U.S. Department of Labor

Office of Administrative Law Judges
5100 Village Walk, Suite 200
Covington, LA 70433

(985) 809-5173
(985) 893-7351 (Fax)

Issue Date: 15 November 2018

CASE NO.: 2015-SDW-1

In the Matter of:

FREDERICK B. WRIGHT
Complainant

v.

RAILROAD COMMMISSION OF TEXAS
Respondent

APPEARANCES:

FREDERICK B. WRIGHT, *pro se*
Complainant

MICHAEL J. DEPONTE, ESQ.
JULIE C. TOWER, ESQ.
On Behalf of the Respondent

BEFORE: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER ON REMAND

This proceeding arises under the employee protective provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1367, and the regulations thereunder at 29 C.F.R. Part 24 brought by Frederick Wright (Complainant) against the Railroad Commission of Texas (Respondent).

I. PROCEDURAL BACKGROUND

On July 19, 2013, Complainant filed this complaint based upon his assertion that Respondent terminated him on June 20, 2013 due to his protected activities under these statutes when he raised concerns about requiring oil and gas operators to comply with rules regulating

drilling wells to protect sources of underground drinking water. (RX-35).[1] In addition to his termination, Complainant also alleged Respondent created a hostile work environment by allowing his immediate supervisors Director Teague and Assistant Director Fisher to (1) remove him on December 1, 2012 from approval of well plugging procedures based upon an complaint filed by operator Monty L. McCarver; (2) assign Teague and Fisher to manage the Houston district with only a rudimentary understanding of the rules, regulations, and engineering drilling principles resulting in a failure to require operators to comply with the rules (plugging procedures, preparation of completion reports); (3) limit his access to information necessary to perform his duties; (4) approve two completion reports subject to deficiencies so that the reports could be evaluated by compliance and engineering; and (5) require him (a specialist VI) to report to Terry Papek (a specialist IV). (CX-31-48).

On April 9, 2015, OSHA issued its findings stating it found no cause to believe that Respondent violated either the SDWA or FWPCA. On May 6, 2015, Complainant timely appealed OSHA's finding. Pursuant to Complainant's appeal, a hearing was held before the undersigned in Houston, Texas on December 9-10, 2015. Thereafter, both parties timely submitted post-hearing briefs.

On May 19, 2016, the undersigned dismissed Complainant's complaint and found that he did not meet his burden of showing that any protected activity motivated the termination of his employment. Complainant timely appealed this decision.

On January 12, 2018, the Administrative Review Board (hereinafter "ARB" or "Board") issued a Decision and Order remanding this matter for further proceeding consistent with its opinion. Specifically, the Board vacated my May 2016 Decision and Order finding Complainant did not engage in protected activity because he did not explicitly reference the SDWA or FWPCA. Since I did not assess whether Complainant had a reasonable belief when he engaged in the activities he alleges were protected, the ARB remanded this matter for further fact finding and consideration. *Wright v. Railroad Comm'n.,* ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 6.

On remand, the Board directed that the undersigned conduct the proper legal analysis to determine whether Complainant engaged, or reasonably believed he engaged, in protected activity. In particular, the Board instructed the undersigned consider whether Complainant's email to Teague and his allegations within his hostile work environment complaint are protected activities and if Complainant reasonably believed he was raising environmental or public health and safety concerns when he acted in each instance. As such, the Board directed the undersigned make findings of fact and determinations about whether Complainant had a reasonable belief in each instance. The ARB also left the determination regarding the issues of causation and affirmative defense to the undersigned on remand. *Wright v. Railroad Comm'n.,* ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 8-11.

[1] References to the record are as follows: Transcript: Tr. __; Complainant's Exhibits (listed by bates numbers): CX-__; Respondent's exhibits: RX-__; Stipulated facts: STF.

Further, the Board affirmed my finding that there was an adverse action and reversed my decision regarding the issues of causation and the affirmative defense since they must be reanalyzed in light of the expansive definition of protected activity. Finally, the Board instructed the undersigned to clarify with specificity which exhibits were admitted and which exhibits were rejected at the admitted. Exhibits CX 56-60 were also to be admitted into the record. *Wright v. Railroad Comm'n.,* ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 12.

II. ADMITTED EXHIBITS

Pursuant to the Board's instructions, I hereby **ADMIT** CX-56-60. Further, in determining whether Complainant reasonably believed his actions constituted environmental hazards, it is helpful to consider his work performance prior to termination to determine objectively what he actually believed or should have believed as an oil and gas engineer. To do this, the Board instructed the undersigned to first clarify with specificity which exhibits were admitted or rejected. *Wright v. Railroad Comm'n.,* ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 12.

Regarding the admitted exhibits, I hereby **ADMIT**, to the extent they are not already admitted, Complainant's bates-marked exhibits labeled CX-24-25, 31-48, 52-66, 68-98, 103-161, 179-211, and 221-223.[2] Also **ADMITTED** are Respondent's exhibits RX-1-12, 14, 16-21, 24-32, 35.

III. ISSUES PRESENTED ON REMAND

Based the Board's remand and the parties' arguments, I find the following issues need to be addressed:

1. Whether Complainant engaged, or reasonably believed he engaged, in protected activity under the Acts;

2. Whether any alleged protected activity caused, or was a motivating factor in, Complainant's termination; and

3. Whether Respondent demonstrated by a preponderance of the evidence that it would have terminated Complainant in the absence of any protected activity.

[2] I **REJECT** the remainder of Complainant's exhibits not listed above as irrelevant to the determination of the issues presented to the undersigned for resolution in this matter.

IV. STATEMENT OF THE CASE

A. Factual Background[3]

Respondent is a Texas state agency responsible for the regulation of the oil and gas industry in the state of Texas, including administration and enforcement of the underground injection control program under the federal Safe Drinking Water Act for class 2 injection wells associated with oil and gas exploration and production activities as well as brine mining activities. Respondent also serves as the certifying agency for federal permits under the Federal Water Pollution Control Act (FWPC), for projects associated with oil and gas exploration and production activities. (Tr. 211-213; 40 CFR §147.2201).

Respondent's former District 3 Director, Guy Grossman, hired Complainant on October 1, 2007, as an engineer specialist II for its Houston District 3 Office, Field Operations Section, Oil and Gas Division. (CX-52; STF-1, 3). Prior to his employment with Respondent, Complainant worked as a petroleum engineer for the U.S. Bureau of Land Management, as a car sales manager, and as a project engineer for Gulf Oil, Union Texas Petroleum, and Exxon. (CX-196-201). As an engineer for Respondent, Wright's duties included conducting surveys, making inspections, investigating complaints, and collecting and analyzing engineering data. (RX-1). Complainant was assigned as a technical staff person to work with the regulated industry to secure compliance by oil and gas operators with the rules and statutes assigned to Respondent for enforcement. (RX-31; Tr. 93-95).

Regarding the alternate surface casing program which was the primary activity involved in this proceeding, Wright had two responsibilities: (1) to insure that the operator was going to circulate cement to the surface and (2) to determine the number of centralizers to be used in this process. (Tr. 219-220, 230, 231-233).

As of June 20, 2013, Wright had received two promotions to engineer VI with his last bonus effective December 1, 2012. (RX-2; 27, STF-2). Respondent terminated Wright on June 20, 2013, at which time he was under the supervision of District Director Charles Teague and assistant director Peter Fisher, who both reported to Deputy Director Raymond Fernandez.[4]

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[3] The factual background consists of not only the parties' stipulations but also the undersigned's factual determination of the record consisting of admitted exhibits and credibility determinations. In general, I was not impressed with Complainant's denial of his mistreatment of operators and refusal to work with staff personnel. Management was very lenient with Complainant and tried to encourage him to work with, as opposed to working against, independent contractors and fellow employees.

[4] Raymond Fernandez retired from Respondent on August 31, 2014. Prior to his retirement, Fernandez served as Respondent's Deputy Director of Field Operations for its Oil and Gas Division for three years. In that position, he managed nine district offices, including Houston's District 3 Office. As Deputy Director, he had overall supervision for 250 employees. Before his promotion to Deputy Director, he held a numerous other positions with Respondent. As a professional petroleum engineer, he worked with oil and gas operators in dealing with and resolving regulatory issues. (Tr. 812-92).

At his first employee evaluation (EPE) on April 29, 2008, supervisor Gil Bujano, Director of Respondent's Oil and Gas Division, and Guy Grossman rated Wright as meeting the requirements of his position. (RX-3). On his next two evaluations on October 21, 2008, and October 28, 2009, Wright received similar evaluations. (RX-4-5).

At the next evaluation (EPE) on October 28, 2010, Wright maintained an overall rating of meeting the requirements of his position on average but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived Complainant was unwilling to work out amenable solutions at times. (RX-6). In reply, Wright stated:

> I am taking this comments option to file a complaint that the District Director and the Assistant District Director are using their official capacities to harass me, with the intent to create a hostile work environment and adversely impact my employment opportunities. The baseless comments in this EPE about my lack of professionalism, me engaging in debates with operators, as well as the implication that unbiased individuals are hesitant to approach me, is part of the manifestation of this harassment.

(RX-6, p. 7).

In response, Guy Grossman and Raymond Fernandez stated there was no attempt to harass or create a hostile work environment for Wright. Rather, they were suggesting ways Wright could improve his performance for the betterment of Respondent. On appeal, HR Director Mark Bogan reviewed Wright's harassment allegations and denied any evidence of harassment. He also indicated that Houston's District Office management comments were suggestions for work improvement. (RX-7-8).

In support of its evaluation of Wright, Respondent produced an e-mail from Douglas Storey of Fidelity Exploration & Production sent to Grossman dated June 15, 2010, in which Storey complained of Wright's arrogant opinion of himself. According to Storey, Wright acted as though he was the only individual who knew anything about engineering or regulatory issues and accused Storey of not properly calculating the correct number of centralizers. Complainant also demanded Storey write a letter of apology indicative of a lack of professionalism. (RX-17). Storey also sent another e-mail dated April 16, 2013 indicating other instances of Wright arbitrarily holding up completion reports. (RX-19).

On his next employee evaluation (EPE) on October 28, 2011, Wright received an overall average evaluation with suggestions of taking more field trips and working for better relations with all operators to make "every effort to assist operators in keeping wells on production but also complying with the rules and regulations" and viewing violations from practical standpoint "in addition to the straight rules and regulations." (RX-9).

On the next employee evaluation (EPE) of November 14, 2012, Respondent evaluated Wright as average but still needing to improvement relations with operators with the goal of

providing excellent customer service and making the path to compliance quick and uncomplicated while working on better relations with staff as well. (RX-16). In support of its suggested improvements, Respondent cited instances of Wright requiring analyst Marsha Vogel to report string depths on a completion package when she had never been required to do so in 20 years of regulatory reporting. (RX-13). Wright denied causing any delays in processing completion reports and informed Fernandez his processing of completion reports "…significantly exceeds the rest of the District." (CX-31).

On September 6, 2012, Wright filed a complaint with Gil Bujano, Director of Respondent's Oil and Gas Division, concerning the temporary assignment of Terry Papak to run the District 3 office in the absence of Teague and Fisher. Wright claimed former District Director Ron Smelley initiated this practice of appointing Papak, who was only specialist IV, as opposed to Complainant, who was a specialist VI, in order to demean him. According to Wright, he contacted Mark Bogan about this appointment and was advised it was only a temporary appointment and that he should not be concerned about it. Wright disregarded Bogan's advice and when Fisher later made a similar appointment, Wright again filed an informal complaint with Bujano. (CX-32).

Rather than working with operators to resolve compliance problems, Wright continued to play "hard ball" with operators by refusing to help them resolve problems. For example, operator Paul Hendershott met with Wright in an attempt to resolve potential drilling problems. Rather than helping Hendershott, Wright laughed and told him that he could come up with more violations. Fellow employee Mark Motal overheard the exchange and apologized for Complainant's conduct, after which Hendershott stated he had never been so humiliated, talked down to, and made fun of in his entire life. The following day, Hendershott spoke with District Director Charlie Teague, who resolved Hendershott's problems and answered his questions. (RX-12).

Besides the Hendershott incident, Respondent produced an e-mail from fellow employee Michael Sims to Charlie Teague dated March 21, 2013, wherein Wright, rather than helping Sims resolve an issue of the burial of oil based mud, continued to argue with Sims, which resulted in Sims having to seek assistance from Wright's supervisor, Charlie Teague, and Peter Fisher, Deputy District Director, because Wright refused to listen to anything Sims had to say. (RX-14).

As a further example of Wright's unwillingness to work with operators and a lack of professionalism, Respondent provided an e-mail from Carla Martin of Enervest to Fernandez dated April 12, 2013, wherein she reported submitting a new form approved by Teague for use in a SWR 13(b)(2) request (alternative surface casing exemption request) for Strake #1H well in Grimes County only to be told by Wright that she had to use an old form to get her request approved. In addition, she complained that Wright had a problem working with women and cited her experience of being interrupted by Wright when she called to explain the purpose of her call. (RX-18).

Wright's refusal to work with operators was exemplified by his dealing with Douglas Storey of Fidelity Exploration & Production Co. which was also set forth in an e-mail dated

April 16, 2013. The email states that Wright rejected Storey's revisions of a completion package tracking no. 71248 without letting Respondent's proration and engineering personnel determine whether they were going to give Storey the necessary allowance. Upon receiving Wright's response, Storey e-mailed Fernandez indicating that everything he submitted to Wright was rejected even for things Storey was admittedly correct on. Further, Storey told Fernandez that if necessary he could provide three years of issues with Wright. (RX-19).

B. Events Leading to Complainant's Discharge

In support of his hostile work complaint mentioned above, Wright stated District Director Teague and Assistant Director Fisher possessed only a rudimentary understanding of the rules, regulations, and engineering principles associated with a Director's office. Complainant alleged both had ignored operator compliance with rules such that new hires to the technical staff had no opportunity to develop understanding of the issues. He also alleged that Teague brought in several clerical staff members to train other clerical staff in Region 3 which resulted in the improper processing of completion reports as seen in the plugging back of a well without setting an effective isolating plug in May 2012.

On July 24, 2012, Wright stated Teague approved several reports of down hole production comingling without a SWR I0 exception. In addition, on September 3, 2012, Teague received a call from an operator who reported that cement was not circulating to the surface during the primary cementing of the surface casing. Teague approved running a one inch string down the annulus to 500 feet and from there cementing the annulus to the surface allowing two fresh water reservoirs that were supposed to be isolated from each other to communicate with each other on the annulus.

Teague denied Wright's allegations that he was willing to allow completion reports without bringing them in compliance with the rules. Rather, it was Teague's position that Commission employees should help operators by providing them with information needed to comply. Teague was upset with Wright's failure to come forth with needed information and admitted temporarily appointing Papak because he head practical knowledge and a fair amount of humility. (RX-22, pp 1-4). Regarding the appointment of Aton Motal and Fisher to deal with Monty Mc Carver of Nabors Completion, Teague did so to provide McCarver with a fair and productive conversation with the Commission as opposed to dealing with Wright, who devised very different and costly suggestions when a variance arose.

Wright then cited various instances involving a lack of understanding and disregard of the rules. These allegations included a review of completion reports by Nancy Cook, Pete Fisher, and Aton Motel and their improper approval of remedial squeezing of surface casings and improper writing up the entire plugging procedure without requiring the operator to properly isolate the base of usable quality water. He also cited their refusal to discuss staff issues with Teague and their limitations on his access to information from Austin. (RX-22, pp. 9-12).

Operators continued to file complaints against Complainant regarding his inability or unwillingness to provide practical solutions to drilling problems. In December 2012, Monty L. McCarver, operations manager for Nabors Completion & Production Services Company, complained to Teague that every time they called to get a variance in plugging operations, Complainant came up with costly and impractical methods. In turn, Teague assigned other personnel, including himself and Fisher, to address these problems while removing Complainant. In response, Complainant filed a formal complaint with Gil Bujano, contending his removal was in retaliation for a previous complaint he filed against Teague and Fisher in September 2012 and as a means to demean him and to impair his ability to have operators comply with the rules. (CX-32-34).

On April 17, 2013, Fernandez informed Teague that Complainant had filed a complaint alleging that District 3 management had created a hostile work environment due to their lack of understanding of the rules, regulations, and engineering principles associated with the responsibilities of a district office. In support of his complaint, Complainant cited instances wherein Teague approved a completion packet involving the use of partial plugs in inappropriate situations and wherein Fisher, in consultation with Anton Motal, improperly approved the remedial squeezing of a surface casing of a new well followed by an improper remedial cementing of another surface casing. Wright also asserted Teague had improperly limited his access to information and made other assertions which Teague denied. (CX-37-47). Regarding Fisher, Wright alleged he came to District 3 without a proper understanding or regard for the rules and improperly turned over responsibilities for reviewing completion reports to clericals, which Fisher also denied. (CX-56-59).

On May 17, 2013, Fernandez and Bill Miertschin from Respondent's Austin office travelled to the Houston District Office to conduct a Form P-112 "Performance Counseling" session of Wright. Teague and Fisher attended this counselling session. A summary of the counseling in RX-20 stated the following:

> This counseling session is to remind you of past conversations we have had with you regarding your performance, along with suggested improvement that has been addressed in your earlier EPE's. All issues that you may have regarding your work assignments should first be brought to the attention of your District Director before you contact the Deputy Director of Field Operations or the Director of the Oil and Gas Division. Exceptions may be limited to those issues outlined in the Equal Employment Opportunity section of the Employee Handbook. The use of the "chain of command" has been brought to your attention in the past and you are reminded that you are expected to follow these instructions.
>
> Unsolicited complaints continue to be received regarding your relationship with operators. This continues to occur despite our efforts to help you with your work relationships. Operators report that you are difficult to work with, you exhibit rude behavior, and you are condescending in your dealings with them, and that you

> have resorted to "name calling." Operators complain that you are unreasonable and do not attempt to offer solutions to bring them into compliance with Commission rules. The Commission expects you to behave in a professional manner with Commission staff and industry representatives.
>
> Your work assignment does not include any management duties. Yet, you continue to insert yourself into managing co-workers when that is clearly not your assignment. This behavior disrupts the workplace. You are not to intervene in the management of the district office and its staff. If you believe there is a need for your involvement, you must contact the District Director or Assistant District Director.
>
> A great deal of time has been consumed by management at the district office and in Austin in dealing with your issues. Improvement in your behavior is required. Failure to do so may result in further disciplinary action up to and including termination of your employment with this agency.

(RX-20).

In response, Wright appealed by asking for specific incidents supporting the above evaluation, claiming he had not been provided with such information in the past. (RX-20, p. 2). On May 23, 2013, Gil Bujano replied, indicating Wright's response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination. (RX-24).

On May 31, 2013, Kathryn Jaroszewicz (Jaro), a consultant with Miller Consulting Inc., submitted an application with Complainant for an alternate surface casing program and utilized a new form approved by Teague in January 2013 (which did not require the number of centralizers to be listed for the BUQW on the second string when a short casing is run and did not address the issue of whether the bottom 20% of the surface casing was going to be cemented with critical cement). Complainant told the consultant that she needed to use an older form and list the correct number of centralizers.[5] Jaro stated she would supply the requested information but was confused as to the correct form, new or old, to be used. (STF-6-8). When Teague learned of Wright's treatment of Jaro, he informed her she did not have to fill out another form. Rather, she could e-mail or phone Wright and give him the number of centralizers needed to fulfill the requirements of Rule 13 whereupon Complainant could alter the form she submitted, initial the alteration, and approve it. (RX-25).

[5] In January of 2013, Teague approved use of an Alternate Surface Casing Program form (January ASCF) in District 3. In a February 5, 2013 e-mail, Teague requested comments from District 3 technical staff on changing the January ASCF form to a form he had used in other districts (February ASCF). On February 6, 2013, Complainant advised Teague he would have to get additional information from operators to review their alternate surface requests if Teague adopted the February ASCF form, which he did. (STF3-5).

On June 4, 2013, Teague e-mailed Wright and told him the new form contained enough information to approve Jaro's request regarding the issue of the sufficiency of cement. He informed Wright that the new form addressed by the question of whether the operator planned on circulating cement to the surface on all casing strings protecting usable-quality water. Teague then asked Wright if he had approved her request as Teague had informed her. (RX-23).

The following day, Wright e-mailed Teague, telling him that the new form did not address all issues raised by SWR 13(b)(2)(F), unless Teague was re-interpreting SWR 13(b)(2)(F) to eliminate the requirement that centralizers be run from BUQW to the surface. He also stated the new form did not ask for the centralizers that had been required from the BUQW on the second string when a short surface casing was run. Further, SWR 13 requires the bottom 20% of the surface casing be cemented with critical cement which the new form did not address or require the operator to provide the data to verify. Wright then stated that the RCC's failure to review the data that operators had been submitting for the past five years amounted to "gross negligence" since operators made errors in the past that did not comply with the regulations intended to protect fresh water.

Wright then stated:

> If you are informing me that it isn't my job to conduct the RCC's due diligence review of these applications and/or that you're revising these criteria, I will proceed accordingly. Your e-mail below appears to indicate your position on cement; however I will hold the application for your interpretation of the centralizers issue or the operator's response.

(RX-23, p.1).

On June 6, 2013, Teague, in an e-mail to Bogan and Fernandez, recommended further disciplinary action of Wright's due to his refusal to comply with the directives of his counseling session. (RX-25). On June 10, 2013, Jaro submitted the correct number of centralizers for the alternate surface casing request for the well named "Ol Army Unit #1," which was the well Jaro had originally requested an alternate surface casing form. On June 10, 2013, Wright approved Jaro's request. (STF-8-14).

On June 20, 2013, Respondent terminated Wright due to his refusal to comply with Respondent's directives to work with management and staff and to assist operators in resolving compliance problems. This included the most recent issue of assisting an operator on how to resolve a casing exception request. Instead of resolving this issue as instructed, Wright engaged Teague in an e-mail debate and turned a simple resolution into a complex process by accusing Teague of incorrectly reinterpreting rules, interfering with his ability to perform his duties, and characterizing Teague's actions as "gross negligence." In so acting, Wright ignored prior warnings that such action could lead to his termination.

C. Complainant's Testimony

Wright testified that he used the Alternate Surface Casing Program Form (ASCF) approved in January 2013 rather than the ASCF approved by Teague in February 2013, because the January form provided more information. Further, he interpreted Fernandez's comments that his use of the January 2013 form was not required by his job to be the primary reason for his termination even though he allegedly insisted on using the January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act. (Tr. 518-519).

Regarding his communication on May 31, 2013 with Jaro, Wright advised her that the use of seven centralizers was insufficient and that she should fill out the January ASCF form with the correct number of centralizers. (CX-70). Previously, she had used the February ASCF form. Wright testified that the January ASCF form allowed the reviewer to evaluate more detailed information regarding cement volume, the placement of centralizers on the surface, the second string of casing, and the strength of the casing. (Tr. 522).

Twenty minutes later, Jaro responded to Wright's e-mail saying she would update the information concerning the centralizers when she received it from the operator. Further, she requested information as to which ASCF form to use. About 5 minutes later, Marie Blanco informed Peter Fisher of the correspondence and within seven minutes, Teague sent an e-mail to Jaro telling her it is not necessary to submit another form but simply to advise Wright of the number of centralizers to fulfill the requirement of Rule 13. On June 3, 2013, Wright e-mailed Teague, with copies to Fernandez and Fisher, stating it appeared that Teague was telling him that he could no longer request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules. (CX-168-170; Tr. 524-526). On June 3 and June 7, 2013, Jaro e-mailed the operator indicating "They (Complainant) would not indicate the number of centralizers needed to proceed with the application" to which the operator indicated on June 7, 2013 that he would run at least 20. On June 10, 2013, Jaro relayed with this information to Wright, and he approved the application. (CX-186-192, Tr. 531-532).

Wright testified that his use of the January form, which requested additional information, constituted protected activity. Further, Wright was told by Teague that the February form contained sufficient information to approve operators' request. However, Complainant disagreed with Teague, because the February form did not ask for the number of centralizers from the base of usable quality water in the second string. Teague accused Wright of doing a detailed analysis of alternate surface request, which was not his job, and told Complainant he could calculate the number of required centralizers from the February form. (Tr. 544-549). Wright complained of being subject to a hostile work atmosphere in February 2013 when he was assigned to bring wells into compliance. According to Wright, Teague stated operators accused Wright of being unreasonable and not offering solutions. As a result, Teague ordered him to approve completion reports and refer them to Austin for resolution. (Tr. 591-596).

On cross examination, Wright denied being told by his supervisors that he needed to improve his relationships with co-workers and industry operators by not only pointing out violations but suggesting alternative ways to achieve compliances. (RX- 9-11, 16; Tr. 634-641). Yet, in the counselling session, he admitted being reminded of his duty to improve relations or be terminated for failing to do so. (Tr. 648-652).

Regarding the alternate surface casing request of Jaro for "Ol Army Unit #1" (CX-146, RX-25) which she submitted on May 31, 2013 using the February form, Wright knew the number of centralizers (7) was more than enough for the surface casing set at 825 feet but not enough for the base of usable quality water set at 2,025 feet which had to be protected. Rather than get on the phone and ask additional questions to determine the proper number and placement of the centralizers, Wright sent Jaro the January form to complete, although in doing so he was going beyond what his duties required. (Tr. 679-681).

D. Testimony of Raymond Fernandez, Charles Teague, Peter Fisher, & Mark Bogan

Fernandez testified that he and Gil Bujano, Division Director, recommended to Milton Rister, Executive Director, that Wright be terminated for unprofessional and unacceptable behavior with industry operators and staff, including incidents reported directly to them by operators and outside experts who claimed that Wright had been rude to them, called them "stupid" and "liars," and refused to work with them in resolving problems. (Tr. 106-108, 126-131). As a result of Wright's misconduct, Respondent fell far behind in its work due to an undersized staff and a booming industry as well as due to the delays caused by dealing with the complaints generated by Wright. (Tr. 134-135).

Regarding the May 31, 2013 alternate surface casing request of Jaro, Fernandez found fault with the manner in which Wright handled the request and how Wright dealt with the deficiencies in this request. Instead of calling the operator and resolving the deficiencies over the phone, Wright chose not to do as Teague had instructed him to do in similar situations and complete the process in a few simple steps. Rather, Wright told Jaro to fill out the older and more detailed form as opposed to the less detail form approved in February. Teague told Jaro it was not necessary to fill out the older and more detailed January form but simply to inform Wright of the number of centralizers to be used. Then, Wright could initial the changes on the February form and submit it for approval (assuming it correctly identified the number of centralizers). It was not necessary to provide the additional information relating to cement volume as long as the operator indicated that it was going to circulate cement to the surface. (Tr. 164-166). In essence, Fernandez stated it was not Wright's duty to redesign the operator's casing program but rather to determine if the operator was going to circulate cement back to the surface and the number of centralizers to be used. (Tr. 181-187).

In addition, Fernandez also testified that Wright was terminated not for insisting on completion of the older January alternative casing form but for the unprofessional manner in which he handled the May 31, 2013 alternate surface casing request of Jaro which could have been determined by use of the February alternative surface form, initializing the correct number on the February form she had already used, and approving it as corrected. Instead, he instructed Jaro to fill out the January form, which caused unnecessary confusion and delay. (Tr. 216-221, 225-227, 231-238, 287, 288).[6] In so doing, Complainant admittedly went outside his instructions and demands of his office. (Tr. 271-281).[7]

[6]A copy of the new and more streamlined application for alternate surface casing program form as authorized by District Director Teague and used by Ms. Jaroszewicz appears at RX-21. A copy of the older form that Complainant insisted that Ms. Jaroszewicz fill out in addition to the newer form appears as RX-23, pp. 4-5. Respondent admitted the older form required more detailed information.

In deciding to terminate Complainant, Fernandez took into consideration Teague's June 6, 2013 e-mail in which Teague stated that Complainant refused to correct the errors on the February alternative casing form, initial the changes, and sign it. Complainant failed to inform Jaro of what was needed for approval. Wright's behavior was not the correct way to handle the problem. Instead, Complainant characterized Teague's efforts as incompetent and a disregard for rules by creating a hostile work environment. In his e-mail, Teague stated that Complainant's conduct was not professional and a manifestation of being difficult to work with, about which he had been warned during his counselling session on May 17, 2012. (CX-67; RX-20, 26; Tr. 289).[8]

Teague, who retired from Respondent on December 31, 2014, and was District Director for District 3 from May 1, 2012 to December 31, 2014, testified that he recommended additional disciplinary action (not necessarily termination) due to Complainant's refusal to follow the directives of his counselling session of May 21, 2013. Specifically, Complainant was directed to behave in a professional manner with Commission staff and industry representatives and to cease being arrogant, insolent, and insulting to Commission managers and operators. He was also directed with avoiding unnecessary obstacles to getting paper work done or approval, holding up approval of requests form minor issues, issuing a vague request for information, telling individuals to refile applications when the simple solution would have been to get on phone, and advising operators of deficiencies. (Tr. 338-339).[9] Teague cited instances of Wright's

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[7] Fernandez testified about other instances of unprofessional conduct by Wright in April 2012 when Fernandez received unsolicited complainants from regulatory analysts alleging Wright was rude, called one stupid, and was impossible to work with. (Tr. 106, 131, 248). Fernandez also received other complaints about Wright being unable to work with by a former employee who had retired and was working for an outside contractor and from another contractor accusing Wright of calling him a liar. (Tr. 107-108, 247, 313-314). Fernandez cited another instance of Complainant not getting along with fellow employee, Terry Papak, when he complained about an instance when Papak was appointed to supervise the Houston office for several days. (Tr. 311-313). Former employee Doug Storey complained to Fernandez about Complainant unduly delaying the processing of his applications after leaving Respondent and going to work for an outside contractor. (Tr. 315-316).

[8] RX-26 sets forth Fernandez's reasons for terminating Complainant, which amounted to Complainant's unacceptable behavior with Commission staff and industry personnel who had previously complained about Complainant's refusal to work with them in resolving regulatory issues as exemplified by his treatment of Ms. Jaroszewicz's May 31, 2013 surface application request. Instead of following Fernandez's admonition to improve his working relationship with staff and outside contractors as directed in the May 21, 2013, counselling session, Wright ignored this advice knowing such conduct could lead to his termination. Fernandez summarized his position in a subsequent affidavit to DOL. (RX-33). Complainant also ignored the May 31, 2013 instruction of Gil Bujano, Director of Respondent's, Oil and Gas Division to improve his conduct or be terminated. (RX-24).

[9] After the counselling session of May 23, 2013, Complainant appealed what he had been told to Gil Bujano, Director of the Oil and Gas Division, who concluded Complainant was continuing to reject the guidance of his supervisors. In turn, he advised Complainant that continued rejection could result in his termination. (RX-24). Complainant's subsequent treatment of Ms. Jaroszewicz on May 31, 2013 led to his termination on June 21, 2013. (RX-26-27).

misconduct wherein Wright made compliance unnecessarily difficult and unpleasant, especially the May 31, 2013 request by Jaro. (RX-34; Tr. 347-367, 369-378). The only thing missing from Jaro's application was the correct number of centralizers, which if not performed as answered on the new form, her application would not be approved and no drilling commenced.(Tr. 180-189, 218, 219).

It was not Wright's job to redesign casing problems but to work with operators using the newer application forms. If operators did not properly case and cement the well, then Respondent would not approve the completion report and no production would be allowed. (Tr. 225-226, 230-233). Teague testified that Wright, rather than accepting his directive, accused him and Respondent of gross negligence and suggested it was not his job to diligently review alternative surface casing requests. (RX-25, p. 2; Tr. 445- 450). Teague then cited Complainant's inappropriate treatment of former employee Doug Storey by demanding an apology for not allegedly calculating the correct number of centralizers, his refusal to work with Michael Simms on a mud pit issue in March 2013, and his humiliation of operator Hendershott, who asked for his help in resolving compliance issues only to be met with threats of finding additional violations in April 2013. (RX-12, 14; Tr. 469-477).[10]

Fisher, currently District Director for District 3 since August 17, 2015 and formerly Assistant Director for District 3, confirmed the occurrence of the Terry Papek and Hendershott incidents. (RX-11; Tr. 698-700). Fisher also testified that Complainant mishandled Jaro's May 31, 2013 alternate surface request and could have calculated the number of centralizers to be run, informed her of that number, and then approve that request as modified without having her complete the older form. Instead, Complainant turned a simple request into a more complex proceeding in disregard of Respondent's policy of streamlining the approval process while protecting ground water. (Tr. 704-709).

Bogan, the Human Resources Director for Respondent, testified that in response to internal complaints Wright filed against Teague and Fisher for creating a hostile work environment, he learned that Wright had problems with other co-workers and operators such that operators went out of their way to avoid contact with Wright because they found him difficult to work with. (RX-7-8; Tr. 760-762). Bogan testified Complainant was terminated for not following Respondent's procedures. (Tr. 752-753). Further, when terminated, Wright did not claim he was being retaliated against for engaging in protected activity in violation of the Federal Water Pollution Act or the Safe Drinking Water Act. More importantly, Respondent did not terminate Complainant for engaging in such activities. (Tr. 754-755).

V. THE PARTIES' POSITIONS

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[10] Storey cited other examples of Complainant's lack of professionalism. On June 15, 2010, Complainant arrogantly accused Storey of not correctly calculating the correct number of centralizers and demanded a letter apologizing and stated it would never happen again. (RX-17). On April 16, 2013, Storey informed Fernandez of Complainant again unreasonably demanding a letter of apology from Storey for allegedly miscalculating the number of centralizers and holding up completion reports for punitive reasons. (RX-19).

A. Complainant

On remand, Complainant questions which exhibits and transcripts can be referenced as evidence. In regards to whether he engaged in protected activity under the Acts, Complainant offered several instances where he sought to protect usable quality water, such as ensuring compliance with pollution prevention, reviewing request for exceptions to SWR 13, and providing Jaro with a January ASCF form requiring the submission of all requested information. In particular, Complainant asserts the information requested on the January ASCF form would enable him to make a more accurate evaluation of the cement design for wells applying for alternate surface casing exceptions and to identify design oversights that could not be identified with the information requested on the February ASCF form. Further, Complainant argues the January ASCF form allows for a more accurate evaluation of the proposed cementing program and that the Acts prohibit knowingly rendering inaccurate monitoring devices or methods. (Comp. Br., pp. 1, 7-11).

Complainant also contends Teague's switch to the February ASCF form was meant to eliminate his collection of the more detailed information requested in the January form and to avoid Complainant creating any problems in approval. Moreover, Complainant's termination letter specifically addressed his use of the January ASCF form to justify his termination of employment with Respondent, despite the testimony of both Teague and Fernandez wherein they confirm the January form provides a more accurate evaluation of an operator's proposed casing design modification. (Comp. Br., pp. 12-14).

In addition, Complainant sent an email to Teague on June 5, 2013 wherein he pointed out technical inaccuracies that the February ASCF form introduced into the SWR 13 approval process. Complainant's alleges Teague's testimony in regards to this email makes it clear that he was aware of his complaints about the environmental issues of protecting fresh water. Instead of responding to Complainant's concerns, Teague submitted this email to Fernandez and recommended further disciplinary action against Complainant. (Comp. Br., pp. 14-20).

B. Respondent

On the other hand, Respondent argues Complainant failed to present evidence that he reasonably believed that the practices complained of could result in violations of the SDWA or FWPCA. Specifically, Respondent contends Complainant's hostile work environments complaint does not amount to protected activity since it merely amounts to a list of criticisms of his supervisors' performance and perceived professional slights that fail to demonstrate a reasonable belief of possible water contamination. In addition, Complainant failed to show that his decision to use the January ASCF form amounts to protected activity. Further, Respondent argues Complainant's June 2013 email to Teague does not constitute protected activity as it fails to demonstrate a reasonable belief that Respondent was in violation of the Acts. (Resp. Br., pp. 11-20).

Even if Complainant engaged in protected activity, Respondent asserts Complainant cannot establish a causal connection between his alleged protected activity and any adverse employment action. Rather, Complainant was terminated due to his uncooperative conduct in

dealing with operators and colleagues. Further, Respondent argues Complainant's termination would have occurred in the absence of any protected activity. (Resp. Br., pp. 20-25).

VI. DISCUSSION

A. *Prima Facie* Elements of Safe Drink Water Act (SDWA) and Federal Water Pollution Control Act (FWPCA) Violations

The purpose of the SDWA "is to assure that water supply systems serving the public meet minimum national standards for protection of public health." H.R. REP. 93-1185, 1974 U.S.C.C.A.N. 6454, 1974 WL 11641, 6454 P.L. 93-523; *see also Nat. Res. Def. Council, Inc. v. E.P.A.*, 812 F.2d 721, 723 (D.C. Cir. 1987). In addition to "establishing overall minimum drinking water protection standards for the nation," the statute provides "for delegation of specific regulation and enforcement to states," including state primary enforcement of underground injection processes to protect sources of drinking water. *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1232 (10th Cir. 2000), as amended on denial of reh'g and reh'g en banc (Mar. 30, 2000) (citing 42 U.S.C. § 300h). The Congressional declaration of goals and policy for the FWPCA provides that "[t]he objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251.

Both the SDWA and the FWPCA contain anti-retaliation provisions prohibiting employers from discriminating against employees who have participated in activities protected by the statutes. Specifically, the SDWA prohibits employers from discriminating against an employee who "assisted or participated . . . in any other action to carry out the purposes of this subchapter," and the FWPCA prohibits employers from discriminating against an employee who "filed, instituted, or caused to be filed or instituted any proceeding under this chapter or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter." 42 U.S.C. 300j-9(i); 33 U.S.C. § 1367. Under the environmental whistleblower statutes, for a complainant's acts to be protected, the complainant must show that he reasonably believed that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant act(s). *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001 (ARB Dec. 28, 2012).

To prevail on a whistleblower complaint, a complainant must establish by a preponderance of the evidence "that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). If a complainant makes this showing, "relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id*.

B. Whether Complainant Engaged in Protected Activity Under the Acts

Under the SDWA and FWPCA, an employee engages in protected activity if he or she:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in §24.100(a) or a proceeding for the administrative or enforcement of any requirement of any requirement impose under such statute;

2. testified or is about to testify in any such proceeding; or

3. assisted, 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 statute.

29 C.F.R. § 24.102(b).

Protected activities include external and internal complaints, written or oral, and extends to 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 the statute. *Melendez v. Exxon Chemical Americas*, ARB No. 96-051, ALJ 1993-ERA-6, slip op. at 17 (ARB July 14, 2000). Whistleblower protection requires an employee's complaints be grounded in conditions constituting violations of the environmental acts. *Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No. 2007-SDW-1 at 5 (ARB Jan 5, 2001). The reasonableness of a whistleblower's belief regarding statutory violations by an employer is determined on the basis of the knowledge available to a reasonable person in the circumstances within the employees training and experience. *Melendez,* ARB No. 96-051, ALJ No. 1993-ERA-006, at 27.

While raising internal complaints to an employer can be considered to be protected activity, "[p]rotected activity cannot be based on assumptions and speculation." *Kuehu Donna Sweetie v. United Airlines*, ALJ No. 2010-CAA-00007, at 13 (May 25, 2012) (finding that Complainant did not engage in protected activity under the FWPCA where Complainant made complaints regarding alleged environmental violations pertaining to water stream, but was unable to explain the basis of her belief that grease from a grease trap on employer's premises would enter the water stream in question, rendering her complaint speculative."). "An employee's protected activity must be grounded in conditions constituting reasonably perceived violations of the environmental acts." *Id*. at 13. "In other words, the complainant must demonstrate that [his] complaints were based on a reasonable belief that the respondent violated the applicable environmental laws." *Id*. "Reasonable belief must be scrutinized under both a subjective and objective standard; namely [the complainant] must have actually believed that the employer was in violation of an environmental statute and that belief must be reasonable for an individual in the [complainant's] circumstances having his training and experience." *Id*.

Employee complaints are not protected simply because the employee "subjectively thinks the complained of employer conduct might affect the environment." *Kesterson v. Y-12 Nuclear Weapons Plant,* ARB Case No. 96-173, ALJ Case No. 95-CAA-0012 at 3 (April 8, 1997). "Internal complaints which could only threaten the environment if many speculative events all occurred" are not protected. *Kesteron,* ARB Case No. 96-173, at 4. Indeed, "a complaint that expresses only a vague notion that the employer's action might negatively affect the environment

is not protected." *Saporito v. Central Locating Serv., Ltd.*, ARB No. 05-004, ALJ No. 2001-CAA-00013 at 6 (Feb. 28, 2006).

In remanding this matter to the undersigned, the Board found the appropriate standard in which to determine whether Complainant engaged in protected activity is whether he reasonably believed the actions he reported or complained about constituted environment hazards irrespective of whether Respondent's actions violated a particular environmental statute. *Wright v. Railroad Comm'n.*, ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 6-12.

In discussing the reasonable or objective belief standard, the Board found the following are to be considered protected activity under the Acts if Complainant reasonably believed that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA:

1. Requesting consultant Kathryn Jaroszewicz (Jaro) complete and submit additional information requested on an older January 2013 Alternative Surface Casing Form as opposed to the newer form which Teague had used without any problem and had implemented in February 2013.

2. E-mailing Teague on June 5, 2013 protesting that Respondent was restricting him from doing his job to protect drinking water by denying his request to use the old form; and

3. Alleging on April 4, 2013 the creation of a hostile work environment by Respondent and ignoring their responsibility to require operator compliance within the rules.

Wright v. Railroad Comm'n., ARB No. 16-068, (ALJ No. 2015-SDW-00001) (ARB Jan. 12, 2018) slip op. at 7-8. The Board made no ruling as to whether Complainant held a reasonable belief for each of these allegations. As such, each allegation will be discussed individually.

1. Complainant's Use of the January 2013 ASCF Form

Complainant's first specific allegation of protected activity acknowledged by the Board is his request that Jaro send him additional information using the January 2013 ASCF form as opposed to the February 2013 ASCF form. Complainant argues he preferred the use of the older January 2013 form as it would apparently unearth any errors and ensure that operators were complying with the rules. I disagree. Not only do I find Complainant's insistence in using the older form did not carry out the purpose of either Act, I also find Complainant did not have a reasonable belief that he was raising environment or public health and safety concerns when he used the January 2013 ASCF form.

At the 2015 hearing, Respondent admitted that the older January 2013 form used by Wright required more information than the newer February 2013 form. However, the February 2013 form was more streamlined in processing the number of centralizers necessary to guarantee

adequate cement circulation. Moreover, the newer form allowed for Complainant to more quickly approve and correct mistakes by noting the errors, if any, and approve it subject to modification. (Tr. 325, 350-351, 597-98; RX-25).

I find no basis to believe Complainant was motivated by a desire to carry out the purposes of either Act. Rather, I find he relies on both Acts in an effort to escape the consequences of his misconduct in not following Teague's directions to reach out and work with operators, inform them what was missing from an application, and note it on the application. In fact, Teague informed Complainant that the newer form contained sufficient information to approve Jaro's request for circulating cement to the surface.

While Complainant contends Respondent took issue with the technical merits of the January 2013 ASCF form as well as the fact that he asked Jaro for more information it deemed unnecessary, I find Complainant did not send the older form to Jaro to assure the water systems met the minimum national standards or maintain the chemical, physical, or biological integrity of the Nation's water. Rather, his use of this form reflects his refusal to work cooperatively with operators and commission employees. Instead of having Jaro submit additional information, Complainant could have simply told Jaro the correct number of centralizers that could be determined from the application itself. By requesting Jaro to complete another application, Wright essentially created conflicting instructions and confusion that could have easily been avoided by telling Jaro the correct number of centralizers to use and then noting it on the newer application. (Tr. 238-239, 348-349). By not telling Jaro the correct number of centralizers, Wright unnecessarily delayed the approval of Jaro's application.

Additionally, I find he failed to offer any support that he reasonably believed his use of the January 2013 form raised environmental or public health and safety concerns and that the February 2013 ASCF form was inadequate or failed to carry out the purposes of the Acts. Rather, the record evidence reflects that the newer form had been widely used in Teague's former district without any apparent error. More important, the February 2013 form contains language indicating an operator's plan to circulate cement to the surface on all casings strings protecting usable quality water. (CX-146). Complainant also acknowledged that the use of the February form was not improper and admitted he ultimately used this form to approve Jaro's May 2013 application. (Tr. 214, 283-284). In addition, Fernandez testified that an operator's application would never be approved if the operator did not use the proper number of centralizers or the proper amount and quality of cement. (Tr. 166-167).

In reviewing Complainant's allegations, Complainant argued he wanted additional information from Jaro in order determine whether the operators planned to use sufficient centralizers. However, Complainant failed to address how he reasonably believed this information would protect drinking water and reveal any environmental or public health and safety concerns. Contrary to his assertions, Complainant held a speculative and unreasonable belief that his use of the older form was proper. In addition, Complainant overstated the necessity of additional information on the old form. Instead, Complainant caused unnecessary delay and misstated his role in the compliance. Fernandez testified Complainant's role in approving alternate surface casing requests was to ensure that operators intended to comply with the applicable rules at the outset. (Tr. 219). Fernandez further described the process and testified

that operators must file a completion report after the well is completed such that Respondent can determine if the well is properly cased and cemented. (Tr. 226). It is upon receipt of this completion report that Respondent determines if the well was properly built. (Tr. 226). This form must be approved in order for an operator to be allowed to produce from a well. (Tr. 226, 271-272).

Based on the above, it is evident Complainant's use of the January ASCF form is based on an unreasonable objective belief that he was carrying out the purposes of either Act. Instead, his use of the older form stems from his misunderstanding of his role in the process for ensuring compliance with Respondent's rules and regulations. Had Complainant possessed a sufficient understanding of the compliance process and his role at the outset of the process, he would have known the additional information requested on the January 2013 ASCF form was unnecessary and a cause for delay. Therefore, I find and conclude Complainant did not engage in protected activity under either Act when he requested that Jaro send him information using the January form on May 31, 2013.

2. Complainant's June 2013 Email to Teague

Next, the Board held Complainant's June 2013 email to Teague would constitute protected activity under the Acts if he reasonably believed he was acting in furtherance of the SDWA and FWPCA and if he reasonably believed he was raising environmental or public health and safety concerns. *Wright*, ARB No. 16-068, slip op. at 10-11 (emphasis added).

After Complainant sent Jaro the older form requesting she list the correct number of centralizers, Teague informed Jaro that this was unnecessary. (Tr. 348-349; RX-25, p. 3). In an email to Jaro in which Complainant was copied, Teague asked Jaro to email or phone Complainant with the correct number of centralizers needed to fulfill the requirements of SWR 13. (RX-25, p.3). Teague also emailed Complainant and informed him that the new February 2013 ASCF form contained enough information to approve Jaro's request about circulating cement to the surface. (RX-23).

In response, Complainant told Teague that the new form did not provide enough information, because operators make oversights in alternate surface casing designs that do not comply with the regulations intended to protect fresh water. Complainant further elaborated that it was his opinion "that [Respondent] not taking the five minutes to review the data that the operators have been submitting to this District for years and should have readily available, rises to the level of gross negligence." Complainant concluded that if he was being informed that it was not his job to conduct Respondent's due diligence review of applications or that Teague was revising this criteria, then he would proceed accordingly. (RX-23, p. 1; RX-25, p. 2).

While Complainant argues his email to Teague protesting that Respondent was restricting form doing his job to protect drinking water is protected under the Acts, I disagree. While the Board acknowledged Complainant's protests were protected by the Acts if he reasonably believed he was acting in furtherance of the Acts and raising environmental and public health and safety concerns, I find Complainant did not hold such a reasonable belief when he emailed Teague on June 5, 2013. Rather, I find his protests were the result of his dissatisfaction with

Teague's instructions to follow management directives and his inability to work with his colleagues that he now attempts to disguise as concerns for the protection of drinking water. Indeed, this email is a reflection of Complainant's habit of disrupting the compliance process and causing unnecessary delay due to his inability to work professionally with colleagues, contractors, and operators.

Similar to Complainant's use of the older form, his email to Teague does not carry out the purpose of either Act. In reviewing Complainant's email sent to Teague on June 5, 2013, it appears Complainant alleges, without any support, that the older form would unearth any errors operator had previously made. Complainant also alleges he is being restricted from doing his job. However, Teague was attempting to help Complainant from making compliance unnecessarily difficult and from avoiding unnecessary obstacles in approving requests. (Tr. 180-189, 218-219, 338-399, 347-378). However, Complainant remained adamant in his preference to process an alternate surface casing request which caused confusion and delay.

Therefore, I find Complainant did not have a reasonable belief that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns in his June 2013 email to Teague. Rather, it appears Complainant sent this email to Teague out of anger and frustration. While Complainant deceptively alleges Teague was restricting him from doing his job, Teague testified he was attempting to help Complainant from making the compliance process difficult and redundant. Complainant now attempts to disguise his email as protected activity, and I find his argument to be without merit. Accordingly, I find and conclude Complainant did not engage in protected activity under either Act when he emailed Teague on June 5, 2013.

3. Complainant's Allegations of a Hostile Work Environment

Finally, Complainant alleged numerous instance of protected activity within a hostile work environment complaint he had submitted internally on April 4, 2013 about protecting drinking water. (CX-56-60; RX-23, pp. 1-3). As stated by the Board, these allegations include, but are not limited to, the following: reports that Respondent's District Director and Assistant Director were willing to ignore their responsibility to require operators to comply with the rules; they did not require operators to bring their wells into compliance on several occasions; and they demonstrated a lack of concern for protected fresh water when they gave an approval to an operator on September 3, 2012. For example, he noted that Fisher "approved the remedial squeezing of the surface casing of a new well in a fashion that would not properly isolate the fresh water reservoirs"; that Teague's approvals to an operator "demonstrated a misunderstanding of well configurations and a lack of concern for protecting fresh water"; and that Teague "was willing to approve completion reports without them being in compliance the rules." (CX-56-60).

In reviewing his allegations of a hostile work environment, I find Complainant did not have a reasonable belief he was raising environmental or public health and safety concerns when he submitted this complaint. Rather, I agree with Respondent that his complaint merely amounts to a rejection of supervisory directives and perceived, but unreasonable, professional slights. Indeed, none of these allegations demonstrate Complainant reasonably believed he was raising

concerns of possible water contamination. On the contrary, Complainant accuses his supervisors of having a "rudimentary understanding of the rules" and criticizes Fisher for two events which occurred over a year before he submitted his hostile work environment complaint in April 2013. CX-56.

Several of Complainant's allegations do not concern protecting drinking water, but involve critiques of decisions made by Fisher. In particular, Complainant questions approvals made by Fisher and second-guesses Fisher's decisions without offering any detail that he reasonably believed he was reporting violations of the SDWA or FWPCA. These critiques are wholly subjective, lack any objective belief that Respondent's conduct was in violation of either Act, and fail to explain how these management deficiencies pose a threat to the contamination of drinking water. Further, Complainant's critiques of Teague occurred more than seven months before his submission of his hostile work environment complaint. CX-57. Similar to his criticism of Fisher, Complainant's criticism of Teague's actions amount to subjective criticisms that fail to show Complainant reasonably believed he was reporting violations of either Act or was concerned about protecting drinking water. The remainder of Complainant's hostile work environment allegations involve events occurring from March 2012 through December 2012, with only one event addressing water. Specifically, Complainant alleges a plugging procedure drafted by a co-worker did not "properly isolate the base of usable quality water." CX-58. However, Complainant offers no further explanation as to his reasonable belief how this amounted to a violation of either Act.

In reaching this determination, I also note Complainant's hostile work environment allegations are based on assumptions and speculations. *See Kuehu Donna Sweetie*, ALJ No. 2010-CAA-00007, at 13. More important, these complaints cannot be considered protected activity as they are based on Complainant's subjective belief that the complained of conduct might affect the environment. *See Kesterson*, ARB Case No. 96-173, ALJ Case No. 95-CAA-0012 at 3. Accordingly, I find and conclude the allegations set forth in Complainant's hostile work environment complaint fail to show Complainant had a reasonable belief he was reporting perceived violations of the SDWA or FWPCA. Therefore, it is insufficient to show Complainant engaged in protected activity under both Acts.

4. Conclusion on Protected Activity

While I note the broad language of the SDWA and FWPCA, I nevertheless find Complainant's actions fall outside these Acts based on his lack of reasonable belief that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns when he requested Jaro submit information using an older January 2013 ASCF form. In like manner, I also find Complainant failed to demonstrate that he had a reasonable belief that that he was acting in furtherance of the SDWA and FWPCA or that he was raising environmental or public health and safety concerns in his June 2013 email to Teague or in his hostile work environment complaint. While Complainant appears to retroactively argue he held a reasonable belief, I find otherwise. Accordingly, I conclude Complainant has failed to demonstrate, by a preponderance of the evidence, that he engaged, or reasonably believed he engaged, in protected activity under the SDWA or the FWPCA.

C. Remaining Elements

Assuming *arguendo* that Complainant engaged in protected activity, I will analyze and discuss the remaining *prima facie* elements stated above. It is undisputed that Respondent was aware of Complainant's conduct. In addition, Respondent admits, and the Board affirmed, that Complainant suffered adverse action when he was terminated. Thus, the only remaining questions to be resolved are whether Complainant proved by a preponderance of evidence that his alleged protected activity was a motivating factor in his discharge and whether Respondent is able to establish that it would have taken the same adverse action in the absence of any alleged protected activity by a preponderance of the evidence.

1. Motivating Factor

To establish discrimination under the FWPCA and SDWA, the complainant must prove by a preponderance of the evidence that the protected activity was a "motivating factor" in the employer's decision to take adverse action. *Dixon v. U.S. Dep't of Interior, Bureau of Land Mgmt.*, ARB Nos. 06-147, -160; ALJ No. 2005-SDW-008, slip op. at 8 (ARB Aug. 28, 2008); *Seetharaman v. Stone & Webster, Inc.*, ARB No. 06-024; ALJ No. 2003-CAA-004, slip op. at 5 (ARB Aug. 31, 2007); *Morriss v. LG&E Power Servs., LLC*, ARB No. 05-047; ALJ No. 2004-CAA-014, slip op. at 31-32 (ARB Feb. 28, 2007); *accord* 29 C.F.R. § 24.100(a), 24.109(a). 29 C.F.R. § 24.109(b)(2). "A 'motivating factor' is 'conduct [that is] . . . a 'substantial factor' in causing an adverse action." *Onysko v. State of Utah, Dep't Envt'l Quality*, ARB No. 11-023; ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)); *see also Hulen v. Yates*, 322 F.3d 1229, 1237 (10th Cir. 2003). In making this showing, the "Complainants need only establish that th[e] protected activity was a motivating factor, not the motivating factor, in the decision to discharge them." *Abdur-Rahman*, ARB Nos. 08-003, 10-074, slip op. at 10, n.48. While temporal proximity does not necessarily establish retaliatory intent, it is "evidence for the trier of fact to weigh in deciding the ultimate question whether a complainant has proved by a preponderance of the evidence that retaliation was a motivating factor in the adverse action." *Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101; ALJ No. 1996-ERA-034, -036; slip op. at 6 (ARB Mar. 30, 2001).

Assuming Complainant established he engaged in protected activity, then I find that such activity was not a motivating factor in Respondent's decision to terminate his employment. In its decision, the Board stated that if Complainant engaged in protected activity on April 4, May 31, and June 5, 2013, then temporal proximity to the June 20 termination and to the June 6 recommendation of further disciplinary action supports an inference of causation. *Forrest v. Smart Transp. Servs. Inc.*, ARB No. 08-111, ALJ No. 2007-STA-009, slip op. at 5, n.6 (ARB Sept. 21, 2010) (While not necessarily dispositive, "temporal proximity may support an inference of retaliation."). While I agree with the Board that an inference of causation is supported, I find that this inference alone is insufficient to support a finding that Complainant's alleged protected activity was a motivating factor in his termination.

I have reviewed Complainant's entire employment record, including his most recent evaluations. From these evaluations that clearly precede his discharge, I note a documented history of interpersonal conflicts with operators and Respondent's own staff. In particular, Complainant demonstrated an unwillingness to work with operators in identifying alternative ways to become compliant such that operators went out of their way to avoid dealing with him by calling outside Complainant's schedule hours of work. (RX-6, 9, 16; Tr. 105-109, 631, 633-634, 640-641, 691-693, 746-747).

When he became District 3 Director, Teague observed Wright's behavioral problems and found Wright to be arrogant, insulting, and insolent when working with co-workers, supervisors, and operators. (RX-17; Tr. 335, 338-340, 465, 466, 477). Instead of helping operators obtain specific information to process applications, Wright would instead locate a piece of missing or inaccurate information, issue a vague request for more information, and ask operators to refile their applications without providing any guidance. (Tr. 340).

Teague cited a specific example of Complainant's inappropriate conduct wherein Complainant demanded an apology from former employee Doug Storey for his submission of incorrect centralizers. Teague also recalled observing Complainant laughing at operator Paul Hendershott when Hendershott asked for help in resolving well violations. (RX-12, Tr. 476-477). Teague also testified about Complainant's inability to work with Respondent employee Michael Simms on a technical issue. (RX-14, Tr. 469-470).

Along similar lines, Fernandez testified that he continued to receive complaints about Wright in 2013 from Storey and two regulatory analysts who found Wright to be rude and impossible to work with. (Tr. 106, 130-131, 318). One of these analysts, Carla Marn, emailed Fernandez on April 12, 2013, and complained about Wright demanding an old alternate surface casing request to fill out when Teague had already sent her a new form. (RX-18, Tr. 314).

On May 21, 2013, Complainant received a P-112 employee counseling from Fernandez wherein he warned Complainant that further misconduct could result in disciplinary action and even his termination. (RX-20, Tr. 320). Despite this admonition, Wright continued to display unprofessional conduct. On May 31, 2013, Wright received an alternate surface request from Jaro, a consultant to an operator. Wright directed Jaro to fill out the old form and indicate the appropriate number of centralizers although the correct number could be determined from the new application. (RX-25, Tr. 155-156, 347-348, 350-353, 369-372, 383-384, 441-442, 520, 597-598).

The record supports a finding that Complainant was terminated due to his uncooperative conduct in dealing with operators and colleagues. Contrary to Complainant's allegation, Teague did not take action against him because of his use of an old environmental application. Rather, Complainant was disciplined due to his failure to make reasonable efforts to call and inform the consultant of the correct number of centralizers which could be determined from the new application form Complainant ultimately used. Indeed, Fernandez testified Complainant was terminated as a result of his behavioral problem in dealing with other people. In addition, Fernandez testified that Complainant was insubordinate and argumentative. (Tr. 232-233). Further, Fernandez stated he had no issue with the technical aspects of Complainant's work and that his attitude and unprofessional behavior was the problem. (Tr. 104, 327, 338).

The record evidence clearly indicates Complainant made the compliance process more complex than necessary. More important, Teague did not recommend discipline of Complainant because he sought to require more detailed information through the use of the older form. Instead, Teague recommended discipline of Complainant, because he refused to follow instructions and created a state of confusion which was indicative of his refusal to work with operators and to make the application process more difficult than necessary. Unfortunately, Complainant was unable to accept the fact that his job did not involve a review of well designs but was a much simpler process of reviewing alternative surface drilling requests. (Tr. 219).

Consequently, in light of the above, the undersigned concludes that, even if he was able to establish that he engaged in protected activity under the SDWA and FWPCA, Complainant has failed to establish by a preponderance of the evidence that such activity was a motivating factor in his termination.

2. Respondent's Affirmative Defense

A respondent can avoid liability by "demonstrat[ing] by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Id; see also Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013). "[T]he preponderance of the evidence standard requires that the employee's evidence persuades the ALJ that his version of events is more likely true than the employer's version. Evidence meets the 'preponderance of the evidence' standard when it is more likely than not that a certain proposition is true." *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013; ALJ No. 1997-SDW-005, slip op. at 28 (ARB Dec. 30, 2004)(citing *Masek v. The Cadle Co.*, ARB No. 97-069; ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

As previously discussed, the undersigned concluded that Complainant's alleged protected conduct was not a motivating factor in Respondent's decision to terminate Complainant's employment. However, in the alternative, even if Complainant's alleged protected activity was a motivating factor in Respondent's decision to terminate Complainant, the undersigned concludes Respondent is able to establish by a preponderance of the evidence it would have taken the same adverse action in the absence of any alleged protected activity.

Undisputed evidence of record establishes that Respondent had documented a history of Complainant's interpersonal conflicts with other employees as well as operators in the industry. In particular, Complainant's October 29, 2010 performance evaluation indicated Complainant lacked a better understanding that there can be exceptions to many of the rules if the circumstances seem to meet the required objective. In addition, the evaluation also stated that personnel in the office and industry were hesitant to approach Complainant due to his perceived unwillingness to work out an amenable solution at times. (Tr. 633; RX-6). Further, Complainant's October 2011 evaluation also noted Complainant should strive for better relations with all operators and point out alternative ways to come into compliance and to assist operators in keeping wells on production while complying with the rules and regulations. (Tr. 634; RX-9). Moreover, Complainant's November 2012 evaluation also showed Complainant was still being

directed to improve relations with operators and staff. (Tr. 640-641; RX-16). Similarly, a May 2013 performance evaluation indicated Complainant was difficult to work with, had exhibited rude behavior, and had resorted to name-calling. (RX-20). Complainant was warned that a failure to improve his behavior could result in further disciplinary action, including the termination of his employment. (RX-20).

This undisputed testimony is further corroborated by the testimonial evidence in the record. For example, Fernandez described Complainant's relationships with industry representative and operators as unacceptable and recalled multiple incidents where Complainant clashed with operators and behaved in a rude and threatening manner. (Tr. 105-109). In addition, Bogan testified he discovered that operators would call Respondent outside of Complainant's scheduled working hours to avoid having to work with him. (Tr. 746-747). Further, Teague described Complainant as arrogant, insolent, and insulting. (Tr. 338). He also testified that Complainant presented unnecessary obstacles to processing approvals, requests, and paperwork. (Tr. 338-339).

Respondent also successfully demonstrated that Complainant was not reprimanded for sending Jaro a second form or for his email to Teague. Rather, in response to receiving Jaro's form, Complainant sent Jaro a second form rather than simply calling her to determine whether the proper number of centralizers would be used. In so doing, Complainant again demonstrated his inability to work with operators and his unwillingness to work with operators. As a result of Complainant's continued behavioral issues, Teague recommended Complainant be subjected to further disciplinary action and noted Complainant was insubordinate and disruptive. (Tr. 347; RX-25). Upon receipt of Teague's recommendation and after consulting with Bojano and Bogan, Fernandez recommended Complainant be terminated due to his continued behavioral problems. (Tr. 327-328). Complainant was then terminated on June 20, 2013. (RX-27).

Based on the above, Respondent has demonstrated by a preponderance of the evidence that it would have taken the same adverse action in the absence of any protected activity. Indeed, Respondent treated Complainant in the same manner it would have treated any other employee who refused to follow directions. (Tr. 763-764). Contrary to Complainant's assertions, Respondent terminated Complainant due to his uncooperative behavior and combative attitude. Despite several warnings and repeated coachings, Complainant failed to follow directions and act in a professional manner. I am convinced that Complainant's misconduct hampered and impeded his supervisors' ability in dealing with an overload of problems associated with the proper enforcement of a booming regulatory business. As such, Respondent has proven by a preponderance of the evidence it would have terminated him even if he was able to prove that alleged protected activity was a motivating factor in his discharge.

VII. CONCLUSION

Pursuant to the Board's instructions, the undersigned has reanalyzed the issue of whether Complainant engaged in protected activity in light of the expansive definition of what constitutes protected activity under the Acts. In considering all of the evidence and testimony submitted by the parties, the undersigned remains of the opinion that Complainant failed to demonstrate he engaged in protected activity. Specifically, I find Complainant did not have a reasonable belief

that he was raising environmental or public health and safety concerns governed by or in furtherance of either SDWA or FWPCA when he requested Jaro complete and submit additional information on an older January 2013 ASCF form, when he emailed Teague alleging he was being restricted form doing his job, or when he alleged the creation of a hostile work environment in a complaint dated April 4, 2013.

Assuming *arguendo* that Complainant engaged in protected activity, I also find that Complainant has failed to establish by a preponderance of the evidence that such activity was a motivating factor in his termination and that Respondent has shown by a preponderance of the evidence that it would have terminated him even if he was able to prove that alleged protected activity was a motivating factor in his discharge. Accordingly, the undersigned finds that Complainant has failed to produce sufficient evidence to demonstrate by a preponderance of the evidence that he engaged in protected activity or that Respondent's decision to terminate him was motivated, at least in part, by a discriminatory purpose. Therefore, I find he has not met his burden under the SDWA and FWPCA and dismiss the instant charges as lacking merit.

VIII. ORDER

In view of the foregoing, **IT IS HEREBY ORDERED** that the claim in the above-captioned matter file by Complainant Frederick B. Wright against Respondent Railroad Commission of Texas is **DISMISSED** with prejudice.

ORDERED this 15th day of November, 2018, at Covington, Louisiana.

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check

the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing 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 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.

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

If filing paper copies, 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 an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file 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. If you e-File your petition and opening brief, only one copy need be uploaded.

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 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 may include 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. If you e-File your responsive brief, only one copy need be uploaded.

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 you e-File your reply brief, only one copy need be uploaded.

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.