



Issue Date: 11 August 2011

CASE No: 2009-SDW-00007

In the matter of:

DEAN WOLSLAGEL,
Complainant,

v.

CITY OF KINGMAN, ARIZONA,
Respondent.

Decision and Order

The Complainant, Dean Wolslagel, was a water conservation coordinator for the City of Kingman, Arizona, from July 2006 until he was fired in August 2008. He alleged the City terminated him in retaliation for protected disclosures about a wastewater spill that may have affected school children, high levels of nitrates in the city's drinking water, and the release of allegedly dangerous amounts of chlorine gas into the air. He filed this employment protection claim under the Safe Drinking Water Act (SDWA), 42 U.S.C. §§ 300j-9(i), *et seq.*; Clean Air Act (CAA), 42 U.S.C. § 7622(a); and Water Pollution Control Act (WPCA), 33 U.S.C. § 1367(a). The City proved a longstanding pattern of unprofessional behavior that he would not correct led it to fire him. I find for the City and dismiss all claims.

I. Summary of Findings

At the heart of this case lies a dispute about the City's motivation. The Complainant is convinced that once he showed his protected activities, all the City's efforts to change his behavior could only have been motivated by retaliatory animus. The City, in contrast, insists it had no problem with any of Wolslagel's protected activities and introduced evidence it made substantial efforts to address his concerns and ensure he suffered no retaliation. Wolslagel's interpersonal relations were the problem. The City proved his rude, aggressive, insubordinate, and hostile behaviors created an untenable

atmosphere that so upset coworkers, supervisors, and third parties that he had to go.

Wolslagel seemed sincerely concerned with what he perceived to be the City's violations of federal statutes meant to protect public health and safety. He complained to his immediate supervisor, the Director of his department, the City Attorney, City Council, and other agencies about these alleged violations. In the process he also called his supervisors "dumb," he lost his temper dealing with an outside vendor, and accused several City officials of being incompetent and not wanting to do their jobs. When the City made honest efforts to have Wolslagel explain his safety complaints so it could address them, he refused to cooperate; he concentrated instead on what he perceived as a conspiracy to retaliate against him for raising the matters. The City attempted to correct Wolslagel's rude, unprofessional, and insubordinate behavior with progressive discipline. Each of the adverse employment actions was preceded by an incident of uncooperative and unprofessional behavior. He received verbal warnings before his December 18, 2007, written warning. Wolslagel's disciplinary probation was extended when he met some—but not all—of the probation's goals in the allotted time. Only after repeated efforts to improve Wolslagel's professional behavior proved futile did the City end his employment.

Wolslagel made a *prima facie* case by showing he engaged in protected activity near the time of each of the City's adverse employment actions. Yet he was unable to carry his ultimate burden to prove by a preponderance of evidence that the City retaliated against him.

II. The Record

This case came to trial on Wednesday, March 31, 2010, in Kingman, Arizona. The record includes the testimony the Complainant; various co-workers; his managers, George Sedich, Robert Steele, Barry Weathers, and Jack Kramer; Human Resources and Risk Management Director, Jackie Walker; and City Attorney, Carl Cooper. The city's golf course superintendent, Michael Meersman, also testified regarding an incident Respondent argued was the catalyst for Wolslagel's first written warning.¹ I admitted as Complainant's exhibits twenty-two photographs offered to show various SDWA and WPCA violations.² I also admitted Complainant's exhibits 1–11, 34–91,

¹ Tr. at 180. This Decision and Order cites to the record this way: citations to the trial transcript are abbreviated as Tr. at [page number] citations to the Complainant exhibits are abbreviated as C. Ex. [exhibit number] at [page number], the Respondent's exhibits are abbreviated as R. Ex [exhibit number] at [page number].

² C. Exs. 12–33.

which include his written internal and external complaints regarding alleged SDWA, WPCA, and CAA violations.³ I admitted Respondent's exhibits 1–24, which include a transcript of the meeting that preceded Complainant's probationary period and a recording of the meeting that preceded Complainant's termination.

III. Wolslagel's Work for the City of Kingman

Wolslagel was hired as a water conservation coordinator for the City of Kingman in July 2006.⁴ Water superintendent George Sedich interviewed and hired him, and directly supervised Wolslagel throughout his employment.⁵ The water conservation coordinator was to "plan, organize, administer, and coordinate the City of Kingman's water conservation program."⁶ Wolslagel acquired a reputation as someone who often complained and was easily angered.⁷ He complained about the park budget, water usage at the golf course, and co-workers' conversations interfering with his work.⁸ He frequently complained to co-worker Sherri Furr about what he perceived as a conspiracy to prevent Wolslagel from exercising his "amendment rights;" he believed "everybody was crooked" and "there was some kind of conspiracy."⁹ Furr testified "he would get pretty angry," leaving her and co-worker Donna King wondering what he would do.¹⁰ Furr often heard Wolslagel refer to managers as "ignorant."¹¹ She couldn't recall a specific conversation, but remembered that several times Wolslagel came into the office upset about something and called his supervisors "stupid."¹² Though his comments made her uncomfortable, she wasn't personally offended and didn't report them to human resources (HR).¹³

A. Reports About Wolslagel's Inappropriate Behavior Before October 2007

The City's Construction Maintenance Supervisor, Robert Steele, received several complaints from outside employees about Wolslagel's

³ See C. Exs. 35, 37, 38, 39, 42, 43, 44, 44b, 44c, and 45b.

⁴ C. Ex. 4.

⁵ Tr. at 178.

⁶ R. Ex. 1 at 1.

⁷ Tr. at 22.

⁸ Tr. at 22.

⁹ Tr. at 23.

¹⁰ Tr. at 23.

¹¹ Tr. at 18.

¹² Tr. at 23.

¹³ Tr. at 19.

aggressive approach to his job. During one incident, Wolslagel went to the airport to flush a contaminated waterline and approached a contractor there.¹⁴ Although Steele didn't recall the specifics, he said the contractor complained about Wolslagel approaching him in an "aggressive" manner.¹⁵ Another time a construction employee with Friday Construction asked Steele who was the person who acted "like a water cop with the City of Kingman."¹⁶ Steele immediately understood the construction worker was talking about Wolslagel.¹⁷ The construction employee clarified Wolslagel "approaches you in the wrong way" and needed to be a little more "tactical."¹⁸ Steele described Wolslagel as someone who "comes up and starts ranting and raging" before knowing all the facts.

Wolslagel was involved in another incident at work that several coworkers witnessed. Wolslagel and his co-worker Steve Cramer were discussing guns,¹⁹ when Wolslagel called Cramer an "idiot" and did so in a voice so loud it stopped everyone in their tracks.²⁰ Cramer testified Wolslagel screamed when he called him an idiot, and thought the incident was "weird."²¹ Afterwards some people laughed it off, but Steele, who was present, thought Wolslagel created an uncomfortable situation and reported the incident to George Sedich, Wolslagel's immediate supervisor.²² Wolslagel acknowledged calling Cramer an idiot, but thought the conversation was a "normal hobby discussion" and "not harmful to anyone."²³ On several occasions—including after the gun conversation—Steele talked to Wolslagel about his approach towards people because he was worried Wolslagel's inappropriate behavior could cost Wolslagel his job.²⁴ Steele told Wolslagel to "relax and calm down" and that "this wasn't a bad job."²⁵ After Wolslagel filed the OSHA complaint on January 14, 2008, Steele convened a meeting with the crew working at the City's Castle Rock pumping station because he was concerned once Wolslagel's co-workers learned that

¹⁴ Tr. at 54.

¹⁵ Tr. at 54.

¹⁶ Tr. at 55.

¹⁷ Tr. at 55.

¹⁸ Tr. at 55.

¹⁹ Tr. at 57.

²⁰ Tr. at 57.

²¹ Tr. at 157.

²² Tr. at 56.

²³ Tr. at 110.

²⁴ Tr. at 59.

²⁵ Tr. at 59.

Wolslagel filed a complaint criticizing their work, they might retaliate against him. At this meeting, Steele told the “guys to treat [Wolslagel] the same and make sure that [he wasn’t] left out of the circle.”²⁶

The impression Steele gave of Wolslagel was that of an unpredictable hothead. Steele explained he and his co-workers worried about Wolslagel’s behavior escalating since he didn’t seem to listen to anyone.²⁷ Steele said “once things started to advance, all of us felt uncomfortable around” Wolslagel and “didn’t know what was next.”²⁸

B. Phoenix Pest Control Incident

On October 11, 2007, Wolslagel lost his temper with a pest control worker who was spraying the Public Works building where Wolslagel worked.²⁹ The worker, a new employee, was spraying the office for the first time; Wolslagel became upset because the pesticide canister the employee used to spray wasn’t carrying an MSDS (Material Safety Data Sheet) and because the employee was in a public works building without an escort.³⁰ The pest control worker was not actually required to have the MSDS sheet posted on the canister or required to have an escort through the Public Works Building, but Wolslagel perceived these as hazmat violations.³¹ It’s not clear from the record whether Wolslagel requested an MSDS sheet or was simply berating the worker for not displaying one on the canister, but several people witnessed Wolslagel yelling at the pest control employee.³² The worker ended up giving Wolslagel the MSDS sheet, which the company made available on request.³³

Just after Wolslagel’s interaction with the pest control worker, Wolslagel approached Barry Weathers, who worked for the City doing fleet and building maintenance.³⁴ Wolslagel then had a copy of the MSDS the worker gave him.³⁵ Wolslagel was still upset, and raised his voice and pointed his finger at Weathers.³⁶ He complained to Weathers about the Phoenix Pest Control employee not having a placard on the

²⁶ Tr. at 45.

²⁷ Tr. at 58.

²⁸ Tr. at 58.

²⁹ R. Ex. 5 at 1.

³⁰ Tr. at 21.

³¹ Tr. at 163.

³² R. Ex. 2 at 1.

³³ Tr. at 32.

³⁴ Tr. at 133.

³⁵ Tr. at 124.

³⁶ Tr. at 133.

spray canister.³⁷ Weathers told Wolslagel he would call Phoenix Pest Control to resolve the issue and follow up with Wolslagel.³⁸ Right after the incident Weathers spoke with the pest control worker, who was “upset, shaken,” and unable to “do his job correctly,” so Weathers told him to take a break to collect himself.³⁹ By the time Weathers telephoned Phoenix Pest Control, the manager there, Linda Reed, already had received a complaint from her employee that he was confronted by a rude guy who “didn’t care what [the employee] said.”⁴⁰ Weathers apologized for Wolslagel’s conduct.⁴¹ Reed said the canister wasn’t required to carry a placard for the pesticide being applied.⁴² She also said the company’s practice was to furnish an MSDS to anyone who requested one.⁴³

After this conversation Weathers told Wolslagel’s supervisor, George Sedich, what had happened.⁴⁴ On October 12, 2007, Sedich verbally warned Wolslagel about his “rude” and “aggressive” behavior with the pest control worker.⁴⁵ Sedich instructed Wolslagel to contact him “through the chain of command” in the event of a future problem with an outside vendor.⁴⁶

C. December 2007: Incidents, Protected Activity, and a Written Warning

1. The Computer Slow-Down Problem

In December 2007, the City’s computer system slowed so much it was difficult to enter water payments or purchase orders.⁴⁷ Information Systems staff traced the problem to a large report Wolslagel ran that caused some computers to slow down and others to shut down completely.⁴⁸ The Finance Department contacted Sedich and informed him of Wolslagel’s activities and their effects.⁴⁹ The Finance

³⁷ Tr. at 132.

³⁸ Tr. at 133.

³⁹ Tr. at 133.

⁴⁰ R. Ex. 5 at 1.

⁴¹ Tr. at 134.

⁴² Tr. at 133.

⁴³ Tr. at 134.

⁴⁴ Tr. at 135.

⁴⁵ R. Ex. 13 at 2.

⁴⁶ R. Ex. 13 at 2.

⁴⁷ Tr. at 168.

⁴⁸ Tr. at 169.

⁴⁹ Tr. at 169.

Department asked Sedich to tell Wolslagel to run the reports early in morning or late at night so other computers wouldn't be affected.⁵⁰ On December 20, 2007, Sedich counseled Wolslagel about creating a backlog of the computer system. During this meeting Wolslagel told Sedich he'd been trying to discredit the Wastewater Department budget by informing other City employees about the Wastewater Department having a "\$78,000 computer."⁵¹ Wolslagel ran the same report in March 2008,⁵² ignoring Sedich's instruction to only run the report early in the morning or late at night; he ran it during peak hours.⁵³

2. The Golf Course Superintendent Encounter

On December 12, 2007, Wolslagel stopped by the city golf course to warn the superintendent a sprinkler was leaking on the sidewalk.⁵⁴ He met with the superintendent, Michael Meersman, and another golf course employee, Buddy Dodge.⁵⁵ This was the first time Wolslagel and Meersman met. Meersman had been on the job just five months, and had already tried to set up a meeting with Wolslagel to work together on conserving water, but Wolslagel had never replied to his overtures.⁵⁶ Wolslagel told Meersman and Dodge he was there because he was out giving other people citations, so he should give them one also.⁵⁷ While he was there, Wolslagel told Meersman and Dodge to make a "wish list" for improvements they wanted to see at the golf course for conserving water.⁵⁸ Wolslagel asked for Meersman's assistance in motivating Meersman's supervisor, Darrell Fruwirth, to respond to the wish list because Fruwirth wasn't responsive to Wolslagel.⁵⁹ At this meeting, Wolslagel told Meersman that like Darrell Fruwirth, Jack Kramer, the Public Works Director and Acting City Manager, "[didn't] want to do anything, either, because he [was] going to retire" the

⁵⁰ Tr. at 169.

⁵¹ R. Ex. 13 at 2.

⁵² Tr. at 170.

⁵³ Tr. at 209.

⁵⁴ Tr. at 146.

⁵⁵ Tr. at 146.

⁵⁶ Tr. at 146.

⁵⁷ Tr. at 149.

⁵⁸ Tr. at 146.

⁵⁹ Tr. at 147.

following year.⁶⁰ Meersman thought Wolslagel's comments were unprofessional, so he reported them his supervisor, Fruwirth.⁶¹

Fruwirth, in turn, contacted Kramer, and explained Wolslagel had made inappropriate comments to Meersman about them both.⁶² Kramer relayed Wolslagel's comments to Wolslagel's supervisor, Sedich.⁶³ The next day, Sedich and Kramer decided to talk to Wolslagel about his behavior.⁶⁴ They went to his desk to look for him, but could not find him.⁶⁵ Sedich thought Wolslagel was at the site of a sewer overflow caused by a spill from the local jail.⁶⁶ However, Sedich did not find him there and, for unexplained reasons, decided not to talk to Wolslagel at the end of shift that day when he did see him.⁶⁷ The incident at the golf-course was, according to Sedich, the "most explosive" incident with Wolslagel so far.⁶⁸ Wolslagel would go on to make many negative comments about Sedich and other City officials throughout the winter and spring of 2008. These comments would later become the basis of a disciplinary action and are discussed in more detail *infra* Section III.G.1.

The next day (December 13, 2007), Kramer wasn't feeling well and wasn't available to talk to Wolslagel with Sedich.⁶⁹ Sedich suggested giving Wolslagel a written warning so maybe "he'[d] get the point" if he read what Sedich had already verbalized.⁷⁰ Sedich believed a written warning was warranted because Wolslagel's inappropriate and unprofessional behavior had been getting progressively worse.⁷¹ Sedich didn't talk to Wolslagel on the 13th, but gave Wolslagel the written warning on December 18, 2007.

3. Jail Sewage Spill Affecting School Children

On December 13, 2007, a sewer from the local jail overflowed from two manholes in downtown Kingman⁷² when inmates at the jail

⁶⁰ Tr. at 147, 300.

⁶¹ Tr. at 147.

⁶² Tr. at 180.

⁶³ Tr. at 180.

⁶⁴ Tr. at 180.

⁶⁵ Tr. at 180.

⁶⁶ Tr. at 181.

⁶⁷ Tr. at 181.

⁶⁸ Tr. at 179.

⁶⁹ Tr. at 181.

⁷⁰ Tr. at 182

⁷¹ Tr. at 181.

⁷² C. Ex. 39 at 1.

stuffed up toilets and caused the sewage to come up.⁷³ The sewage flowed down a street and by Palo Christi Elementary School.⁷⁴ The Kingman Fire Department responded to reports of a water leak, but then learned it was actually a sewer overflow.⁷⁵ Six city workers were exposed to the wastewater, and Jeff Corwin, Wastewater Superintendent, sent them home to shower and change clothes.⁷⁶ Corwin reported the sewer spill to Sedich, the Water Superintendent. The city workers exposed to the sewer overflow received medical treatment.⁷⁷

Wolslagel found out about the spill when someone, probably Corwin, came into his office and announced it.⁷⁸ Wolslagel also heard about several school children contacting the contaminated water.⁷⁹ He then sent an email to Kramer regarding the children who had come in contact with the contaminated water and requested to involve risk management.⁸⁰ The following Monday, December 17, Wolslagel asked Kramer (the Acting City Manager) if the school had been informed of the spill and the children's exposure to sewage.⁸¹ Kramer stated the department hadn't contacted the school.⁸² Wolslagel believed Kramer was upset when Wolslagel told him to inform the school because Kramer "didn't want this entanglement" with the situation involving a sewage spill and school children.⁸³ Kramer told Wolslagel to go back to his desk, but within a half hour, at Kramer's request, Corwin came to get Wolslagel to go to the school to inform the principal of the spill.⁸⁴ When Wolslagel and Corwin arrived at the school, they learned the principal was already aware of the spill and the children's contamination.⁸⁵ The principal said he would look into the issue.⁸⁶

⁷³ Tr. at 14.

⁷⁴ Tr. at 15.

⁷⁵ Tr. at 180.

⁷⁶ Tr. at 180.

⁷⁷ Tr. at 37.

⁷⁸ Tr. at 180.

⁷⁹ Tr. at 203.

⁸⁰ C. Ex. 44b at 1.

⁸¹ C. Ex. 44b at 1.

⁸² C. Ex. 44b at 1.

⁸³ Tr. at 86.

⁸⁴ Tr. at 87.

⁸⁵ Tr. at 87.

⁸⁶ Tr. at 123.

4. The December 18, 2007, Written Warning

On December 18, 2007, the day after Wolslagel and Corwin visited the school, Wolslagel received a written warning.⁸⁷ Sedich cited Wolslagel's escalation in unprofessional behavior toward people as the reason.⁸⁸ Sedich gave the gun incident with Cramer and inappropriate comments made to Meersman and Dodge at the golf course as examples of increasing aggression in Wolslagel's behavior.⁸⁹ Sedich testified he first contemplated giving Wolslagel a written warning during his December 13, 2007, conversation with Kramer about Wolslagel's behavior at the golf course.⁹⁰ The warning itself stated it was for "conduct in the performance of duties that are not acceptable to this department," but did not cite any specific instances of prohibited conduct.⁹¹ Among other instructions, the warning reminded Wolslagel to not reveal his personal or political views while performing his official duties, to be respectful toward his co-workers and supervisors, and to "not discuss any of the City's programs in a negative manner."⁹² The warning also required Wolslagel to report his daily activities to Sedich and inform Sedich of his meetings and appointments.⁹³ The warning did not spell out any consequences if Wolslagel violated its instructions.

Wolslagel became "animated" and "belligerent"⁹⁴ when given the written warning and refused to sign it.⁹⁵ Wolslagel told Sedich what he was doing (i.e., giving Wolslagel the warning) was illegal and remarked Sedich wasn't qualified to be a supervisor.⁹⁶

Later that day, Sedich told Human Resources Director and Risk Management Director, Jackie Walker, he'd had a disciplinary meeting with Wolslagel, and it hadn't gone well.⁹⁷ He told Walker that Wolslagel behaved erratically in the meeting, insisted Sedich didn't have the authority to issue the warning, and claimed the warning was "all about safety."⁹⁸ Walker asked her assistant, Linda Semm, to

⁸⁷ R. Ex. 18 at 1.

⁸⁸ Tr. at 182.

⁸⁹ Tr. at 179.

⁹⁰ Tr. at 181.

⁹¹ R. Ex. 18 at 1.

⁹² R. Ex. 18 at 1.

⁹³ R. Ex. 18 at 1.

⁹⁴ Tr. at 183.

⁹⁵ Tr. at 183.

⁹⁶ Tr. at 183.

⁹⁷ Tr. at 254.

⁹⁸ Tr. at 253.

contact Wolslagel and find out what his safety concerns were.⁹⁹ Semm then requested Wolslagel meet with her to discuss his safety concerns.¹⁰⁰ Wolslagel responded by letter and insisted speaking to HR about his safety concerns would be pointless because Kramer and Walker were already aware of the warning letter.¹⁰¹ Wolslagel focused in his letter to Semm on his belief that the written warning was improper because Sedich didn't cite any specific rules or procedures Wolslagel had violated.¹⁰² The letter also insisted that since Kramer had the final word on the warning, it would be a "moot point" to file a grievance.¹⁰³ Wolslagel then stated Kramer would be the "focus of the federal complaint," but didn't explain what he meant.¹⁰⁴ In a follow-up email later that day, Wolslagel told Semm he'd be filing a complaint with Occupational Health and Safety Administration ("OSHA") regarding the City's inaction pertaining to children's exposure to wastewater.¹⁰⁵

Fearing Wolslagel wouldn't meet to discuss his safety concerns, Walker emailed Sedich and asked him to come into her office the following Monday morning with Wolslagel.¹⁰⁶ Wolslagel and Sedich met with Walker in her office that Monday.¹⁰⁷ Walker asked Wolslagel what his safety concerns were.¹⁰⁸ Wolslagel didn't respond, but instead asked Walker what her qualifications were.¹⁰⁹ Walker stated she would tell Wolslagel her qualifications if he told her if there was an immediate safety concern for the public or the employees.¹¹⁰ Wolslagel answered that there wasn't.¹¹¹ After Walker told Wolslagel that she was the Human Resources Director and the Risk Management Director, Wolslagel stated there was a conflict between those two jobs.¹¹² When

⁹⁹ Tr. at 254.

¹⁰⁰ C. Ex. 37 at 1.

¹⁰¹ C. Ex. 35 at 1.

¹⁰² C. Ex. 35 at 1.

¹⁰³ C. Ex. 35 at 1.

¹⁰⁴ Tr. at 35.

¹⁰⁵ C. Ex. 37 at 1.

¹⁰⁶ Tr. at 255.

¹⁰⁷ Tr. at 256.

¹⁰⁸ Tr. at 257.

¹⁰⁹ Tr. at 257.

¹¹⁰ Tr. at 257.

¹¹¹ Tr. at 257.

¹¹² Tr. at 257.

Walker asked him to clarify what he saw as a conflict, Wolslagel made a hissing noise, which Walker described as disrespectful.¹¹³

Wolslagel eventually stated a couple of safety concerns. One involved a water sample he had collected from a house in December 2007;¹¹⁴ he believed the sample contained algae.¹¹⁵ Wolslagel and Sedich had an exchange about whether Wolslagel should have taken the water sample from the tap, as he had done, or if someone certified should have taken the sample.¹¹⁶ Wolslagel accused Sedich of intending to throw out the water sample.¹¹⁷ Sedich said he wouldn't discard it.¹¹⁸

Wolslagel also discussed his safety concerns regarding the sewer spill.¹¹⁹ He asked Walker if she was aware that the spill affected school children.¹²⁰ Walker explained she'd just learned that and believed it had been dealt with, but didn't offer specifics.¹²¹

Walker described Wolslagel's conduct during the meeting as rude; she observed him rolling his eyes several times.¹²² He sat with his legs crossed and faced away from her while they were talking.¹²³ Since she felt the meeting wasn't going anywhere, and Wolslagel was concerned about a conflict of interest between Walker's concurrent positions in HR and Risk Management, Walker suggested he bring his concerns to the City Attorney, Carl Cooper.¹²⁴

5. The FBI Letter

On December 27, 2007, Claimant sent a letter to the FBI regarding a Mohave County Sheriff's report about vandalism that allegedly occurred at a waste water treatment facility.¹²⁵ Wolslagel told the FBI approximately 400 pounds of chlorine gas were released into the air as a result of the vandalism and accused the "Department

¹¹³ Tr. at 258.

¹¹⁴ Tr. at 78.

¹¹⁵ Tr. at 258.

¹¹⁶ Tr. at 258.

¹¹⁷ Tr. at 258.

¹¹⁸ Tr. at 259.

¹¹⁹ Tr. at 259.

¹²⁰ Tr. at 259.

¹²¹ Tr. at 259.

¹²² R. Ex. 13 at 2.

¹²³ Tr. at 259.

¹²⁴ Tr. at 260.

¹²⁵ C. Ex. 42 at 1.

Heads” of failing to act to prevent further attacks.¹²⁶ The City was not aware of this letter until it received the letter as Wolslagel’s exhibit.¹²⁷

D. Wolslagel’s Email Exchange with City Attorney Carl Cooper

On December 31, 2007, City Attorney, Carl Cooper, and Wolslagel began a long exchange of emails about meeting to discuss Wolslagel’s safety concerns.¹²⁸ Cooper asked Wolslagel to draft a list of “issues and pertinent federal or state statutes.”¹²⁹ Wolslagel replied he had “some concepts and an idea that may help the city” and sent Cooper a list of statutes.¹³⁰ They ultimately scheduled a meeting for January 9, 2008.¹³¹

On the evening of January 8, 2008, Cooper emailed Wolslagel to reschedule their meeting. He apologized for the inconvenience and promised to contact Wolslagel to schedule another date.¹³² The following morning, Wolslagel replied, claiming Cooper had “evidently” talked to someone already based on his email.¹³³ Wolslagel’s impression of Cooper’s cancellation seems to be that it was an intentional tactic orchestrated perhaps by Sedich and Walker to prevent Wolslagel from being heard by the City Attorney. Wolslagel stated he’d go ahead and file complaints with “the agencies” because no one seemed to have the time to address the public safety matter he sought to address.¹³⁴

Wolslagel went on to tell Cooper it was Wolslagel’s duty as a public servant to protect the public and filing with “the agencies” was a “legal procedural process” to protect the public.¹³⁵ Cooper replied by stating he “disliked” Wolslagel’s tone.¹³⁶ Cooper again apologized for canceling the meeting and asked Wolslagel to draft a memo regarding his concerns and deliver it via Cooper’s inter-office mail.¹³⁷ Wolslagel replied again, insisting “emails do not have tones,” and adding his tone was serious because children were exposed to hazardous wastewater

¹²⁶ C. Ex. 42 at 1.

¹²⁷ Tr. at 285.

¹²⁸ C. Ex. 43.

¹²⁹ C. Ex. 43.

¹³⁰ C. Ex. 43.

¹³¹ C. Ex. 43 at 1.

¹³² C. Ex. 45.

¹³³ C. Ex. 45.

¹³⁴ C. Ex. 45.

¹³⁵ C. Ex. 45.

¹³⁶ R. Ex. 16 at 1.

¹³⁷ R. Ex. 16 at 1.

and no one was doing anything to help.¹³⁸ Wolslagel again referred to his duty to report his concerns with outside agencies and asked Cooper to see Walker regarding the background of Wolslagel's complaint, because she and Kramer "evidently decided in secret to have [Wolslagel] written up according to staff and her own comments," but didn't explain what he meant by those accusations.¹³⁹

After this exchange Wolslagel became convinced Cooper had been corrupted by Sedich, Kramer, and Walker to oppose Wolslagel; he began to regard Cooper as someone who conspired against his efforts to promote public safety.¹⁴⁰

On January 11, 2008, Wolslagel sent Cooper a "formal complaint."¹⁴¹ That letter gave the chronology of Wolslagel's involvement with the school sewer spill and the written warning he received on December 18, the day after he told Kramer the school should be informed about the children's contact with wastewater.¹⁴² Wolslagel complained Sedich hadn't stated what City regulations Wolslagel had violated when Sedich gave him the December 18 written warning.¹⁴³ Wolslagel accused Walker, Kramer, and Sedich of "acting in concert" and in "direct conflict" of the "Whistleblower Protection Act" when they "acted in collusion to cover up" the incident involving the children's contact with the sewage spill because they were aware of "the potential hazard several weeks prior."¹⁴⁴ It's not clear from the letter or the record what it was Wolslagel believed Walker, Kramer, and Sedich knew or when. Wolslagel added Kramer, Walker, and Sedich were not concerned with the safety of the children, but only cared about keeping their jobs.¹⁴⁵

Wolslagel also complained the pest control employee violated a federal law by not labeling a chemical container and insisted no one had corrected this.¹⁴⁶

Wolslagel informed Cooper he would be filing complaints with the U.S. Department of Labor and OSHA. Lastly, Wolslagel complained

¹³⁸ R. Ex. 16 at 1.

¹³⁹ R. Ex. 16 at 1.

¹⁴⁰ R. Ex. 16 at 1 and R. Ex. 10 at 1.

¹⁴¹ C. Ex. 44b. The letter is actually dated as "1-11-07," but this is presumably a typo because the letter references the "Dec. 18" (2007) written warning received by Wolslagel 25 days prior.

¹⁴² C. Ex. 44b at 1.

¹⁴³ C. Ex. 44b at 1.

¹⁴⁴ C. Ex. 44b at 1.

¹⁴⁵ C. Ex. 33b at 2.

¹⁴⁶ C. Ex. 44b at 1.

the City had employees working in multiple roles that created conflicts of interest. He believed having Kramer act as the Director of Public Works and City Manager created a conflict of interest because it left Kramer managing himself.¹⁴⁷ Likewise, he believed that there was a conflict in having Walker act as Human Resources Director and Risk Manager because it meant she was managing herself.¹⁴⁸

Within a few months, Wolslagel also began openly criticizing Cooper in front of co-workers, behavior Cooper and others found unprofessional. On March 26, 2008, Wolslagel's co-workers, Tom Callahan and Bob Steele, observed Wolslagel ranting about Cooper's incompetence.¹⁴⁹ Wolslagel directed the comments to Steele, who agreed Wolslagel was "ranting and raving."¹⁵⁰ Wolslagel said Cooper's "days were numbered" and claimed he was "going to get rid of him," meaning Cooper.¹⁵¹ Wolslagel accused Cooper of being a "delivery boy" to a Phoenix attorney.¹⁵² According to Callahan's report of the incident, Callahan and Steele didn't encourage Wolslagel's ranting and eventually left because Wolslagel wouldn't stop.¹⁵³

E. Wolslagel Becomes Frustrated and Makes Multiple Internal and External Complaints

Over the seven months between his initial email exchange with Cooper and his termination, Wolslagel made a number of internal and external complaints, mostly dealing with what he perceived as the City's mishandling of the jail sewer spill, but other deficiencies were alleged too.

Sometime after his initial visit with the school principal, Wolslagel returned to the school to inquire whether the principal alerted the parents about the spill.¹⁵⁴ The principal told Wolslagel he had not notified the parents.¹⁵⁵ Based on his perception that neither the Water Department nor the school took any action to notify the parents of the sewage spill, Wolslagel went up what he described as the "chain of command."¹⁵⁶ On January 14, 2008, Wolslagel notified

¹⁴⁷ C. Ex. 44b at 2.

¹⁴⁸ C. Ex. 44b at 2.

¹⁴⁹ R. Ex. 10 at 1.

¹⁵⁰ Tr. at 56.

¹⁵¹ R. Ex. 10 at 1.

¹⁵² R. Ex. 10 at 1.

¹⁵³ R. Ex. 10.

¹⁵⁴ Tr. at 88.

¹⁵⁵ Tr. at 88.

¹⁵⁶ Tr. at 89.

Arizona OSHA of the sewer spill.¹⁵⁷ The notice indicated the City was not following federal and state water regulations and asserted the local sewer system created a hazard to children downtown.¹⁵⁸ On January 16, 2008, Wolslagel filed a complaint with the Arizona Department of Environmental Quality (ADEQ) about the sewer spill.¹⁵⁹ The complaint to ADEQ charged the City had failed to ensure notification of parents whose children may have come in contact with a sewage spill.¹⁶⁰ The complaint also charged the City with violating the Whistleblower Protection Act.¹⁶¹ On April 22, 2008, Wolslagel filed a complaint with the Secretary of Labor.¹⁶² In this complaint, Wolslagel referenced the incident involving school children coming in contact with water from the sewer spill.¹⁶³ Wolslagel wrote he was given a warning letter in response to bringing up concerns for the children's safety and claimed his supervisor never told him what the warning was about.¹⁶⁴

Two complaints were made to outside agencies about the sewer spill in May. On May 12, 2008, Wolslagel filed a complaint with the Mohave County Health Department about it.¹⁶⁵ On May 14, 2008, he filed another complaint with the Arizona Department of Environmental Quality (ADEQ). It accused the City of failing to notify all affected residents of excessive nitrates in a well and failing to notify them within the required 24-hour time period.¹⁶⁶ The high level of nitrates in the Santa Fe well was discovered in February of 2008. The City sent 1100 notices out to residents three days after its discovery.¹⁶⁷

On June 16, 2008, Wolslagel met with Mayor Salem about the sewer spill,¹⁶⁸ telling the Mayor that some children had touched contaminated water.¹⁶⁹ He also told the Mayor he'd filed complaints with the City Attorney regarding the City's inaction in the jail sewer matter.¹⁷⁰

¹⁵⁷ C. Ex. 45b.

¹⁵⁸ C. Ex. 45b.

¹⁵⁹ C. Ex. 38.

¹⁶⁰ C. Ex. 38.

¹⁶¹ C. Ex. 38.

¹⁶² C. Ex. 64 at 1.

¹⁶³ C. Ex. 64 at 1.

¹⁶⁴ C. Ex. 64 at 1.

¹⁶⁵ C. Ex. 12 at 1.

¹⁶⁶ C. Ex. 71 at 1.

¹⁶⁷ C. Ex. 71 at 1.

¹⁶⁸ Tr. at 89.

¹⁶⁹ Tr. at 89.

¹⁷⁰ Tr. at 89.

Another issue Wolslagel raised in this complaint dealt with a drinking water line connected to a commercial steel plant.¹⁷¹ Wolslagel alleged Sedich did not want to order the steel plant to install a backflow valve because he didn't want to make the plant incur a cost; Wolslagel believed this jeopardized the quality of drinking water at the plant.¹⁷² Because no proof was offered about this matter at trial, it won't be discussed further.

F. April 3, 2008, Meeting with Cooper, Kramer, Sedich, and Walker

While Wolslagel was making his various complaints and sending letters alerting federal, state, and local officials to the water safety violations he perceived, he continued to pursue his safety concerns with Cooper. On March 26, 2008, Wolslagel sent a follow-up email to Cooper about various safety concerns he had already brought to Cooper's attention.¹⁷³ He indicated he would forward his unspecified concerns to the Attorney General if the City didn't have the capacity to follow-up.¹⁷⁴ As a result of this email, Cooper agreed to meet with Wolslagel, Kramer, Sedich, and Walker on April 3, 2008. The meeting was intended as a follow-up to Wolslagel's list of complaints, given Wolslagel's doubts the City had taken any action on his concerns.¹⁷⁵

Wolslagel quickly derailed the meeting from any productive discussion of his safety complaints to focus on the December 18, 2007, written warning (which he believed was unjustified) and his belief his supervisors and other City officials were incompetent. Wolslagel expressed his belief the written warning was meant to intimidate him to keep quiet about his safety concerns.¹⁷⁶ Cooper explained the warning was an "action plan" intended to direct Wolslagel about how to comport himself in his day-to-day activities.¹⁷⁷ Wolslagel responded by saying Walker "should take personal [sic] management classes."¹⁷⁸ Wolslagel pointed out the warning letter contained no specific violations of City ordinances or regulations, and didn't state who

¹⁷¹ C. Ex. 64 at 1.

¹⁷² C. Ex. 64 at 1.

¹⁷³ C. Ex. 54.

¹⁷⁴ C. Ex. 54.

¹⁷⁵ R. Ex. 12 at 1.

¹⁷⁶ R. Ex. 12 at 3.

¹⁷⁷ R. Ex. 12 at 3.

¹⁷⁸ R. Ex. 12 at 3.

complained against him.¹⁷⁹ He perceived the written warning as an order to keep quiet.¹⁸⁰

Later in the same meeting, Wolslagel stated Sedich wasn't qualified for his job and accused Kramer and a "Mr. Byron" of running the city as a "country club" or a "personal business."¹⁸¹ Cooper told Wolslagel he was making assumptions about a lack of action in response to his complaints, and explained the City was not obligated to report to him how it was following up.¹⁸² Wolslagel insisted Cooper should have directed Walker to give Wolslagel a chance to defend himself against any complaints made against him.¹⁸³

Cooper then explained the City had addressed a chlorinator issue by replacing it and was in the process of talking with the jail about the sewer issue.¹⁸⁴ Wolslagel responded by asking "[w]hy are unqualified people in positions that they are not qualified to be in?"¹⁸⁵ He insisted someone certified as a "three level" shouldn't be running a "level four facility" and that his department was a "level four facility." It's not clear whether others present at the meeting understood these comments, which aren't explained elsewhere in the record.¹⁸⁶ Cooper responded that Wolslagel's complaints tied back to his belief that everyone is unqualified for their job.¹⁸⁷ Wolslagel claimed he wasn't implying everyone was unqualified, but insisted Sedich, had the same "level one" certification as Wolslagel, meaning Sedich was under-qualified for his job.¹⁸⁸

Cooper attempted to review Wolslagel's list of complaints, but Wolslagel cut him off, responding instead they were talking about "the point that the procedures for reprimanding an employee were not followed because I was never given a chance to defend myself."¹⁸⁹ Walker clarified she had never given Wolslagel a reprimand and had instructed Sedich to include in the warning specific information about why Wolslagel was receiving it.¹⁹⁰ Sedich explained Wolslagel's

¹⁷⁹ R. Ex. 12 at 3.

¹⁸⁰ R. Ex. 12 at 4.

¹⁸¹ R. Ex. 12 at 4.

¹⁸² R. Ex. 12 at 4.

¹⁸³ R. Ex. 12 at 6.

¹⁸⁴ R. Ex. 12 at 7.

¹⁸⁵ R. Ex. 12 at 8.

¹⁸⁶ R. Ex. 12 at 8.

¹⁸⁷ R. Ex. 12 at 8.

¹⁸⁸ R. Ex. 12 at 8.

¹⁸⁹ R. Ex. 12 at 11.

¹⁹⁰ R. Ex. 12 at 11.

interpersonal interactions, specifically his encounter with and statements to Meersman at the golf course in December 2007 prompted the warning.¹⁹¹ Wolslagel denied making negative statements to the golf superintendent about Kramer and Fruwirth.¹⁹² Sedich and Wolslagel disagreed about whether Sedich asked Wolslagel about the golf course incident while giving him the warning.¹⁹³

Cooper tried to keep the focus of the meeting on Wolslagel's safety concerns, but Wolslagel insisted the meeting was about Sedich and how he handled reprimands.¹⁹⁴ He then announced the "meeting is over."¹⁹⁵ Right after that announcement, Wolslagel accused Cooper of not addressing safety issues and failing to protect the community (despite Cooper's purpose in calling the meeting and his efforts to focus the meeting on safety concerns).¹⁹⁶ Cooper responded Wolslagel was making assumptions.¹⁹⁷ Wolslagel said he found contaminated water that Sedich did not investigate.¹⁹⁸ Sedich offered to respond to the accusation, but Wolslagel ended the meeting by insisting it wasn't going anywhere and announcing he would be submitting his safety complaints to the Attorney General and the U.S. Attorney's Office.¹⁹⁹

Later that day, Wolslagel filed a letter complaint with the City Council that he gave to the City Clerk.²⁰⁰ In it, Wolslagel alleged giving Cooper, along with a formal complaint, "30+ photographs and a 7 page report which described over 30 possible violations" of clean water laws.²⁰¹ Wolslagel also claimed the City had no response on "90% of the issues."²⁰² Wolslagel criticized Kramer for promoting Sedich into the Water Superintendent position since Sedich didn't have the qualifications to run a "class 4 Water System."²⁰³ Wolslagel asserted Sedich was promoted into his position because of his friendship with Kramer.²⁰⁴ Wolslagel faulted HR with not training managers on the

¹⁹¹ R. Ex. 12 at 12.

¹⁹² R. Ex. 12 at 12.

¹⁹³ R. Ex. 12 at 13.

¹⁹⁴ R. Ex. 12 at 13.

¹⁹⁵ R. Ex. 12 at 13.

¹⁹⁶ R. Ex. 12 at 1.

¹⁹⁷ R. Ex. 12 at 13.

¹⁹⁸ R. Ex. 12 at 13.

¹⁹⁹ R. Ex. 13 at 14.

²⁰⁰ C. Ex. 56.

²⁰¹ C. Ex. 56.

²⁰² C. Ex. 56.

²⁰³ C. Ex. 56 at 1.

²⁰⁴ C. Ex. 56 at 1.

proper selection of job applicants.²⁰⁵ He also faulted Cooper for not following up on Wolslagel's complaints by consulting with a water expert.²⁰⁶ He again criticized Sedich for failing to test a water sample.²⁰⁷

The letter also referred to an email Wolslagel received at an unspecified time regarding the incident with the Santa Fe well that showed an excessive level of nitrates.²⁰⁸ At a follow-up test, the nitrate levels returned to the normal range.²⁰⁹ The email to which Wolslagel referred in his letter came "from a School District #20 official who stated that Mr. Sedich told him that the [Santa Fe water well] which had excessive Nitrates was off and not running prior to the test and it was only turned on during the water test."

At trial, Sedich testified he received a call from the school district asking about possible water contamination in the Santa Fe well.²¹⁰ Sedich told the official who called that the well was turned off after the first test showing excessive nitrates and was not turned back on until results from the second test came back showing nitrates in the normal range.²¹¹ The City sent notices out to residents more than three days after discovering a high level of nitrates in the Santa Fe well, as opposed to the 24 hours Wolslagel alleges was required.²¹² Wolslagel claims Sedich lied to the school district official because two water operators and well log sheets indicated the Santa Fe well was turned on prior to the test.²¹³ But it's not clear whether Wolslagel was referring to the first or the second test. Wolslagel closed his letter by informing the City Council he would be filing complaints with state and federal officials.²¹⁴ In a postscript to the letter, he insinuated Cooper intended to erase the recoding of the meeting earlier in the day and asked the City Council to prevent Cooper from erasing the evidence.²¹⁵

²⁰⁵ C. Ex. 56 at 1.

²⁰⁶ C. Ex. 56 at 1.

²⁰⁷ C. Ex. 56 at 1.

²⁰⁸ C. Ex. 57.

²⁰⁹ Tr. at 212.

²¹⁰ Tr. at 213.

²¹¹ Tr. at 213.

²¹² Tr. at 94.

²¹³ C. Ex. 57 at 2.

²¹⁴ C. Ex. 56 at 2.

²¹⁵ C. Ex. 56 at 2.

G. Disciplinary Measures and Termination

1. Wolslagel's Performance Improvement Plan

Two weeks later, on April 18, 2008, Sedich gave Wolslagel a written reprimand and placed him on disciplinary probation.²¹⁶ Sedich put Wolslagel on a 90-day performance improvement plan that provided Wolslagel's performance would be reevaluated after 90 days; the City would then take further disciplinary action, including termination, if Wolslagel didn't cease engaging in the actions he had been warned about.²¹⁷ Semm, Sedich, and Wolslagel were present at the meeting.²¹⁸ The reprimand listed fifteen specific instances of inappropriate behavior about which Sedich had previously warned Wolslagel. Some of these 15 specific instances that follow were referenced in the record, while others were not.

First, Wolslagel made "disrespectful accusations questioning the ethics" of the City's Finance Department in a meeting with a councilmember.²¹⁹ At the time, Sedich warned Wolslagel against making unfounded accusations against public employees and told him the water department's budget was not within the scope of his job description.²²⁰ Second, Wolslagel spoke on the topic of water infrastructure needs in a meeting in the fall of 2007.²²¹ At the time, Sedich told Wolslagel that he wasn't qualified to speak on that topic and to gather all information on a subject before speaking about it.²²² Third, Sedich cited a comment Wolslagel made on October 1, 2007, about Steve Cramer not doing his job because "he is too close to retirement."²²³ Next, in a meeting with Sedich on October 12, 2007, Wolslagel made a similar comment about Jack Kramer not wanting to

²¹⁶ R. Ex. 13 at 1.

²¹⁷ R. Ex. 13 at 3.

²¹⁸ R. Ex. 21. Respondent's exhibit 21 is a recording of three meetings. The first is the April 3, 2008, meeting intended as a follow-up to Wolslagel's complaints lodged with Cooper. The second meeting is the April 18, 2008, meeting placing Wolslagel on a disciplinary probation. The last meeting recorded is a meeting informing Wolslagel of his employment termination.

²¹⁹ R. Ex. 13 at 1.

²²⁰ R. Ex. 13 at 1.

²²¹ R. Ex. 13 at 1.

²²² R. Ex. 13 at 1.

²²³ R. Ex. 13 at 1. Although there is no other reference in the record to Wolslagel's comment about Cramer not doing his job because "he is too close to retirement," it appears this is an incident separate from Wolslagel's interaction with Cramer regarding guns.

do anything because he was “too close to retirement.”²²⁴ Sedich then cited the October 12, 2007, incident with the pest control employee after which Sedich verbally warned Wolslagel against aggressive behavior toward outside vendors.²²⁵ During this meeting, Wolslagel had raised his voice at Sedich saying that Wolslagel was “obligated to the FBI.”²²⁶

Sedich next cited the December 12, 2007, incident in which Wolslagel told Meersman that Kramer and Fruwirth weren’t interested in doing anything since they were too close to retirement.²²⁷ Sedich also cited Wolslagel’s “very hostile” behavior during the December 18, 2007, meeting called to discuss the written warning regarding the same interaction with Meersman. Specifically, Wolslagel raised his voice and made comments about Sedich not being able to do his job.²²⁸ Sedich also wrote about a comment Wolslagel made during a December 20, 2007, meeting regarding a backlog of the computer system. There, Wolslagel told Sedich and Kramer he’d criticized the Wastewater Department’s budget by telling other employees about the department having a \$78,000 computer.²²⁹ Sedich counseled Wolslagel during this meeting against speaking on a topic before having the pertinent information.²³⁰

Sedich then listed incidents others had reported to him. On February 8, 2008, Wolslagel told an unnamed employee he was “out to get” Sedich.²³¹ On March 25, 2008, Wolslagel told Meersman it would be good if Dodge retired to get some “new blood” in the city’s golf course.²³² On March 26, 2008, unnamed Public Works department employees (probably including Tom Callahan) overheard Wolslagel saying Cooper was a “delivery boy” to a Phoenix attorney and his days with the city were numbered.²³³ On April 3, after the meeting with Cooper, Walker, and Sedich, Roy Ratcliff overheard Wolslagel calling Cooper, Walker, and Sedich “a bunch of idiots,” and stating Cooper “doesn’t know what he is doing.”²³⁴ Sedich also cited Wolslagel’s “very

²²⁴ R. Ex. 13 at 2.

²²⁵ R. Ex. 13 at 2.

²²⁶ R. Ex. 13 at 2.

²²⁷ R. Ex. 13 at 2.

²²⁸ R. Ex. 12 at 2.

²²⁹ R. Ex. 13 at 2.

²³⁰ R. Ex. 13 at 2.

²³¹ R. Ex. 13 at 2.

²³² R. Ex. 13 at 2.

²³³ R. Ex. 13 at 2.

²³⁴ R. Ex. 13 at 2 and Tr. at 190.

confrontational” manner during the April 3 meeting.²³⁵ In that meeting Wolslagel raised his voice and slammed his hands on the table,²³⁶ and Cooper asked him to calm down.²³⁷ Lastly, Sedich found Wolslagel’s April 3, 2008, letter to the Mayor and City Council was inappropriate insofar as it referred to city staff as “ignorant” and implied the City Attorney might tamper with evidence of a meeting by erasing the recording.²³⁸

This meeting was recorded with Wolslagel’s knowledge and consent, and admitted as Respondent’s Exhibit 21. The audio recording of the meeting indicated Wolslagel read through the reprimand for approximately five minutes.²³⁹ When he finished reading, he began laughing. He could then be heard saying the reprimand was in response to his April 3 letter to City Council.²⁴⁰ Several times, he insisted the City’s “intent [was] to fire” him, and he was “seeing retaliation.”²⁴¹ He claimed to be shocked at “how dumb” Sedich was for giving him a reprimand so soon after he wrote a letter to City Council, and claimed Sedich was “way out of line” for giving him the reprimand.²⁴² Semm interrupted to say the City was trying to make him “aware of some issues,” and he was being placed on disciplinary probation.²⁴³ Wolslagel responded to Semm by saying all the allegations in the reprimand were “completely false.”²⁴⁴ Prior to leaving the meeting, Wolslagel reiterated his shock at “how dumb” they were to give him the reprimand after filing a complaint with City Council, and he was “gonna go see an attorney now.” Wolslagel refused to sign the reprimand, but took a copy of it with him.²⁴⁵

2. Wolslagel’s Reaction to the Extension of His Probationary Period

On July 24, 2008, Wolslagel’s 90-day probation was extended.²⁴⁶ Sedich acknowledged Wolslagel had improved his conduct toward other

²³⁵ Citation Needed.

²³⁶ Citation Needed.

²³⁷ R. Ex. 13 at 3.

²³⁸ R. Ex. 13 at 3.

²³⁹ R. Ex. 21.

²⁴⁰ R. Ex. 21.

²⁴¹ R. Ex. 21.

²⁴² R. Ex. 21.

²⁴³ R. Ex. 21.

²⁴⁴ R. Ex. 21.

²⁴⁵ R. Ex. 13 at 3.

²⁴⁶ Tr. at 192.

employees, but during his 90-day probationary period Wolslagel avoided even eye contact with Sedich.²⁴⁷ Wolslagel's December 18, 2007, written warning specifically required Wolslagel to communicate with Sedich regarding his daily activities²⁴⁸ and to notify Sedich before taking "action" "if action becomes necessary."²⁴⁹ The April 18, 2008, disciplinary probation didn't specifically require Wolslagel to communicate with Sedich regarding his daily activities, but the disciplinary probation summarized the terms of the December 18, 2007, written warning and issues leading to the December written warning.²⁵⁰ The disciplinary probation letter states that Wolslagel's performance would be re-evaluated at the end of another ninety days and the City would take further disciplinary action, "up to and including termination" if the issues stated in the letter have not stopped.²⁵¹

The terms of Wolslagel's disciplinary probation also specifically prohibited "insubordinate behavior."²⁵² Sedich cited two incidents while Wolslagel was on probation that Sedich believed were insubordinate, or demonstrated Wolslagel's intentional avoidance of Sedich in violation of the terms of the disciplinary probation. On April 21, 2008, Wolslagel emailed an individual named Tom Spear and informed him the City was giving him a water conservation award.²⁵³ Wolslagel had not discussed this award or the selection criteria for the award with Sedich.²⁵⁴ When Sedich asked Wolslagel about it, Wolslagel replied he spoke with Kramer, but Kramer denied authorizing Wolslagel to issue the award to Spear.²⁵⁵

On June 27, 2008, Sedich sent Wolslagel to Home Depot to investigate high water consumption there.²⁵⁶ When Wolslagel determined the problem, he drove back to the office to send Sedich an email rather than call Sedich from his City-issued cell phone.²⁵⁷

²⁴⁷ R. Ex. 19 at 2.

²⁴⁸ R. Ex. 18 at 1.

²⁴⁹ R. Ex. 13 at 1.

²⁵⁰ R. Ex. 13 at 2.

²⁵¹ R. Ex. 13 at 3.

²⁵² R. Ex. 13 at 3.

²⁵³ R. Ex. 19 at 1.

²⁵⁴ R. Ex. 19 at 1.

²⁵⁵ R. Ex. 19 at 1.

²⁵⁶ R. Ex. 19 at 2.

²⁵⁷ R. Ex. 19 at 2.

The probation extension cited other instances in which Wolslagel deliberately avoided contact with Sedich.²⁵⁸ Because Wolslagel appeared to have made progress in the area of “belligerent and hostile outbursts of raising [his] voice or name calling if [his] supervisors and others,”²⁵⁹ the City extended his probation instead of terminating him at the close of the 90-day period, to give him more time to improve in the area in which his performance was still deficient.²⁶⁰

Sedich wasn’t available to meet with Wolslagel, so Kramer and Walker met with him instead.²⁶¹ Walker recalled that when informed of the extension of the probation, Wolslagel said to Kramer, “Ah, you’ve got to be kidding me. I can’t believe you’re this stupid.”²⁶² Kramer tried to calm Wolslagel down, explaining they weren’t terminating his employment, but extending his probation.²⁶³ Wolslagel got angry and raised his voice.²⁶⁴ He made an unspecified personal comment against Walker regarding her background.²⁶⁵ Kramer said the comment was uncalled for and tried to re-direct Wolslagel’s attention to the bullet points outlining areas for improvement.²⁶⁶ They reviewed the first bullet point regarding Wolslagel’s failure to communicate, and Wolslagel explained he wasn’t communicating with Sedich because his attorney advised against it.²⁶⁷ Nothing in the record indicates Wolslagel actually hired an attorney.²⁶⁸ After that, Wolslagel got up, told Kramer he was going to jail, and walked out of the meeting.²⁶⁹

3. The City Terminates Wolslagel’s Employment

After Wolslagel walked out of the meeting to extend his probationary period, Kramer came to a conclusion “the City of Kingman had done everything that they could to help Mr. Wolslagel in his character and demeanor with City employees, staff members, council members, the Mayor, and [himself.]”²⁷⁰ Kramer said Wolslagel

²⁵⁸ R. Ex. 19 at 1–3.

²⁵⁹ R. Ex. 19 at 1.

²⁶⁰ Tr. at 268.

²⁶¹ Tr. at 269.

²⁶² Tr. at 269.

²⁶³ Tr. at 270.

²⁶⁴ Tr. at 276.

²⁶⁵ Tr. at 270.

²⁶⁶ Tr. at 270.

²⁶⁷ Tr. at 271.

²⁶⁸ Tr. at 271.

²⁶⁹ Tr. at 271.

²⁷⁰ Tr. at 297.

just “wasn’t getting it” and kept reverting back to his old disrespectful behavior, which included calling Kramer dumb to his face and making personal attacks against Walker in a meeting with her.²⁷¹ Five days later on July 29, 2008, Kramer presented Wolslagel with a Notice of Intent to Terminate.²⁷² The Notice set out Wolslagel’s “disrespectful and insubordinate” behavior towards Kramer and Walker at the July 24, 2008, meeting.²⁷³ It also set out a number of incidents leading up to the termination, including lack of communication with Sedich, eye-rolling during a meeting with HR, and talking negatively about Cooper to his co-workers.²⁷⁴ Upon receiving this Notice, Wolslagel again asked Kramer if he was really “that dumb” to fire him.²⁷⁵ Wolslagel also said the City fires “people who want to protect the public.” When he walked out of this meeting, he insisted he would see Kramer in court, in front of a federal judge where he would get a large settlement.²⁷⁶ Wolslagel’s termination was effective on August 8, 2008.²⁷⁷

IV. Analysis and Conclusions of Law

A. Wolslagel has Made a *Prima Facie* Case of Whistleblower Retaliation

Wolslagel brought complaints under the Safe Drinking Water Act, Federal Water Pollution Prevention and Control Act, and the Clean Air Act .

Congress enacted the Safe Drinking Water Act of 1974 (“SDWA”) “to assure that water supply systems serving the public meet minimum national standards for protections of public health” and “to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste.”²⁷⁸ The SDWA requires public water systems to monitor levels of contaminants that carry the potential to be harmful to human health, to test the water for these contaminants to ensure that they are at acceptable levels, and to make the results available to the public.²⁷⁹ The SDWA includes a whistleblower protection scheme that prohibits a public water system from

²⁷¹ Tr. at 298.

²⁷² R. Ex. 20.

²⁷³ R. Ex. 20 at 1.

²⁷⁴ R. Ex. 20 at 3–4.

²⁷⁵ R. Ex. 21.

²⁷⁶ R. Ex. 21.

²⁷⁷ R. Ex. 23 at 1.

²⁷⁸ H.R. Rep. No. 93-1185 (1974).

²⁷⁹ 42 U.S.C. § 300f.

discriminating against the employee “with respect to compensation, terms, conditions, or privileges” because the employee engaged in protected activity.²⁸⁰

The Federal Water Pollution Prevention and Control Act (“WPCA”) was designed to “restore and maintain chemical, physical, and biological integrity of the Nation’s waters.”²⁸¹ Specifically, the WPCA is concerned with “the setting of water quality standards for interstate navigable waters.”²⁸² The WPCA includes the same whistleblower protection scheme as the SDWA and prohibits firing or discrimination against any employee for taking action to further the Act.

The purpose of the Clean Air Act (“CAA”) is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”²⁸³ The CAA also contains the same whistleblower protection scheme as the SDWA and WPCA.²⁸⁴

To establish a *prima facie* case under these three statutes, an employee’s complainant must show:

- (i) The employee engaged in a protected activity;
- (ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity;
- (iii) The employee suffered an unfavorable personnel action; and
- (iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the unfavorable action.²⁸⁵

To succeed in his *prima facie* case, Wolslagel must demonstrate by a preponderance of evidence that his protected activity was a “motivating factor.”²⁸⁶ Wolslagel can meet the fourth prong of his *prima*

²⁸⁰ 42 U.S.C. § 300j-9(i)(1).

²⁸¹ 33 U.S.C. § 1251.

²⁸² S. Rep. 92-414 (1972).

²⁸³ 42 U.S.C. § 7401 (b)(1).

²⁸⁴ 42 U.S.C. § 7401(b).

²⁸⁵ 29 C.F.R. § 24.104(e)(2).

²⁸⁶ The term “motivating factor” is often used in employment discrimination law, but infrequently defined. “A complainant must prove more when showing that protected activity was a ‘motivating’ factor than when showing that such activity was a ‘contributing’ factor.” *Lopez v. Serbaco*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. 4 n.6 (Nov. 29, 2006) (citing *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 5–7 (ARB Sept. 30, 2003); *Vander Meer v. Western*

facie case by showing temporal proximity between his protected activity and the city's adverse action.²⁸⁷ Respondent can rebut this inference if it "demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity."²⁸⁸ The ultimate burden of proof, however, remains with Wolslagel to show by a preponderance of the evidence that "the protected activity was a motivating factor in the unfavorable personnel action alleged in the complaint."²⁸⁹ The preponderance standard is met when "it is more likely than not that a certain proposition is true."²⁹⁰

1. Wolslagel Engaged in Protected Activity

The implementing regulation for all three statutes, 29 C.F.R. § 24.102, states "no employer" may discriminate against any employee who has engaged in protected activity.²⁹¹ The whistleblower protection scheme protects an employee's participation in activities that further the objectives of the statutes.²⁹² The SDWA protects activities that further the promotion of safe drinking water; the WPCA protects activities that promote biologic integrity related to navigable waters; and the CAA protects activities directed at promoting air quality.

An employee engages in protected activity if he:

(1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in Section 24.100(a) or a proceeding for the administration or enforcement of any requirement imposed under such statute;

(2) Testified or is about to testify in any such proceeding; or

Ky. Univ., ARB No.97-078, ALJ No. 1995-ERA-38, slip op. at 3 (ARB Apr. 20, 1998)); *see also Dierkes v. West Linn-Wilsonville Sch. Dist.*, ARB No. 02-001, ALJ No. 2000-TSC-002, slip op. at 6-7 (ARB June 30, 2003) (distinguishing between "motivating" factor the lower "contributing" factor burden); 72 Fed. Reg. 44956, 44959 (Aug. 10, 2007) (discussing the difference between contributing and motivating factor in the version of the regulations pertinent to this claim). A motivating factor need not be the only factor or the primary factor; it may be one of several motives. *Cf., Cosa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (discussing the definition of "motivating factor" as used in Title VII cases and codified at 42 U.S.C. § 2000e-2(m)).

²⁸⁷ 29 C.F.R. § 24.104(e)(3).

²⁸⁸ 29 C.F.R. § 24.104(d)(4).

²⁸⁹ 29 C.F.R. § 24.109(a).

²⁹⁰ *Fischl v. Armitage*, 128 F. 3d 50, 55 (2d Cir. 1997).

²⁹¹ 29 C.F.R. § 24.102.

²⁹² *Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (sec'y May 18, 1994).

(3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such statute²⁹³

Protected activity includes external and internal complaints, as well as written or verbal communications.²⁹⁴ In addition, protected activities under these environmental statutes also include the “raising of employee safety and health complaints, including the filing of complaints under OSHA . . . when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes.”²⁹⁵ I find Wolslagel engaged in protected activities under the SDWA, WPCA, and CAA.

a. Wolslagel’s Protected Activity Under the SWDA

Wolslagel expressed concern regarding the quality of city residents’ drinking water after he took a water sample from a resident’s home in December 2007. Wolslagel reasonably believed the sample contained algae and needed to be tested because the sample he took from the tap of the resident’s mobile home was green and possibly contaminated with algae.²⁹⁶ He brought the sample back to his supervisor, Sedich, for testing. At a meeting on December 24, 2007, Wolslagel informed HR Director and Risk Management Director Walker about that water sample. Wolslagel was worried Sedich wouldn’t test the sample for contaminants Wolslagel believed were present. On April 3, 2008, he gave the City Council a letter in which he accused Sedich of not testing a water sample, presumably referring to the water sample discussed with Walker on December 24, 2007. These are protected activities because Wolslagel was attempting to have the City enforce safe drinking water regulations and test the drinking water for the presence of algae.

Wolslagel’s January 14, 2008, complaint to Arizona OSHA is also a protected activity because he expressed concern the City was not

²⁹³ 29 C.F.R. § 24.102. Part 24 of Title 29 of the Code of Federal Regulations implements the whistleblower protection provisions of six environmental protection statutes and the Energy Reorganization Act (ERA). 29 C.F.R. § 24.100. Decisions under any of the six environmental acts or the ERA apply a common legal framework. Citations to 29 C.F.R. Part 24 in this Decision and Order are to the August 10, 2007, version of the regulations, which were in effect during the events pertinent to this case.

²⁹⁴ *Hermanson v. Morrison Knudsen Corp.*, ARB No. 29-CER-2, ALJ No. 94-CER-2, slip op. at 5 (ARB June 28, 1996).

²⁹⁵ *Melendez v. Exxon Chemical Americas*, 96-051, ALJ No. 1993-ERA-6, slip op. at 17 (ARB July 14, 2000) (citing *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3, slip op. at 7 (ARB Sept. 29, 1998)).

²⁹⁶ Tr. at 78.

following “clean water laws.” Wolslagel referred to a “hazard” posed to “45,000 residences,” which included the entire City, because clean water laws were not being followed.²⁹⁷ In his December 27, 2007, letter to the FBI, Wolslagel wrote the attack on the City’s waste water treatment facility may have been brought on by “disgruntled locals upset at the polluted ground water they think is caused by our treatment process.”²⁹⁸ This was protected activity because Wolslagel raised questions regarding the quality of the drinking water of many City residents.

Wolslagel suggested he might also have complained about the presence of a lead bullet in a water tank and redwood particles used to plug the bullet hole, further contaminating water in the tank.²⁹⁹ Had they been proven, those actions would be protected because the presence of lead and other contaminants has an impact on the quality of drinking water, but Wolslagel failed to prove he actually complained about the presence of a bullet or other contaminants in the water tanks.

The City also admits Wolslagel emailed City Attorney Cooper on December 31, 2007, and this email was protected activity.³⁰⁰

Other examples of Wolslagel’s protected activities under the SDWA include:

1. complaints during an April 3, 2008, meeting with Cooper, Sedich, and Walker, when Wolslagel complained Sedich didn’t test the water sample Wolslagel believed contained algae, that the City had Sedich who was only certified as a “three level” running a “four level facility,” meaning the person overseeing the treatment of the City’s drinking water wasn’t qualified for the job and that he would be reporting this information to the Attorney General and the U.S. Attorney’s Office;
2. an April 22, 2008, letter to the Secretary of Labor citing an issue with a drinking line connected to a steel plant; and
3. a January 24, 2008, letter to OSHA and ADEQ accompanied by a timeline of events referencing “more than a dozen possible” clean water regulations.

²⁹⁷ C. Ex. 45B at 1.

²⁹⁸ C. Ex. 42 at 1.

²⁹⁹ Tr. at 80–81.

³⁰⁰ Respondent’s Pretrial Statement at 9.

b. Protected Activity Under the CAA

Wolslagel engaged in protected activity under the CAA when he complained about the release of chlorine gas. Walker testified about a release of 400 pounds of chlorine gas resulting from a fire at a downtown wastewater plant that occurred sometime in early December 2007.³⁰¹ Walker consulted with HAZMAT Coordinator Bill Johnston who told her the release did not pose a public safety risk.³⁰² On December 27, 2007, Wolslagel wrote a letter to the FBI regarding this incident, accusing Kramer of failing to properly address that incident. In the FBI letter, Wolslagel further alleged Kramer and Walker intentionally kept details about the incident a secret and did not report them to the public.³⁰³ Wolslagel went on to state the Mohave County Sheriff's report had "no mention" of the "nearly 400 lbs. of Chlorine gas that was released" during the vandalism and that this was enough gas "to do some real harm."³⁰⁴

The 1990 Clean Air Act Amendments identify chlorine as a hazardous air pollutant.³⁰⁵ Wolslagel's FBI letter was meant to initiate an investigation into the City's alleged mishandling of the threat to air quality, so the letter was a protected activity under the CAA.

c. Protected Activity Under the WPCA

The bulk of Wolslagel's alleged protected activities concern the sewer spill near the elementary school. These activities are protected under a very broad interpretation of the WPCA. The WPCA is concerned with navigable waters and those bodies of water that are connected to navigable waters.³⁰⁶ In 2006, a plurality opinion of the Supreme Court of the United States defined the extent to which "the waters of the United States" must be navigable or connected to navigable waters to fall under the WPCA. The "waters of the United States" include only "relatively permanent, standing or flowing bodies of water" and exclude temporary or intermittent flows of water.³⁰⁷ The sewer spill involved "approximately 10,000 gallons of raw sewage," which "flowed down the streets through a downtown area into an unnamed wash, a tributary to Holy Moses Wash."³⁰⁸ Wolslagel doesn't

³⁰¹ Tr. at 280.

³⁰² Tr. at 280.

³⁰³ C. Ex. 42 at 1.

³⁰⁴ C. Ex. 42 at 1.

³⁰⁵ 42 U.S.C. § 7412(b)(1).

³⁰⁶ 33 U.S.C. § 1311 (f).

³⁰⁷ *Rapanos v. United States*, 547 U.S. 715, 732–33 (2006).

³⁰⁸ C. Ex. 39 at 1.

make clear in the record what body of navigable water the Holy Moses Wash is, if any. But I take judicial notice that the Holy Moses Wash is part of the Lower Colorado Watershed, which includes navigable waters.³⁰⁹ In light of Wolslagel's numerous complaints regarding the sewer spill in the Holy Moses wash and children's contact with that water, he has sufficiently engaged in protected activity under the WPCA.

Wolslagel first brought the matter to the attention of Public Works Director Jack Kramer the day Wolslagel learned about the spill. Wolslagel followed up with Kramer the following day. Kramer responded by sending Wolslagel and a co-worker, Corwin, to the Palo Christi Elementary School to inform the principal about the spill and children contacting the contaminated water. Wolslagel thought the City wasn't acting to protect the children exposed to the contaminated water, so he informed Walker, Cooper, the City Council, and the Mayor about the sewer spill and his belief neither the City nor the school had done anything to ensure children received the same treatment as the city workers had who had been exposed to the contaminated water. Wolslagel also made repeated external complaints regarding the sewer spill incident to Arizona Department of Environmental Quality, the Occupational Safety and Health Administration, and the Department of Labor throughout the nine-month period leading up to his termination.

The City denies Wolslagel engaged in protected activity when he alerted Kramer to the sewer spill, but admits that Wolslagel did send an email to Kramer about the spill.³¹⁰ The email, dealing with children's contact with waste water was protected activity under a generous interpretation of the WPCA. The City also denies Wolslagel ever contacted HR Director Walker on December 20, 2007, or brought up specific safety concerns at the meeting with Sedich and Walker on December 24, 2007. However, the record shows, on December 20, 2007, Wolslagel sent an email to Linda Semm, HR Administrator, telling her he would file an OSHA complaint because City management had not acted to "correct a known hazard that now exposed innocent children to disease laden wastewater."³¹¹ This too is protected activity under the WPCA.

³⁰⁹ See Arizona Flood and Drought Monitoring's description of the Holy Moses Wash, http://data.afws.org/sui/siteDetail.aspx?dbNm=alert&statn_id=1650 (last visited August 4, 2011).

³¹⁰ R. Pre-Trial Statement at 8.

³¹¹ C. Ex. 37 at 1.

Wolslagel's activities pertaining to the WPCA are protected because they "touch on" public safety and health and the environment and were intended to ensure compliance with environmental acts.³¹² Even if Wolslagel's activities pertaining to the sewer spill were not protected activities under the WPCA because they are too far removed from any definition of "navigable waters," Wolslagel did engage in protected activities under the SDWA and the CAA.

However, as I will discuss below, the City has rebutted Wolslagel's *prima facie* claim of whistleblower discrimination and proved by a preponderance of evidence his protected activities were not a motivating factor in the City's adverse employment actions.

2. The City had Knowledge of Most of Wolslagel's Protected Activities

The City had knowledge of most of Wolslagel's protected activities. Wolslagel reported his safety concerns to his immediate supervisor, the Public Works Director, HR, City Attorney, City Council, and the Mayor. Many of Wolslagel's complaints about drinking water safety, water pollution control, and air quality safety are documented.

The City was not aware of some of his external protected activities. For example, there is no evidence in the record the City was aware of Wolslagel's 1 December 27, 2007, letter to the FBI prior to receiving the letter as Complainant's exhibit. There is also no evidence the City was aware of the letter Wolslagel sent to the Director of Mohave County's Health Department on May 12, 2008.³¹³ In this letter, Wolslagel informed the County Health Department about the contamination of a potable water line at the Airport Industrial Park and that the City took a year to correct the contamination; the sewer spill and children's contact with the water; the release of 400 pounds of chlorine gas; high concentrations of nitrates in the Santa Fe well.³¹⁴ However, there is no dispute the City knew of the majority of Wolslagel's protected activities as evidenced by the meeting recordings, emails, and documented letters discussed above. Wolslagel proved the City had knowledge of his protected activities.

³¹² *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-3, slip op. at 10 (ARB Sept. 29, 1998) (quoting *Scerbo v. Consolidated Edison Co.*, ALJ No. 89-CAA-2, slip op. at 4-5 (sec'y Nov. 13, 1992), *aff'd on reconsideration*, (ARB Dec. 24, 1998).

³¹³ C. Ex. 69 at 1.

³¹⁴ C. Ex. 69 at 1 and 2.

3. Wolslagel Suffered Adverse Employment Actions

The parties have stipulated to three adverse employment actions: (1) The written warning of December 18, 2007; (2) April 18, 2008, performance improvement plan; (3) and employment termination effective August 8, 2008. All were adverse actions under the SDWA, WCPA, and CAA.

4. The Circumstances Support an Inference the City Was Motivated by Discriminatory Animus

An adjudicator may infer discriminatory animus if the Complainant shows “the adverse personnel action took place shortly after the protected activity.”³¹⁵ The temporal proximity of adverse employment action to protected activity is circumstantial evidence of a retaliatory motive at the hands of the employer.³¹⁶ The proximity of the adverse actions and Wolslagel’s protected activities throughout the period leading up to his termination is sufficient to establish an inference of discriminatory animus, thus establishing the fourth prong of his *prima facie* case. Wolslagel consistently engaged in protected activity from December 2007 until his termination. Much of the behavior the City cites as reason for Wolslagel’s termination appears to stem from Wolslagel’s frustration with what he perceived as the City’s deliberate inaction to protect children who came in contact with the December 2007 sewer spill. The adverse actions occurred on December 18, 2007; April 18, 2008; and August 8, 2008. Just before the written warning of December 18, 2007, Wolslagel engaged in protected activity when he alerted Kramer of the sewer spill near the elementary school. Wolslagel first alerted Kramer to the spill when he first learned about it, on December 13, 2007, and followed up with Kramer by email on December 17, 2007, urging him to inform the school principal about children making contact with contaminated water. This email, a protected activity under the WPCA, was sent just a day before Wolslagel received his written warning.

Two weeks before it placed Wolslagel on a Performance Improvement Plan on April 18, 2008, Wolslagel engaged in protected activity when he gave a letter to City Council outlining his complaints with the City. That same day, he engaged in protected activity when he accused his supervisor Sedich of not testing a water sample during a meeting with Sedich, Cooper, and Walker.

Wolslagel continued to engage in protected activity in May 2008, while on probation under the Performance Improvement Plan. He also

³¹⁵ 29 C.F.R. § 24.104(d)(3).

³¹⁶ *McMahan v. California Water Quality Ctrl. Bd.*, 90-WPC-1 (Sec’y Jul. 16, 1993).

mentioned his protected activities at the meeting immediately preceding his termination. This temporal proximity is enough to raise an inference of whistleblower retaliation.

B. The City's Nonretaliatory Reasons for Terminating Wolslagel

The City argues it fired Wolslagel because of his poor interpersonal skills.³¹⁷ Wolslagel's December 18, 2007, warning letter was prompted by his interaction with the City's golf course superintendent, Meersman, just days earlier. Wolslagel accused the Public Works Director, Kramer, and Meersman's boss, Fruwirth, of being unmotivated to do their jobs because they were both retiring. Other incidents Sedich considered were Wolslagel's outburst with his co-worker while discussing antique guns and running a large report that overwhelmed his co-workers' computers. While Sedich did not specifically cite the October 2007 Phoenix Pest Control as a factor in deciding to issue Wolslagel a written warning, Wolslagel's behavior with the pest control employee illustrated the kind of tactless, unprofessional behavior the City wanted to stop.

Although Wolslagel engaged in protected activity just one day before he was issued the written warning (sending an email to Kramer urging him to inform the elementary school principal about children touching contaminated water), the record shows Sedich and Kramer decided to give Wolslagel the written warning before Wolslagel engaged in this protected activity, and would have given him the warning at that time, but for his absence from the office attending to the spill.

The sewer spill occurred the day after Wolslagel's incident with Meersman at the golf course. Sedich and Kramer initially planned to verbally warn Wolslagel against inappropriate conduct and conversations with other City employees. On December 12, 2007, Sedich and Kramer went to look for Wolslagel in order to verbally counsel him about his behavior at the golf course, but did not find him at his desk. The next day, Sedich suggested to Kramer they issue Wolslagel a written warning; however, Wolslagel was out of the office dealing with the spill. At that point, Wolslagel had not yet begun complaining about the children's contact with the wastewater and the wastewater contamination itself, so these protected activities couldn't have motivated the City's decision to warn Wolslagel.

Five days later, on Tuesday, December 18, when Sedich finally presented Wolslagel with the warning, he did not receive it well. He

³¹⁷ Respondent's Pre-Trial Statement at 8.

refused to sign it and told Sedich he wasn't qualified to be a supervisor. This interaction was representative of Wolslagel's response to criticism. Rather than handling criticism gracefully or accepting his supervisor's instructions, he reacted with rude and demeaning outbursts. It is also precisely the type of behavior that led to the City to pursue further disciplinary action and ultimately to terminate Wolslagel.

The City wasn't motivated to issue Wolslagel a disciplinary probation because of his protected activities, but because of the rude, insubordinate, unprofessional, and inappropriate way he carried himself during an April 3, 2008, meeting with his supervisor, the City Attorney, and the HR Director. At the meeting that Cooper repeatedly attempted to discuss Wolslagel's safety concerns and explain to him how the City had addressed those concerns, but Wolslagel persistently ignored Cooper and refused to discuss safety complaints and instead insisted on focusing on his view that the December 18, 2007, written warning was unjustified.

Another factor in the City's motivation to place Wolslagel on disciplinary probation was the letter Wolslagel wrote to City Council after the April 3, 2007, meeting. While this letter itself included several complaints that were protected activities, it was not these complaints that raised the City's ire. Instead it was Wolslagel's apparently unfounded accusation of Cooper's, the City Attorney, intent to erase the recording of the April 3 meeting that Cooper, Sedich and others found inappropriate.

When Wolslagel received the, April 18, 2008, Performance Improvement Plan that detailed the terms of his disciplinary probation, he proceeded to call Kramer "dumb" for disciplining him. This rude outburst, among others, contributed to the City's concern.

While on probation, Wolslagel complied with some, but not all, of the terms of his probation. At the end of the probationary period, he had not yet met all goals of the probation. But the City saw he had made progress and improvement, so rather than fire him immediately—as it could have for failing to comply with the terms of his probation—it extended the probation to give Wolslagel more time to work on his behavior, professionalism, and problems with insubordination. Rather than take this opportunity, Wolslagel responded to the extension with another outburst, flinging unsupported accusations at the City officials who attempted to explain the extension to him. Wolslagel's behavior at the July 24, 2008, meeting undermined the progress he'd made during his probation and convinced Kramer that his interpersonal skills couldn't be rehabilitated. Only then, after following the City's progressive

discipline procedure and giving Wolslagel many opportunities to improve, did the City decide to fire him.

The City also went out of its way hear and meet Wolslagel's safety concerns and to ensure no one else in City government retaliated against Wolslagel for his protected activity. In addition to Cooper's and Walker's attempts to get Wolslagel to discuss his water and air safety concerns, Bob Steele held a meeting for Public Works crew to inform Wolslagel's co-workers about complaints Wolslagel made and to instruct them not to retaliate against Wolslagel or treat him differently.³¹⁸ Steele's testimony that he held the meeting in order to ensure other employees would not retaliate against Wolslagel for making complaints against the City is believable because Steele showed concern for Wolslagel previously when he counseled Wolslagel to calm down in order to keep his job.

The City had legitimate nondiscriminatory reasons to fire Wolslagel. It has rebutted Wolslagel's *prima facie* case. The City would have fired him regardless of his protected activity. As I will now discuss, Wolslagel hasn't proved by a preponderance of the evidence that retaliatory animus was a motivating factor in the City's decision to fire him.

C. Wolslagel has Failed to Prove by a Preponderance of the Evidence That the City Retaliated Against Him

In establishing his *prima facie* case, Wolslagel relied on the temporal proximity of his protected activities to the City's adverse employment actions. Aside from looking at suspicious timing to make an inference of retaliation, courts also look at a number of other factors to determine whether the employer acted with retaliatory motive. Wolslagel has not proven any of these other factors were present in his situation. Further, as the City demonstrated, the timing of protected activities to its decisions to take adverse actions against Wolslagel was not as closely linked as appeared at first blush.

An absence of warning before termination may indicate an employer is acting with improper motive.³¹⁹ But here, the opposite is true. Wolslagel received verbal warnings, a written warning, a disciplinary probation, and an extension of his disciplinary probation before he was terminated. Furthermore, each of the three adverse actions was preceded by an incident in which Wolsalgel acted unprofessionally and insubordinately.

³¹⁸ Tr. at 46.

³¹⁹ *Haney v. North American Car. Corp.*, ALJ No. 1981-SWD-00001, slip op. at 17 (ALJ Aug. 10, 1981).

Other factors adjudicators consider when evaluating whether an employer was motivated by retaliatory animus are whether a complainant received a pay increase, promotion, favorable performance review, or other indication of good performance shortly before termination.³²⁰ Those favorable indicators tend to discredit an employer who claims it has fired a complainant for poor performance. No evidence of Wolslagel's good performance contradicts the City's explanation for firing him. The last ten months of his employment were plagued with problems—from blowing up at the pest control worker, calling multiple supervisors names to their faces and to his co-workers, getting into heated debates with coworkers in the office. Wolslagel indicated he would offer a January 2007, performance evaluation as an exhibit to show a lack of performance issues at work. Wolslagel didn't offer this evaluation as an exhibit; even if he had, it would be irrelevant, since that evaluation occurred a year and a half before he was fired and Wolslagel's behavioral issues warranting disciplinary action did not escalate until the fall of 2007.

Another factor that suggests improper motive is an employer's inability to prove allegations,³²¹ which is not present here. The City proved Wolslagel engaged in inappropriate and unprofessional behavior on several occasions, despite repeated warnings against inappropriate and insubordinate acts. Sedich described Wolslagel's comments to Dodge and Meersman at the golf course as the "most explosive" exhibition of Wolslagel's unprofessional behavior up to that point. Wolslagel's comments to Meersman at the golf course and allegations against Meersman's boss, Darrell Fruiworth, and the head of the Public Works Department, Jack Kramer made Meersman uncomfortable. He reported them to his boss, Fruiworth. The record shows Wolslagel's comments to Meersman prompted his written warning, not any protected activity Wolslagel engaged in around the sewer spill—they happened after Sedich had resolved to warn him.

The City contends Wolslagel's disciplinary probation was prompted by Wolslagel's rude and uncollaborative behavior at a meeting with Cooper, Sedich and Walker on April 3, 2008. The transcript of that meeting proved Wolslagel's attitude was disrespectful and uncooperative. Perhaps more importantly, Wolslagel's conduct during this meeting showed him to be more concerned with

³²⁰ See *Murphy v. Consolidation Coal Co.*, ALJ No. 1983-ERA-00004, slip op. at 28 (ALJ Aug. 2, 1983).

³²¹ *Lewis Grocer v. Holloway*, 874 F2d 1008, 1012 (5th Cir. 1989) (upholding inference of discrimination based on unproven allegations in STAA case); *Cram v. Pullman-Higgins Co.*, ALJ No. 1984-ERA-00017, slip op. at 11 (ALJ July 24, 1984)

what he perceived as his unwarranted December 18, 2007, written warning than discussing and following-up on his safety concerns.

Neither did the City offer contradictory explanations for Wolslangel's termination, another factor that may lead an adjudicator to infer retaliatory motive.³²² The City consistently contended and proved Wolslangel was disciplined and terminated for his unprofessional attitude and his poor interpersonal skills that he couldn't improve.

Proof the employer's purported explanation for adverse action isn't true is also influential in establishing retaliatory motive.³²³ Wolslangel has not offered any such proof. At trial, even Wolslangel's witness, Sherri Furr, testified she frequently observed Wolslangel referring to his supervisors as being ignorant and stupid.³²⁴ Wolslangel's history of poor interpersonal skills is well documented. Recordings of two disciplinary meetings³²⁵ show him to be unreasonable and disrespectful in his interactions with supervisors. In these recording, he cannot take any criticism, frequently refers to his supervisors as "dumb."

The City didn't show antagonism by characterizing Wolslangel as a "troublemaker,"³²⁶ which sometimes happens when retaliation plays a role in discipline or termination. The City made repeated efforts to solicit and follow-up on Wolslangel's safety concerns. First, in December 2007, Walker, asked her HR associate, Semm, to arrange a meeting with Wolslangel to learn safety concerns. Wolslangel was not willing to take this opportunity express his concerns to HR, and only went to the meeting when escorted by Sedich. At this meeting, Wolslangel wasn't forthcoming with his safety concerns and had a generally disrespectful attitude, rolling his eyes and facing away from Walker.³²⁷ Furthermore, Bob Steele's efforts to make sure Wolslangel's co-workers didn't perceive or treat him as a 'troublemaker' after filing his OSHA complaint are the opposite of treating or regarding Wolslangel as a "troublemaker."

³²² *Hobby v. Georgia Power Co.*, ALJ No. 1990-ERA-30, 11 (Sec'y Aug. 4, 1995) (citing *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 935 (11th Cir. 1995), *aff'd mem.* 114 F.3d 1203 (11th Cir. 1997)).

³²³ *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination.").

³²⁴ Tr. at 18.

³²⁵ R. Ex. 21.

³²⁶ *Stone & Webster v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997).

³²⁷ R. Ex. 13 at 2.

The City showed no other antagonism or hostility toward Wolslagent's protected conduct, another factor that may lead an adjudicator to infer a retaliatory motive.³²⁸ The City actively solicited Wolslagent's safety complaints. Several of Wolslagent's co-workers testified they frequently brought safety issues to the attention of their supervisors, including Sedich and did not experience any retaliation as a result.

Wolslagent tried to further counter the City's claim his poor interpersonal skills were the reason for his termination, by offering a certificate of merit from a previous employer that he believes shows he had no problems with interpersonal skills.³²⁹ This argument is unpersuasive. The certificate, awarded to Wolslagent in 2002—six years before he was fired—has no bearing on his conduct while employed by the City of Kingman. Just because he got along well with others in the past, doesn't mean he behaved professionally and personably at the City. The record evidence shows Wolslagent was repeatedly rude, demeaning, hostile, aggressive, and confrontational to his supervisors, coworkers, City workers in other departments, and third-parties.

Wolslagent offered a number of other arguments to support his claim, none of which succeed. He argues that because no formal complaints were filed against him during his employment with the City, the City was not authorized to discipline him. Along the same lines, Wolslagent doesn't deny rolling his eyes during a meeting with his supervisor and HR, but doesn't believe that he can be disciplined for this because it is not a specifically prohibited behavior in City's personnel manual. Finally, he erroneously relies on his receipt of unemployment compensation after he was fired proves he did not "violate any city rules."³³⁰ The persuasive proof is that that the City had good grounds to fire him. I reject, however the City's contention that Arizona law expressly prohibits any adjudicator from considering an unemployment compensation decision in any proceeding against the City.³³¹ The Arizona legislature cannot control what proof may be admitted or considered in this federal proceeding, but is free to do so in claims that arise under Arizona law.

Wolslagent's arguments don't persuade me to disbelieve the City's stated reason for firing him, and he has not sustained his burden of persuasion.

³²⁸ *Lewis Grocer Co.*, 874 F2d. at 1012.

³²⁹ C. Ex. 46.

³³⁰ Complainant's Final Argument at 5.

³³¹ Ariz. Rev. Stat. § 23-672.01 (2010).

V. Conclusion and Order

Although Wolslagel proved he engaged in protected activities under the SDWA, WPCA, and CAA and established a *prima facie* case of whistleblower discrimination under those acts, the City convincingly demonstrated it fired Wolslagel because of his ongoing problems with insubordination, rudeness, and hostility towards coworkers, managers, and third parties. Wolslagel failed to prove retaliatory animus was a factor, let alone a motivating factor, in the City's decision to take adverse actions against him, up to and including his termination.

Wolslagel's claim is dismissed.

So Ordered.

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William Dorsey
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.