the position of Engineering Section Manager. The record demonstrates Complainant was informed both verbally and in writing of his demotion on October 25, 2007. *See* TR at 988; RX 18. Complainant however did not file his first complaint with OSHA until June 1, 2008, *see* ALJX 20 at 2, a date over seven months after the event of his demotion and well outside of the thirty days allowed under the SDWA. *See* 42 U.S.C. § 300j-9(i)(2)(A). Consequently, I find Complainant's allegation of such adverse action to be untimely, and do not consider it in my analysis.

Complainant nevertheless argues I should now consider the act of his demotion in the form of the Demotion Letter in my analysis, arguing that it is "inextricably linked" to his July 3rd Evaluation. *See* ALJX 20 at 22. Complainant has pursued throughout these proceedings a theory that Respondent has engaged in a "shell game," *see* TR at 769; ALJX 12 at 3; ALJX 20 at 19, which includes the "swap[ping]" of various documents in and out of his personnel file. *See* ALJX 20 at 19, 22. I note here that I find such a theory completely unfounded and not at all persuasive as a means to bring into consideration Complainant's demotion or the Demotion Letter. Complainant bases his assertion of Respondent's engaging in chicanery regarding such a file in order to "obfuscate evidence" on the testimony of Ms. Baker and Ms. Smith. *See* ALJX 20 at 22. At the hearing, Ms. Smith testified to her understanding of the existence of "an evaluation" for the time period of July 1, 2007 through October 25, 2007 in Complainant's personnel file. TR at 321. In light of the August 19th Letter's representation of the removal of the July 3rd Evaluation from his personnel file, Complainant ceased this line of questioning and chose later to pursue it with Ms. Baker. *Id.* at 322. Ms. Baker, however, clarified that the "evaluation" referred to by Ms. Smith was in fact the Demotion Letter given to Complainant on October 25, 2007. *Id.* at 555. These circumstances are entirely consistent with the August 19th Letter, which purported to remove only the Warning Letter and July 3rd Evaluation from Complainant's personnel file, but made no mention of the Demotion Letter.[42] *See* CX 813. Given such circumstances, I find unpersuasive any theory by Complainant alleging Respondent has been less than candid regarding the representation to Complainant of documents within his personnel file. As such a theory lacks merit, I further find it provides no basis for the consideration of either Complainant's demotion or the issuance of the Demotion Letter.

b. Complainant's July 3rd Evaluation

Complainant alleges the next adverse action taken against him was his July 3rd Evaluation. As discussed, Complainant received an overall rating of "unsuccessful" for the period of July 1, 2007 through October 25, 2007 associated with this Evaluation, his only such poor overall rating during his entire tenure of employment with Respondent. *Compare* RX 26 at 214 *with* CX 1713-31. Complainant argues in part because of the July 3rd Evaluation, his "future earning potential [with Respondent] was grievously harmed" and has consequently resulted in his being "discriminatorily precluded from fair competition for appointment to his former position in [Respondent's] management."[43] ALJX 20 at 24. Respondent conversely asserts the July 3rd Evaluation does not constitute adverse action. ALJX 21 at 11.

[42] I discuss separately below the effect of the August 19th Letter on the July 3rd Evaluation and Warning Letter.

[43] Complainant postures such allegations broadly, including in this portion of his brief the hourly wage decrease he suffered as a result of his demotion. *See* ALJX 20 at 24. As I do not consider Complainant's demotion or the

I note first that Respondent employs an improper standard in arguing the July 3rd Evaluation does not constitute adverse action. Respondent, in relying on *Smart v. Ball State University*, 89 F.3d 437 (7th Cir. 1996), asserts the July 3rd Evaluation "clearly" did not affect Complainant's "employment, compensation, responsibilities[,] and benefits," and therefore cannot constitute adverse action. *Id.* Such an argument, however, only hones in on the type of "material tangible economic . . . damage" that is "certainly *sufficient but not necessary* to satisfy [*Burlington Northern*]'s requisites." *Williams v. W.D. Sports, Inc.*, 497 F.3d 1079, 1090-91 (10th Cir. 2007). Respondent attempts to raise the bar for what Complainant must establish as adverse action to beyond that required by *Burlington Northern*. Such an approach strays from the mandated "case-specific and contextually sensitive inquiry" for determining whether adverse action has occurred, *see Semsroth v. City of Wichita*, 555 F.3d 1182, 1184 (10th Cir. 2009), which inquires as to "whether the employer's conduct 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Williams*, 497 F.3d at 1089-90 (quoting *Burlington N.*, 548 U.S. at 67-68). Therefore, while I consider Respondent's argument below, I do not do so within the framework it proposes. Instead, the July 3rd Evaluation must be analyzed under the framework provided by post-*Burlington Northern* case law considering the issue of adverse action. Under such a framework, the proper inquiry becomes whether a reasonable employee in Complainant's position would be dissuaded from engaging in protected activity by the consequences and circumstances associated with receipt of the July 3rd Evaluation. *See Burlington N.*, 548 U.S. at 67-69; *Semsroth*, 555 F.3d at 1186; *Melton*, No. 06-052, slip op. at 24 (Transue, J., concurring). I therefore examine these circumstances now.

Ms. Baker, Mr. Sinclair, and Mr. Bousfield all offered testimony as to the circumstances surrounding Complainant's July 3rd Evaluation as well as the parameters used and effects of such evaluations. Ms. Baker noted the timing of the July 3rd Evaluation – over eight months after Complainant was removed from the position of Engineering Section Manger – was the result of her discovery at the end of that annual review period that Complainant did not have a review for the period of July 1, 2007 through October 25, 2007. *Id.* at 837-38. When asked specifically what purpose performance evaluations served, Ms. Baker stated they were "to let the employee know, you know, whether they've met the expectations, if there have been any concerns, or what the goals are, what the outcomes of those objectives are." TR at 596. Ms. Baker further agreed with Respondent's counsel's statements that such performance evaluations alone could not affect the "terms and conditions of an employee's employment" – even if such evaluations were unsatisfactory – without further action by Respondent. *Id.* at 597-98. Ms. Baker stated she could not recall any "consequences" Complainant endured as a result of his July 3rd Evaluation. *Id.* at 598.[44]

Mr. Sinclair stated the July 3rd Evaluation was issued at "the behest of Mr. Sprott," and characterized it as "documentation . . . for the record" following the termination of

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Demotion Letter, I restrict my analysis in this section only to the consideration of the effect of the July 3rd Evaluation in applying the *Burlington Northern* standard.

[44] Complainant also attempted to question Ms. Baker about the specific section of the Utah Administrative Code discussing performance evaluations. TR at 559. In response to this questioning, however, Ms. Baker noted the section of the Code referenced by Complainant applied only to probationary employees – not employees such as Complainant, who served in a career mobility position during his tenure as Engineering Section Manager. *Id.* at 559-60.

Complainant's career mobility agreement. *Id.* at 424-25. Mr. Sinclair served in a role of "consultation" to Mr. Sprott in drafting the July 3rd Evaluation, noting he met with Mr. Sprott "shortly before" the issuance of the Evaluation but did not review it prior to it being given to Complainant. *Id.* at 982-83. According to Mr. Sinclair, Mr. Sprott characterized the July 3rd Evaluation as a "needed item" prior to its issuance, although he could not recall the specific details of it. *Id.* at 983. Mr. Sinclair also testified to the effects of performance evaluations generally, noting he was aware of no policy of Respondent's preventing the promotion of or award of salary increases to employees who had received one "unsuccessful" performance evaluation. *Id.* at 984-85. Mr. Sinclair further agreed with Respondent's counsel's representation that such an unsuccessful evaluation could not "change anyone's income by itself." *Id.* at 985. However, when pressed by Complainant, Mr. Sinclair could not recall a scenario in which an employee who had received an unsuccessful performance evaluation had also received a raise or been promoted. *Id.* at 1040-41. Mr. Sinclair did agree there was a policy of Respondent's under which "an employee's rights, duties, obligations, [and] privileges" could change "as a result of an unsatisfactory employment evaluation." *Id.* at 986. When asked to elaborate on this, Mr. Sinclair noted Respondent had a policy of typically following up with an employee who had received such an unsatisfactory evaluation to ensure a return "to a satisfactory working state." *Id.* In the case of Complainant, however, Mr. Sinclair stated such a plan was not implemented due to Complainant's removal from the position of Engineering Section Manager. *Id.* at 986-87.

Mr. Bousfield also testified regarding the performance evaluation process. When asked to explain the execution of performance evaluations, Mr. Bousfield described it as "the delivery of the performance evaluation document to the employee, . . . discussion between the manager and the employee, . . . [and] signatures following that." *Id.* at 697. Mr. Bousfield further corroborated Mr. Sinclair's and Ms. Baker's explanation as to the primary reason for the issuance of the July 3rd Evaluation, noting also that it was done in mid-2008 after the discovery that Complainant's personnel file did not contain a review for the period of July 1, 2007 through October 25, 2007. *Id.* at 709. Mr. Bousfield further testified to the correlation of marks received in individual categories of a performance evaluation to the overall rating issued to a particular employee. Here, Mr. Bousfield noted there was no official rule as to how individual marks influenced the overall rating, although he further noted there was a tendency by some managers, including himself, to at times issue an overall rating in line with the majority of individual scores received by a particular employee. *Id.* at 777-78. Mr. Bousfield admitted, however, that he did not follow this "rule of thumb" in the case of Complainant's July 3rd Evaluation. *Id.* Instead, Mr. Bousfield characterized the one individual "unsuccessful" mark received by Complainant as "connect[ing] with . . . some of the other components" of Complainant's performance during his tenure as Engineering Section Manager. *Id.* at 777. Mr. Bousfield further noted the one individual "unsuccessful" mark was based in part on the conduct outlined in the Demotion Letter. *Id.* at 778. Mr. Bousfield could not recall, however, ever signing off on another employee's performance evaluation where an employee had received an overall rating of "unsuccessful" predicated on a mark of "unsuccessful" in a single individual category. *Id.* at 893.

The contents of the July 3rd Evaluation itself are also instructive. As noted, the single category in which Complainant was marked unsuccessful contained an indictment against

Complainant for his "unwillingness" to adhere to Respondent's Operating Principles, something Mr. Bousfield stated stood in the way of Complainant's becoming an effective manager. *See* RX 26 at 215. Aside from this generalized critique, however, specific details of Complainant's performance are not included aside from reference to the Demotion Letter and the warning letter received by Complainant on February 25, 2008 – which Mr. Bousfield noted served as examples of Complainant's failure to follow Respondent's Operating Principles. *Id.*

After considering the above facts and circumstances, I find Complainant's July 3rd Evaluation did not constitute adverse action by Respondent. I doing so, I note first that the limited number of courts who have considered negative performance evaluations post-*Burlington Northern* have indicated such acts may be insufficiently material when considered alone to constitute adverse action. *See Sutherland v. Mo. Dep't of Corrections*, 580 F.3d 748, 752 (8th Cir. 2009) (holding lower evaluation score without reduction in pay, privilege, or prestige did not materially alter employment); *Taylor v. Solis*, 571 F.3d 1313, 1321 (D.C. Cir. 2009) (holding plaintiff's claims that lowered evaluation scores led to denial of promotions had to be supported by evidence tying evaluations to financial harm); *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (characterizing "unsatisfactory performance review" as containing "job-related constructive criticism," and finding such review could constitute adverse action "only when attached to financial harms"); *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 403 (6th Cir. 2008) (finding lower performance evaluation leading to smaller wage increase was sufficiently material to survive summary judgment motion). While such decisions demonstrate a tendency to focus on the harm to the employee instead of the effect of a negative review on that employee's proclivity to engage in protected activity or report discrimination, I nevertheless find them instructive in creating a baseline regarding the role of negative performance reviews as adverse acts. Indeed, research reveals no post-*Burlington Northern* case in which a bare negative review – without further consequences – constitutes adverse action when standing alone.

In Complainant's case, I find his July 3rd Evaluation to have constituted only "job-related constructive criticism," *see Baloch*, 550 F.3d at 1199, which Respondent rendered in large part as a procedural step to keep current Complainant's personnel file and in no way resulted in financial harm to Complainant. I found credible the testimony of Ms. Baker, Mr. Bousfield, and Mr. Sinclair, who all consistently testified that the July 3rd Evaluation was rendered at the time it was – eight months after the end of Complainant's tenure as Engineering Section Manager – due to a need to have such reviews in place for all times of an employee's tenure with Respondent. *See* TR at 424-25, 709, 837-38. The Evaluation was delivered to Complainant after he had returned to the position of Environmental Engineer, and Complainant presented no evidence of any financial harm upon its receipt.[45] Although Complainant procured testimony that Mr. Sinclair could not think of any employees who had received promotions or raises following the receipt of an unsuccessful evaluation, *id.* at 1040-41, Mr. Sinclair further noted Respondent had no policy preventing the awarding of raises or promotions in light of such evaluations. *Id.* at 984-85. Ms. Baker also agreed with this description as to the effects of performance evaluations. *Id.* at 597-98.

[45] Complainant does allege a $2.00-per-hour decrease in salary associated with his demotion on October 25, 2007. *See* ALJX 20 at 24. As noted, however, Complainant did not file a timely OSHA complaint regarding this action by Respondent. *See supra* Part V.B.2.a.

Complainant was given ample opportunity to call witnesses in this case, and indeed did so through the testimony of twenty-nine individuals (excluding himself). Yet he produced no current or former employee of Respondent who had received an unsuccessful evaluation and consequently been denied such pay increases or promotions. While Complainant himself alleges he has been "grievously harmed," *see* ALJX 20 at 24, and alleges damages of "$5.00 per hour for lost wages in 2008, $10.00 per hour for lost wages in 2009, and $15.00 per hour for lost wages in 2010, reflective of Complainant's salary lagging behind colleagues' salaries," *id.* at 28, he provides no evidence or citation to the record to support the existence of such harm outside of these allegations. I find such evidence collectively does not establish the existence of adverse action in the form of Complainant's July 3rd Evaluation. *See Burlington N.*, 548 U.S. at 67-69; *Sutherland*, 580 F.3d at 752; *Taylor*, 571 F.3d at 1321; *Baloch*, 550 F.3d at 1199. Complainant bears the burden to prove such adverse action by a preponderance of the evidence, *see* 29 C.F.R. § 24.109(a); *Carpenter*, No. 07-060, slip op. at 5; *Cante*, No. 08-012, slip op. at 4-5, and has failed to do so in the instance of his July 3rd Evaluation.

c. Complainant's Receipt of the Warning Letter

Complainant's next alleged adverse act is the receipt of the Warning Letter dated August 11, 2008. *See generally* RX 27. This letter was drafted by Ms. Baker under the guidance of Mr. Sinclair. TR at 567, 571. As discussed, Complainant received this letter for an email he sent to Mr. Jordan and Mr. Hacking on July 18, 2008 in which he cautioned Mr. Jordan to "be very careful" in who he took direction from and accused Mr. Hacking of getting "his wish to have me demoted from Engineering Section Manager." RX 27 at 286.

As in the case of the July 3rd Evaluation, I again find this does not rise to the level of adverse action. This is so for two reasons. First, I found Ms. Baker offered very credible evidence as to the purpose and effect of such warning letters, noting they are not disciplinary actions but instead tools used by management to help employees recognize corrective behavior. TR at 590. Ms. Baker further agreed such warning letters would have no effect on an employee's pay or benefits. *Id.* at 591-92. Such circumstances associated with the Warning Letter would not dissuade a reasonable employee in Complainant's position from engaging in protected activity. Second, while the ARB has not yet addressed whether negative employment evaluations – standing alone – constitute adverse actions, it has addressed whether warning letters amount to such. In *Melton v. Yellow Transportation, Inc.*, the ARB ruled a warning letter – without further accompanying consequences or effects – did not constitute adverse action under *Burlington Northern*. No. 06-052 (ARB September 30, 2008), slip op. at 12; *id.* at 24 (Transue, J., concurring). Although *Melton* dealt with violations under the Surface Transportation Assistance Act ("STAA"), the majority stated the reasoning behind its analysis was applicable to "the employee protection sections of *all* of the statutes that the Labor Department adjudicates." *Id.* at 24 (emphasis added). Consequently, I find Complainant's receipt of the Warning Letter on August 11, 2008 also did not constitute adverse action against him by Respondent.

d. Communications from Mr. Baker to Mr. Bousfield Regarding Complainant's May 12, 2009 GRAMA Request

Complainant's final listed adverse action comprises an allegation that Mr. Baker "tattle[d]" to Mr. Bousfield about a GRAMA request made by Complainant on May 12, 2009. As with Complainant's prior allegations of adverse action in the form of his demotion, the issuance of the Demotion Letter, and the February 25, 2008 warning letter, Complainant here again did not timely file an OSHA complaint related to such activity. Complainant filed his third and final OSHA complaint on September 9, 2008. *See* ALJX 20 at 3. Although Complainant does not state as directed by the prehearing notice the date on which this communication allegedly occurred, *see* ALJX 1 at 2, it could not have occurred prior to the date of Complainant's GRAMA request on May 12, 2009. As the record contains no evidence of a fourth OSHA complaint filed within thirty days of such a date, *see* 42 U.S.C. § 300j-9(i)(2)(A), such an adverse action is not timely alleged, and I do not consider it.

e. Conclusion Regarding Adverse Action

Complainant has failed to demonstrate by a preponderance of the evidence that he suffered adverse actions by Respondent for which he timely filed a complaint under the SDWA. Complainant's demotion occurred and the accompanying Demotion Letter was delivered on October 25, 2007. As Complainant filed his first OSHA complaint over seven months after this date, such actions may not be considered due to the thirty-day limitations period applicable under the SDWA. Such reasoning also bars consideration of the February 25, 2008 warning letter and Mr. Baker's communications to Mr. Bousfield regarding Complainant's May 12, 2009 GRAMA request. With respect to the two acts for which Complainant timely filed complaints with OSHA – the July 3rd Evaluation and the Warning Letter of August 11, 2008 – I find such acts do not constitute adverse action under the framework set forth by the Supreme Court in *Burlington Northern*. Consequently, Complainant is unable to prove an essential element of his whistleblower claim, *see* 29 C.F.R. § 24.109(a), and his complaint must be dismissed. Nevertheless, I below perform an analysis of the causal connection between Complainant's protected activity and the alleged (although unfounded) adverse actions taken against Complainant by Respondent.[46]

[46] As Complainant appeared in *pro se* throughout these proceedings, I briefly discuss here two devices that, while not raised by Complainant, are perhaps relevant, although ultimately inapplicable, to his whistleblower complaint. The first of these is the doctrine of equitable tolling, which allows a plaintiff to file a claim outside of a statutory period because there exists some sort of "excusable delay." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000). A party seeking application of this doctrine generally bears the burden of justifying its application, *see Wilson v. Sec'y, Dep't of Veterans Affairs*, 65 F.3d 402, 404 (5th Cir. 1995); *Ross v. Buckeye Cellulose Corp.*, 980 F.2d 648, 661 (11th Cir. 1993), and must prove two elements to invoke its protections: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way" of filing a complaint. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (citing *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990)). In this instance, I find, at a minimum, the second such element is lacking. The record here demonstrates no factor, other than perhaps his own unawareness of the SDWA's thirty-day limitation's period, stood in the way of Complainant's filing of his whistleblower complaint within thirty days of his demotion, the February 25, 2008 warning letter, or upon learning about the communication by Mr. Baker to Mr. Bousfield about his GRAMA request. Ignorance of the law, however, is not sufficient to support the application of the doctrine of equitable tolling even to litigants appearing in *pro se*. *See Moldauer v. Canandiagua Wine Co.*, No. 04-022, slip op. at 6

3. Causation

A complainant, to demonstrate causation, must prove by a preponderance of the evidence that protected activity known to the employer was "a motivating factor" for subsequent adverse action. 29 C.F.R. § 24.109(a). Such protected activity, however, need not be the sole cause of the adverse action for a complainant to succeed on his or her whistleblower claim. If adverse action is motivated in part by a complainant's protected activities and in part by legitimate reasons that do not qualify as protected activities, however, then a "mixed" or "dual motive" analysis may be applied. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Dixon*, No. 06-147, slip op. at 8. Under this analysis, the complainant bears the initial burden to demonstrate the adverse action suffered was due, at least in part, to his or her engaging in protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-50 (1989); *Seetharaman v. Stone & Webster, Inc.*, No. 06-024, slip op. at 5 (ARB Aug. 31, 2007); 29 C.F.R. § 24.109(a).

Complainant sets forth four arguments to support the finding of a causal connection between his engaging in protected activity and the alleged adverse actions taken against him by Complainant. First, Complainant argues a causal connection exists between the Warning Letter and the filing of his first two OSHA complaints on June 1, 2008 and July 8, 2008. ALJX 20 at 13, 18. Second, Complainant argues the record in this case is rife with "defamatory comments

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(ARB Dec. 20, 2005); *see also Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000). Consequently, equitable tolling would not bring the adverse acts alleged by Complainant within my analysis.

The second device available to Complainant would be an allegation Respondent created and subjected Complainant to a hostile work environment. A hostile work environment arises from a view developed by courts that certain repeated conduct – when "sufficiently severe or pervasive" yet not actionable when broken down into individual events – may create an intolerable and abusive work environment for which there exists legal redress. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). Such conduct must create an environment that is abusive at an objective level – to a reasonable person – and subjectively to the party alleging the existence of the hostile work environment. *Harris*, 510 U.S. at 21-22. Courts may consider a number of factors in determining the existence of a hostile work environment, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23. However, allegations of a hostile work environment consisting of "'petty slights, minor annoyances, and simple lack of good manners' that often take place at work and that all employees experience" will not suffice. *Allen v. Stewart Enters., Inc.*, No. 06-081, slip op. at 16-17 (ARB July 27, 2006) (quoting *Burlington N.*, 548 U.S. at 68). The effect of finding the existence of such a hostile work environment is to allow the consideration of all acts constituting the creation of such an environment even if some such acts fall outside of a specified limitations period. *See Morgan*, 536 U.S. at 117. Here again, however, the record demonstrates Respondent did nothing more than engage in a series of discreet acts – including demoting Complainant, issuing him letters of warning, and issuing him a negative performance review – which would not constitute the creation of such a hostile work environment. Each of these instances of conduct by Respondent was taken in response to documented behavior by Complainant, and collectively did not create a working environment subjecting Complainant to "sufficiently severe and pervasive" ongoing hostility. *See, e.g., Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (finding existence of hostile work environment where plaintiff suffered severe physical abuse – including "repeated sexual abuse, rape, and assault" – at the hands of her superiors over a six-year period); *Trujillo v. Univ. of Colo. Health Scis. Ctr.*, 157 F.3d 1211, 1214 (10th Cir. 1998) (refusing to find existence of hostile work environment where acts constituted only "a collection of unrelated incidents"). Consequently, an attempt by Complainant to argue for Respondent's creation of a hostile work environment would also not bring the untimely discreet acts above within my analysis.

about Complainant and Complainant's work performance," which in turn demonstrates retaliatory animus toward Complainant attributable to Mr. Sinclair. *Id.* at 15. Third, Complainant argues Mr. Bousfield's comments contained in the Demotion Letter and July 3rd Evaluation were motivated by Mr. Bousfield's incorrect application of Respondent's Operating Principles and "deviation from normal procedures." *Id.* at 17, 19. Fourth, Complainant asserts retaliatory animus is evidenced via the transferring of documents from Complainant's personnel file to a confidential file. *Id.* at 21-22. I examine these contentions in turn, ultimately concluding each theory lacks merit.

a. Link Between the Warning Letter and Complainant's First Two OSHA Complaints

While temporal proximity may demonstrate the existence of a causal connection between a complainant's protected activities and adverse action taken against him or her, *see Thompson v. Houston Lighting & Power Co.*¸ No. 98-101, slip op. at 6 (ARB Mar. 30, 2001), such a connection requires the complainant to first demonstrate knowledge attributable to the respondent of the complainant having engaged in such activity . *See Muino v. Fla. Power & Light Co.*, No. 06-092, slip op. at 9 (ARB Apr. 2, 2008). In this instance, Complainant has failed to demonstrate such knowledge attributable to Respondent in the case of his OSHA complaints. Complainant questioned only Mr. Bousfield about awareness of his OSHA complaints. *See* TR at 626-27. Mr. Bousfield admitted to responding to an OSHA complaint on October 4, 2008, *id.* at 627; *see* CX 639-46, noting this response was prompted by a September 29, 2008 letter from OSHA to Respondent of which Mr. Bousfield was aware. TR at 627; CX 639. Complainant presented no evidence nor did Mr. Bousfield admit to any awareness of Complainant's OSHA complaints prior to this date. *See supra* note 38. Furthermore, Complainant did not question Ms. Baker or Mr. Sinclair about when, if at all, they gained awareness of his OSHA complaints. Given such circumstances, I find Respondent did not possess knowledge of Complainant's OSHA complaints prior to August 11, 2008. Consequently, there can be no causal link between Complainant's June 1, 2008 and July 8, 2008 OSHA complaints and the Warning Letter.

b. Discriminatory Animus Attributable to Mr. Sinclair

Complainant next argues retaliatory animus toward him was demonstrated by the actions of Mr. Sinclair. *See* ALJX 20 at 15. Complainant asserts such animus is demonstrated through various acts by Mr. Sinclair, including "derogatory allegations about Complainant adhering to a gold standard of rule interpretation, burning bridges with consultants, inordinate delays in plan reviews and letter preparation, holding up plan reviews, inordinate delays in plan reviews and letter preparation, holding up plan reviews for unnecessary verification of water rights, poor communication . . . , [and] violation of [Respondent's] Operating Principles . . . ." *Id.* Complainant attributed such behavior to Mr. Sinclair's "manipulation by" Mr. Wilde. *Id.*

After considering such an argument, I find it does not establish Complainant's engaging in protected activities were at all a motivating factor in any of the alleged adverse acts taken against Complainant. This is so for two reasons. First, I find Complainant's argument that Mr. Sinclair fell victim to the influence and "manipulation" of Mr. Wilde to be based on little more than conjecture. While Mr. Sinclair did communicate to Mr. Bousfield many of Mr. Wilde's

complaints regarding Complainant, *compare* CX 471-73 *with* RX 10, 11, Complainant presented no evidence of manipulation beyond his own allegations of such. Indeed, Complainant asserts he and Mr. Sinclair "have never really been acquainted . . . [and] spoke rarely – if at all – during Complainant's . . . tenure as . . . Engineering Section [M]anager." ALJX 20 at 15. While Mr. Sinclair may have had limited contact with Complainant and consequently relied on the information provided by Mr. Wilde, who Complainant labels as a "manager at a parallel level" to himself while serving as Engineering Section Manager, such an arrangement does not constitute manipulation.

Second, I find many of the accusations noted by Mr. Sinclair – although brought to his attention by Mr. Wilde – are valid based on the record of this case. For example, numerous exhibits and the testimony of witnesses who served in both supervisory and nonsupervisory capacities demonstrate a consistent inability on Complainant's behalf to complete his work in a timely manner. *See, e.g.*, RX 11 at 247-48; CX 476, 1699, 1712, 1716, 1722, 1725; TR at 291-92, 522, 827, 1082-83. Regarding Mr. Sinclair's allegation of Complainant's subpar communication skills, I similarly find this supported by the record through such events as Complainant's failing to inform Mr. Hacking of his communications with the county planning commission, *see* RX 9, and refusal to meet with Mr. Cassel and Mr. Baxter about the Slate Canyon Project. *See* CX 141-49. While Complainant posed to Mr. Sinclair the hypothetical scenario under which a member of the county planning commission may have communicated with him anonymously, Mr. Sinclair noted Complainant was in that instance responsible for procuring sufficient information from such a call to keep Mr. Hacking informed of any developments. TR at 382-83; *see also id.* at 293-94. Regarding the communications associated with the Slate Canyon Project, I find particularly persuasive in demonstrating such communication problems the testimony of Mr. Cassel, who clarified at the hearing the major detail in dispute regarding the Slate Canyon Project – whether the water line's construction was performed according to approved plans. Notably, in his October 24, 2007 email to Mr. Cassel, Complainant stated, "I only found one air/vacuum release valve, so my count would be 1 air release valve and 8 air vents." CX 147. At the hearing, however, Mr. Cassel stated certain air valves were "difficult to locate" as they were "not in the middle of the . . . travel lane," but asserted the water line was constructed in conformance with DDW-approved plans. TR at 218, 226. When contrasted, I find this exhibit and testimony demonstrate a simple conversation between Complainant and Mr. Cassel – which Mr. Cassel repeatedly attempts to arrange with Complainant, to no avail, over the course of over three weeks, *see* CX 134-48 – would have resolved one of two major issues with the Slate Canyon Project. Such circumstances epitomize a refusal to communicate. Likewise, as Mr. Cassel – the engineer primarily involved in attempting to set up the elusive meeting associated with this project – was a consultant, this also lends credence to Mr. Sinclair's accusation that Complainant undermined relationships such actors. In sum, I find validity to Mr. Sinclair's characterization of Complainant's shortcomings as Engineering Section Manager and further find such accusations were in no way made as a result of Complainant's having engaged in protected activity.

c. Motivation Behind Mr. Bousfield's Actions Toward Complainant

Complainant next argues retaliatory intent may be discerned from the motivation behind Mr. Bousfield's actions toward Complainant. Specifically, Complainant asserts with respect to

his July 3rd Evaluation that "Mr. Bousfield unilaterally decided that Complainant violated [Respondent's] Operating Principles in an incident in which [Mr. Duberow's] allegations against Complainant and his colleague . . . were deemed by the Utah Board of Professional Engineers to be untruthful and unprofessional." ALJX 20 at 17. Complainant further asserts the July 3rd Evaluation was the result of a "deviation from normal procedures" and consequently leads to the inference of the existence of a retaliatory motive which motivated Respondent to take adverse actions against him. I separately address these issues below.

With regard to Mr. Bousfield's animus being rooted at all in reliance on Mr. Duberow's October 23, 2007 email to Complainant and Mr. Bousfield, *see* CX 936, I again note Complainant's disingenuous characterization of any alleged sanction or finding by the DOPL against Mr. Duberow. *See supra* Part V.A. The Letter of Concern to Mr. Duberow consequently did not "deem" him to have engaged in any sort of behavior, but instead only noted that he "may" have conducted himself in an inappropriate way. CX 944. Furthermore, despite Complainant's characterization of Mr. Duberow's conduct, I find Mr. Bousfield's reliance in this case on such a communication reasonable and in no way evidence of protected activity motivating Respondent to take any adverse action against him. Mr. Duberow's October 23, 2007 email evidences dissatisfaction in not receiving approval of plans submitted to Respondent and of failing to be notified such approval was not granted until two-and-a-half months following the submittal of such plans. CX 936. Such complaints are entirely consistent with other evidence in the record supporting Complainant failing to perform work in a timely manner and exhibiting unsatisfactory communication skills with consultants and coworkers. *See supra* Part V.B.3.b. Consequently, I find Mr. Bousfield's reliance on Mr. Duberow's October 23, 2007 email in his critique of Complainant's work performance does not evidence the existence of protected activity motivating Respondent to take any adverse action against Complainant.

I also find unpersuasive Complainant's argument that his July 3rd Evaluation constitute a "deviation from normal procedures," and therefore evidenced retaliatory animus. While "[a]n employer's failure to follow its normal procedures can, in an appropriate case, suggest deliberate retaliation," *Johnson v. Old Dominion Sec.*, 1986-CAA-3, slip op. at 7 (Sec'y May 29, 1991) (citing *Deford v. Sec'y of Labor*, 700 F.2d 281, 287 (6th Cir. 1983), courts have also held that "the use of subjective criteria do[] not . . . prove intentional . . . discrimination." *See Hinojos v. Honeywell Intern, Inc.*, 56 Fed. App'x 884, 886 (10th Cir. 2003) (citing *Kelley v. Goodyear Tire & Rubber Co.*, 220 F.3d 1174, 1178 (10th Cir. 2000)). Considering such precedent, I find Mr. Bousfield's July 3rd Evaluation of Complainant also does not evidence retaliatory animus as a motivating factor in Complainant's having received an overall rating of "unsuccessful." While Mr. Bousfield stated the July 3rd Evaluation did indeed deviate from his normal practice of awarding an overall score commensurate with the score a particular employee received on the majority of individual categories on any performance evaluation, TR at 777-78, I found credible his testimony that the category in which Complainant received the mark of "unsuccessful" was pervasive enough to influence the overall review. *Id.* at 777. Indeed, the language of the July 3rd Evaluation itself states Complainant's single unsuccessful mark "overshadowed [his] good work." RX 26 at 215. Moreover, Complainant was unsuccessful in his position as Engineering Section Manager and the July 3rd Evaluation simply documented his demotion until later removed from his personnel file. I therefore find the existence of any such deviation from

Respondent's performance grading procedures in the case of Complainant's July 3rd Evaluation does not rise to the level of demonstrating retaliatory animus.

d. Transferring of Documents

Finally, I address Complainant's allegation that Respondent transferred documents between his personnel file and another confidential file, which he in turn asserts demonstrates retaliatory animus attributable to Respondent. This again takes the form of Complainant's "shell game" argument, *see* ALJX 20 at 21; *supra* Part V.B.2.a, which I again note is without foundation. While Complainant has repeatedly attempted throughout these proceedings to assemble a grand conspiracy regarding the location and movement of his personnel documents, the record presented to me demonstrates Respondent took actions in accordance with its August 19th Letter. This letter represented to Complainant that the Warning Letter and July 3rd Evaluation were removed from his personnel file. CX 813. Most poignantly, however, the August 19th Letter concluded by stating, "Evaluation and removal from the career mobility position is documented in the letter dated October 25, 2007, from [Mr.] Bousfield." *Id.* This is entirely consistent with the explanation given by Ms. Smith and Ms. Baker at trial regarding the use of the Demotion Letter as Complainant's evaluation for his time as Engineering Section Manager. *See* TR at 321-22, 555. Consequently, I also find Complainant's assertion that changes to his personnel file by Respondent evidences retaliatory animus also lacks merit.

e. Conclusion Regarding Causation

Complainant has set forth a number of theories in an attempt to demonstrate his engagement in protected activities in some way served as a motivating factor to alleged adverse actions taken against him by Respondent. After examination of these theories against the record, however, I find them entirely based on Complainant's own subjective interpretation of the facts presented in this case and entirely without merit. Consequently, I find lack of causation constitutes an additional basis for dismissal of Complainant's whistleblower complaint.

VI. Conclusion

The record in this case demonstrates Complainant to be of superior technical capability as an engineer, perhaps unmatched within Respondent's organizational structure. Nevertheless, the record is also permeated with instances evincing Complainant's shortcomings as a communicator and manager as well as his antagonizing responses toward those who disagree with his opinions. This latter characteristic is perhaps best evidenced by the numerous complaints Complainant has filed against various actors attempting to bring about professional and criminal sanctions, none of which any independent arbiter found to have merit. While Complainant did demonstrate his engagement in protected activity under the SDWA, he failed to demonstrate Respondent took any timely adverse action against him. Furthermore, Complainant is unable to show any protected activity engaged in by him motivated Respondent in any way to take adverse action against him.

Consequently, **IT IS ORDERED** that Complainant's whistleblower complaint is **DISMISSED** *with prejudice*.

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GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

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

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

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

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an

original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.